Российский арбитражный центр

при Российском институте современного арбитража

# ARBITRATION DIGEST
# OCTOBER 2020

# CASE LAW DEVELOPMENTS

## The Hague District Court Lifts the Attachment of the Stolichnaya and Moskovskaya Vodka Trademarks

The Hague District Court has ruled to lift the attachment of trademarks held by state-owned enterprise Sojuzplodoimport, seized under the claim of the former Yukos shareholders. It reasoned that under the Russian civil laws, state-owned enterprises are not liable for the debts of their founder, that is, the Russian Federation. Accordingly, the Court found that the seizure of the trademarks held by the state-owned enterprise, imposed as part of enforcement of the Yukos arbitral award, was inconsistent with the law.

Notably, such a decision would not be unprecedented for European courts. Thus, for instance, the French courts have already lifted the attachment of the accounts of INA Rossiya Segodnya and FSUE Goszagransobstvennost on similar grounds.

Read

## Truth Is Worth More Than Gold

The Central Bank of Venezuela (BCV), whose gold reserves worth USD 1.95 billion are kept in the Bank of England, received two contradictory instructions from the two Presidents of Venezuela as to what to do with the reserves. Deutsche Bank, that owes USD 120 million worth of proceeds to BCV from gold exchange applied to the court to decide which of the Boards of Directors – that under Maduro or Guaidó – was authorised to represent BCV. This is necessary for determination which of the Boards of Directors it will need to address in connection with the BCV arbitration at the LCIA. The Court of Appeal in London held that the UK Government's official recognition of Juan Guaidó rather than Nicolaś Maduro (who, nonetheless, retains effective control), as Venezuela's legitimate President, is not necessarily conclusive for determining who has control over the gold reserves held by the Bank of England., The case was transferred to the Commercial Court to clarify the official position of the UK Government (*Banco Central de Venezuela v Bank of England and others* [2020] EWCA Civ 1249).

Read

## Russian Biathletes Overturn a Lifetime Ban at the CAS

On 24 September, a panel at the Court of Arbitration for Sport (CAS) overturned lifetime bans on participation in the Olympics imposed on three Russian biathletes – Olga Vilukhina, Yana Romanova and Olga Zaytseva – for alleged doping (Olga Vilukhina, Yana Romanova and Olga Zaytseva v. the International Olympic Committee). For Ms. Vilukhina and Ms. Romanova, the panel held that their conduct did not go beyond "mere suspicion" of potential anti-doping rule violations, annulled the bans appealed, and ordered to reinstate all their results in individual events at the Sochi Olympics. Ms. Zaytseva, conversely, violated

anti-doping rules, but instead of imposing a lifetime ban, the panel ruled that she was banned from competing in subsequent Winter Olympic Games after Sochi. Since Ms. Zaytseva did not take part in the PyeongChang Olympics in South Korea in 2018, she will now be able to compete in the future Olympics.

Read

## CAS Invalidates the World Athletics (IAAF) Rule Imposing Burden of Proof on Disabled Athletes to Prove No Competitive Advantage over Able-Bodied Athletes

The CAS has deemed discriminatory the rule that required disabled athletes to prove that they had no competitive advantages before they were allowed to compete against able-bodied athletes. The rule suggested that due to their prostheses, disabled athletes were presumed to enjoy a competitive advantage against athletes without such prostheses.

This controversial rule was revoked under a claim filed by the runner Blake Leeper. It should be noted, however, that while it recognized that the rule was discriminatory, the CAS did hold that Blake Leeper in fact enjoyed competitive advantages by virtue of his prosthetic legs. The Court reasoned that they gave him a head start as compared to other athletes.

The award spurred a negative public response. Blake Leeper himself stated that rules on maximum permissible height that had him banned from competing, were formulated based on height measurements for Asian and Caucasian athletes, hence they failed to take account for the physical characteristics for African athletes.

Read

## Buffet's Conglomerate Drops Jones Day Suit

A conglomerate controlled by the US billionaire Warren Buffet filed a USD 750 million claim against the international law firm Jones Day, that, it believed, had conspired to defraud conglomerate into buying an insolvent German piping business Wilhelm Schulz GmbH (*Precision Castparts Corp and PCC Germany v. Jones Day (Case no. 2020-059685*)). The fraud, according to the claimant, arose as a result of execution of a share purchase agreement with Schulz in 2016, advised by Jones Day lawyers. In early October, PCC filed a lawsuit with the Harris County District Court in Texas, but the judge dismissed the claim without prejudice.

To recall, back in April, an ICDR tribunal awarded PCC a EUR 643 million compensation for fraud and found that Schulz concealed the "functional insolvency" of the company, so the true value of the subsidiaries acquired by Buffet amounted to mere EUR 157 million.

The US District Court for the Southern District of New York ordered to enforce the tribunal's award in July, but PCC stated that it never received any payments under it and that is was unclear whether it would be executed at all – given that preliminary insolvency proceedings have been initiated against the Schulz Group.

Read

## Arbitration Fee Recovered in Court in Favor of the Arbitral Institution

In 2010, Mr. A. Seredkin filed a class action for the protection of the plant's employees against state owned corporation Avangard with the Sterlitamak City Arbitration Court at the non-profit organization Yuridicheskaya Konsultatsiya (the SCAC). Mr. Seredkin claimed compensation for violations of the labor laws, including untimely and incomplete payment of salaries, for the total of RUB 22.4 billion. The SCAC dismissed the claims and recovered the arbitration fee (10% of the amount claimed, that is, RUB 2.24 billion) from Avangard in favor of the SCAC.

Starting from 2010, NPO Yuridicheskaya Konsultatsiya (the NPO) has made attempts to recover the arbitration fee, but faced dismissals from every level of courts. Namely, its claims were heard by the Sterlitamak State Court, the Commercial Court of the Republic of Bashkortostan, the 18th Commercial Court of Appeal, and the Federal Commercial Court for the Urals District.

Later, in 2018, the NPO ceded its claims under an assignment agreement to F.Kh. Mubinov, the NPO's own administrator. Mr. Mubinov's attempts to recover the arbitration fee failed too: the courts believed that the NPO, as the original creditor, did not have a claim and, hence, could not assign it to F.Kh. Mubinov.

In October 2020, F.Kh. Mubinov once again applied to the court with similar claims, this time opting for the Moscow Commercial Court.

Read

## Baring Vostok and Artem Avetisyan Sign a Settlement and Agree to Drop All Civil Claims

On 28 October 2020, the fund Baring Vostok posted a joint statement of the shareholders of Vostochny Bank, IF Finvision Holdings (Artem Avetisyan) and Evison Holdings Limited on the settlement of their corporate dispute, on its website.

According to the statement, the parties entered into a settlement agreement, undertaking to drop all claims filed with Russian, foreign courts and arbitrations (in particular, the LCIA), with Vostochny Bank to receive a RUB 2.5 billion compensation of losses.

The statement indicates that the settlement agreement is confidential and the parties are bound by a non-disclosure agreement.

Read

## The New Jersey Supreme Court Confirms Email as a Viable Means for Transmitting Information Relevant to Labor Arbitration

The New Jersey Supreme Court has heard a dispute on the validity of an arbitration agreement made by employees by clicking on the "acknowledge" button with respect to an arbitration policy that they received in an email from the employer.

It stated that sending the arbitration agreement by email is an effective means of executing the agreement, while the employee, despite the potentially large number of emails in the inbox, must attentively read the email proposing entering into the arbitration agreement.

The Court also ruled that continued employment may constitute a confirmation of the employee's consent to an arbitration agreement with respect to such an employee. The relevant condition, however, should be clearly and unambiguously reflected in the arbitration agreement.

Read

## The UK Supreme Court Delivers a Decision on the Law Applicable to the Arbitration Agreement

A dispute between a subcontractor company and a Russian insurer arose after a fire at a Russian power plant, forcing the Russian insurer to pay USD 400 million.

The arbitration clause between the parties provided for arbitrating disputes under the ICC Rules and for London as the seat of arbitration. The Russian insurer, Insurance Company Chubb LLC, however, brought its claim before the Moscow Commercial Court.

For this reason, the subcontractor company requested an English court for an injunction prohibiting Insurance Company Chubb LLC from continuing its proceedings at the Russian court. The court of first instance refused to grant the injunction, pointing out that an English court is not a proper forum for defining the scope of disputes covered by the arbitration agreement.

The appellate instance, in turn, did issue the injunction on continuing the Russian legal proceedings, reasoning that, in choosing London as the seat of arbitration, the parties impliedly agreed on the English law as the law applicable to the arbitration agreement.

The UK Supreme Court agreed with the appellate court's decision, yet not with its reasoning. It stated that in the absence of a stipulation of the applicable law in the arbitration agreement, the agreement shall be governed by the law of the contract containing the arbitration agreement. In doing so, the Supreme Court did not agree that by choosing the seat of arbitration, the parties thereby agreed on the applicable law. However, explaining its decision to uphold the appellate court's judgment, the Supreme Court held that the parties had not chosen the law governing the contract, hence both the contract and the arbitration agreement fell under the law most closely connected to them.

Read

## An Anti-Suit Injunction on the Claim Filed by a Bankrupt Company in Violation of an LCIA Arbitration Agreement

The English High Court issued an anti-suit injunction requested by the investment fund Riverrock against the International Bank of St Petersburg (IBSP), precluding litigation before the commercial court in St Petersburg and holding that the dispute should be arbitrated at the LCIA instead.

The dispute arose from nine contracts on securities signed by the Bank and Riverrock, each for USD 15 million. The contracts featured LCIA arbitration clauses and were governed by the English law.

In 2018, the Central Bank of Russia revoked the Bank's license. Deposit insurance agency (DIA), acting on behalf of IBSP, decided to challenge the contracts before the St Petersburg Commercial Court, claiming that they constituted a scheme for the withdrawal of IBSP's assets.

Having learned of this, Riverrock applied for an anti-suit injunction to the English High Court. Riverrock had to prove that continuation of the proceedings before the Russian commercial court would violate the arbitration agreements.

The High Court found that the parties chose the English law as the applicable law. The claims filed in the litigation before a Russian commercial court fell under the arbitration agreements. At the same time, the presumption that arbitration agreements should not cover insolvency claims does not make part of the English law.

Read

## WTO Sides with the EU in a Dispute against the US

Back in 2012, the WTO arbitration panel and Appellate Body sided with the EU in a EU-US dispute on state subsidies for Boeing.

Since the US did not fulfil the recommendations of the WTO arbitration panel, the EU filed a request for a permission to impose countermeasures with respect to American goods. The US disagreed with the level of countermeasures requested by the EU and the issue was referred to arbitration.

On 13 October 2020, the arbitrators concluded that the level of countermeasures "commensurate with the degree and nature of the adverse effects" amounts to around USD 4 billion annually. Thus, now the EU may ask for a permission to enact countermeasures against the US at the level that does not exceed that threshold.

The EU has stated that this claim marks the end of the almost 16-year-long proceedings where the US complained against the EU subsidies for Airbus; while the EU, against the US subsidies for Boeing.

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# INVESTMENT ARBITRATION NEWS

## Claims against Croatia to Continue

The Hungarian OTP Bank has brought a USD 35 million ICSID claim against Croatia. So far, it is the latest out of six ICSID claims, including those filed by the Austrian creditor Erste Group Bank, the Austrian banks Raffeisen, Addiko, the Austrian office of the Italian bank UniCredit, and the French bank Société Générale. Croatia is facing these claims due to its 2015 laws on conversion of loans and mortgages in Swiss francs for the amount of USD 3.4 billion into Euro after Switzerland abandoned its exchange rate control mechanism. Croatia claims that the measures were aimed at protecting borrowers from leaps in the rate of the Swiss franc, hence the law provided that the banks would bear the conversion expenses, estimated at more than USD 1 billion.

Read

## Renewable Energy in Spain: More Investors Are Dropping Claims

Due to legislative amendments in the area of tariff regulation of renewable energy enacted in Spain, the state faced numerous claims (around 50) totaling USD 7.3 billion.

Spain tried to find a way out and approved a law last year, offering investors certain benefits, such as the new "rate of return" of 7.4% from 2020 through 2031, available only if they drop their claims against Spain. Those who turned down the offer would have to deal with a decrease of the relevant rate. Initially Spain set a deadline for accepting the offer for October, but then extended it until December this year due to COVID-19.

These new legal enactments resulted in some of the investors indeed abandoning their claims in order to benefit from the new regime that incentivizes renewable energy. Thus, for instance, a group of German investors into solar energy, including RWE, Ferrostatal, as well as Stradtwerke Munchen decided to discontinue their ICSID arbitrations worth EUR 420 million. Earlier this month, the Dutch investor Masdar Solar & Wind Cooperatief (indirectly owned by the Government of Abu-Dhabi) also agreed to waive its right to claim enforcement of an ICSID award for around EUR 80 million. In addition, several claimants in the *PV Investors* case agreed to abandon their right to claim compensation under a EUR 91 million award issued earlier this year.

Read

## Controversial Wording of an Arbitration Agreement to Refer Disputes to the ICSID

An ICSID tribunal has upheld jurisdiction over a claim filed against Egypt by Australia-based mining investors Tantalum International and its parent Emerge Gaming, having found that the phrase "shall consent" found in the agreement constituted an advance consent to arbitration. According to the tribunal, Egypt did not have to take any additional action to be bound by the arbitration clause (*Tantalum International Ltd. and Emerge Gaming Ltd. v. Arab Republic of Egypt (ICSID Case No. ARB/18/22*)).

Interestingly, in the earlier *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia* case (ICSID Case No. ARB/12/14 and 12/40) under the claim of an Australian mining company against Indonesia, the arbitral tribunal chaired by Gabrielle Kauffman-Kohler held that the "shall consent" wording showed that additional action on the part of the state was required to file a claim with the ICSID.

Read

## India to Pay Vodafone

The Permanent Court of Arbitration has rendered an award in favor of the telecommunications giant Vodafone in an arbitration against India initiated under a BIT between India and the Netherlands. The award marks the culmination of an almost decade-long and intense tax dispute between India and the Vodafone Group.

The dispute arose back in 2007, when the Dutch subsidiary of the Vodafone Group, Vodafone International Holdings B.V. (VIH), acquired 67% of shares in the Indian telecommunications company Hutchison Essar Limited (HEL) for USD 11 billion. Shortly afterwards, the Indian tax authorities issued USD 2.2 billion capital gains tax claims, that Vodafone claims it was not obliged to pay, because the HTIL-VIH deal did not involve transfers of any Indian-based core assets.

Having heard the case, the Supreme Court concluded that Vodafone did not have to pay the tax. However, shortly thereafter the Indian Parliament amended the tax laws, providing its retroactive application since 1961. After the amendments, the authorities revived their tax claims against Vodafone.

Vodafone initiated an arbitration where it claimed that filing tax claims by way of a retroactive amendment, where the Supreme Court had already had the final word, was tantamount to violating the fair and equitable treatment (FET) regime under the India-Netherlands BIT. The arbitral tribunal agreed with Vodafone and obliged India's Government to pay over USD 5 million as partial compensation of the legal costs and to refund the tax collected from Vodafone.

Read

## Peru's Losing Streak

Lupaka Gold, based in Toronto, has announced that it filed an ICSID notice of arbitration against Peru, related to a gold mining project halted by a rural community blockade, for USD 100 million (*Lupaka Gold Corp. v. Republic of Peru*). The "illegal blockade," the investor claims, was organized by the members of the neighbouring Paran community of around 360 people, who "were often violent" and did not hesitate to fire rifles and threaten the company's employees.

Global Arbitration Review also reports that Peru faces a threat of another USD 200 million claim on environmental issues. The Pisco Port Terminal demands modernization after it was destroyed by an earthquake in 2007. Under a concession, the Paracas Port Terminal (TPP) consortium suggested amending the project for the port terminal's development worth USD 35 million. The amendments included building a warehouse for storing minerals, as well as treating and desalinating wastewater. Last year, however, the Peru authorities blocked the proposed modifications based on the environmental impact assessment, due to concerns that the modifications could result in the release of brine discharge, the risk of tsunamis and increased traffic of lorries with minerals, that would affect the local population of wild birds, since the terminal is located in the vicinity of the Paracas National Reserve. TPP has announced that it will claim over USD 200 million for being deprived of its right, as an investor, to develop an additional facility under the existing concession.

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# ARBITRATION NEWS

## QMUL and CCIAG Survey of the Investors' Perceptions of Investor-State Dispute Settlement

Queen Mary University of London (QMUL) and Corporate Counsel International Arbitration Group (CCIAG) have published a survey, previously postponed due to COVID-19, supervised by Professor Loukas Mistelis, on how investors perceive the investor-state dispute settlement (ISDS) system. Respondents were surveyed from 28 November 2019 through 31 December 2019 over two phases: an online questionnaire completed by 86 respondents (investors, corporate counsel, management representatives, commercial managers), as well as 9 personal interviews. The survey has shown that, although the existing system satisfies the current needs of its users, it still requires reform in terms of introducing a code of conduct for arbitrators, the process for selecting and appointing arbitrators, a more positive regulation of third-party funding, wider use of mediation before arbitration; the idea of creation of a multilateral investment court, however, received a somewhat negative response.

Read

## A Study Shows that International Arbitral Tribunals and Domestic Courts Should Revisit the Policy of "Division of Labor" and Mutual Competition

Gabrielle Kauffman-Kohler and Michele Potestà have recently published a study of the interplay between courts and tribunals in the context of costly parallel domestic and international litigations and arbitrations concerning the same measure taken by a state. According to the authors, international investment tribunals and domestic courts interact in a variety of ways, ranging from harmonious co-existence to complementarity, mutual supervision, and, at times, competition and controversies. The authors conclude that the "division of labor" between domestic courts and international investment tribunals is by far not always optimal and efficient and might prove burdensome for the dispute resolution system as a whole. These are the areas most in need of improvement by way of a more meaningful distribution of tasks between domestic and international courts and tribunals.

Read

## The ICC Approves Amendments to the Rules of Arbitration, to Take Effect in 2021

The International Court of Arbitration at the International Chamber of Commerce has presented the updated Arbitration Rules that will enter into force on 1 January 2021. The modifications are aimed at increasing the

flexibility and transparency of the arbitral procedure, as well as at taking account of the developments in information technology.

The updated Rules have simplified the procedure for joining new parties to arbitrations or consolidating several arbitrations. Under the new Rules, joinder no longer requires the consent of all the parties to the dispute. It suffices for the party being thus joined to consent to the composition of the acting panel and that joining such a party should be reasonable. Consolidation of several arbitrations is now also possible where the arbitral tribunal's jurisdiction in such arbitrations is based on different arbitration agreements.

From now on, the International Court of Arbitration may ignore a part of the arbitration agreement on the procedure of appointment of arbitrators where it believes that the procedure agreed upon by the parties manifestly violates the principles of justice and equality. In such cases, the Court may appoint the arbitrators itself.

Furthermore, to comply with transparency requirements, the new Rules provide for the obligation to inform of the instances of procedural action being funded by a non-party to the dispute that has an economic interest in the outcome of the case.

Finally, the technological novelties of the Arbitration Rules allow holding oral hearings using videoconferencing, telephone or other means of communication.

Read

## An International Arbitration Centre Opens in the Indian Region of Jammu and Kashmir

On 28 October 2020, a new arbitral institution was inaugurated in India: the Jammu and Kashmir International Arbitration Centre (JKIAC).

As noted by the region's Lieutenant Governor who took part in the inauguration ceremony, the Arbitration Centre's establishment will allow the region to attract more investors, overcome language and cultural barriers in the conditions of globalization.

He noted the importance of arbitration for modern-day India, indicating that statistics show a preference among more than a half of all Indian companies to arbitrate their disputes, instead of taking them to state courts.

Read

# EVENTS ON ALTERNATIVE DISPUTE RESOLUTION

## Webinars for the 4th Professor Mozolin Corporate Arbitration Moot Court Competition

26 October 2020 marked the end of the series of webinars held as part of the 4th National Corporate Arbitration Moot Court named after Professor V.P. Mozolin. During the webinars, arbitration and corporate law specialists shared their experience and valuable expertise on how to draft procedural documents, discussed the secrets of successful presentation, as well as the procedural and substantive issues of the Case.

The webinars were organized by the Russian Institute of Modern Arbitration, by the Young IMA Committee for Moot Courts and the Young IMA Committee for Arbitration of Corporate Disputes.

The live streams of the webinars are available at the Russian Arbitration Center's Youtube channel.

Read

## St Petersburg FDI E-Conference and the Online FDI Pre-Moots

30 October 2020 was the date of the traditional online conference that is part of the FDI St Petersburg Pre-Moot. The conference concerned the correlation of international investment law and the principles of sustainable development and complex corporate structures. The conference's speakers included such leading experts as Hans van Houtte (Iran–United States Claims Tribunal), Eva Kalnina (Lévy Kaufmann-Kohler), Loukas Mistelis (Queen Mary University of London), Mohamed Abdel Wahab (Zulficar & Partners), Jeswald Salacuse (Tufts University), Yarik Kryvoi (Investment Treaty Forum), and Andrea Bjorklund (McGill University).

The conference was moderated by Dimitriy Mednikov, one of the authors of the FDI Moot Case 2020, and Ksenia Koroteeva, FDI Moot Alumna. Prizes for the best questions at the conference were awarded to Elena Burova (Ivanyan & Partners) and Dimitriy Mednikov.

A video of the conference is available at the Russian Arbitration Center's Youtube channel.

The online rounds between 12 teams took place on 31 October 2020. The arbitrators on the Final Round panel – Hans van Houtte, Mohamed Abdel Wahab and Andrea Bjorklund – announced the Saarland University team as the winners. Bianca Bohm became the best speaker (Saarland University).

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## Hong Kong's Annual Arbitration Week Held Live and Online

This year, the Hong Kong Arbitration Week was held in a hybrid format: both offline and online. The topics that have already become traditional in 2020 included the impact of the pandemic on arbitration and the specifics of arranging online hearings.

During the second day of the conference, the issues discussed covered smart contracts, cryptocurrencies and blockchain. Thus, Sir William Blair (former Judge of the Commercial Court (England and Wales)) spoke of the potential of using the distributed ledger technology (DLT), including smart contracts, in arbitration, pointing that this may facilitate automated initiation of arbitration, collection and integration of data as evidence, issuance of arbitral awards compatible with the existing digital platforms, and automated execution of such awards.

The third day of the Hong Kong Arbitration Week dealt with the US-China relations. Experts from various countries offered their views on the current state of the US-China relations and how they affect the global economy. The issues discussed during panel sessions included trade war between the US and China, protests in Hong Kong, the upcoming US presidential elections, as well as the intensification of military activities of both the US and China.

Read a more detailed review of each day of the conference here.

Read

## XII International Arbitration Conference "Russia as a Place for Dispute Resolution"

On 5 November 2020, the Russian National Committee of the International Chamber of Commerce – the World Business Organisation (ICC Russia) organized the XII International Arbitration Conference "Russia as a Place for Dispute Resolution". The event aims at development and popularization of arbitration in Russia as well as improvement of image of Russia as jurisdiction for dispute resolution.

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# UPCOMING EVENTS

## Due Process as a Limit to Discretion in International Commercial Arbitration – Focus Russia

On 12 November 2020, the Russian Arbitration Center, together with the New York University Center for Transnational Litigation, Arbitration, and Commercial Law, will hold a webinar on “Due Process as a Limit to Discretion in International Commercial Arbitration – Focus Russia.” The discussion will be moderated by Franco Ferrari, Professor at New York University School of Law. Among speakers: Dr. Friedrich Rosenfeld Rosenfeld (NYU Law Paris, HANEFELD), Mikhail Batsura (Permanent Court of Arbitration), Yulia Mullina (Russian Arbitration Center), Natalia Gulyaeva (Hogan Lovells).

Participation is free of charge.

Register here.

Read

## ICCA Congress Postponed Again due to Coronavirus

The biennial ICCA Congress that was due to take place in Edinburgh in February, has once again been postponed until 26-29 September 2021 due to the coronavirus, as the UK faces the second wave of cases.

Brandon Malone, Chair of the Scottish Arbitration Centre and the Edinburgh Congress, and Andrew MacKenzie, the Chief Executive of the Centre, who were to retire once the Congress ended, will remain in office to hold the Congress and give all attending a “true Scottish welcome” by September 2021.

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