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ARBITRATION DIGEST

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CASE LAW DEVELOPMENTS

| Unpaid Sick Leaves due to COVID-19: Canada's Approach

Curious findings concerning COVID-19 sick leaves were made in Saskatchewan arbitral award, *UFCW, Loc. 1400 v P&H Milling Group*. Having analyzed the provisions of the collective agreement that allowed sick leaves, but remained silent on what constituted a "sick leave", the arbitrator concluded that the employer was under no duty to pay for sick leaves unless the employee indeed had COVID-19. Therefore, the employees who were required to quarantine for 14 days after returning to Canada from abroad, or after contacting an individual who tested positive for COVID-19, or after participating in a snowmobile rally (that the Public Health Agency of Canada believes to be the cause of a COVID-19 outbreak), or after contacting an individual who was a relative of a person who tested positive for COVID-19, but, in each of these cases admitted that they themselves were not suffering from COVID-19, will not be paid for their sick leaves.

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| A French Court Explains Where to File an Action to Hold an Arbitrator Liable

The Paris Court, in examining a claim against a German arbitrator for non-disclosure of information, which resulted in the reversal of an ICC award, **found** that it lacked jurisdiction. Since a claim on the arbitrator's liability did not fall under the arbitration exception found in the Brussels I Regulation (EU), the Court was not competent to hear the case: the hearings, deliberations and the arbitrator's "intellectual performance", that is, the effective and principal exercise by the arbitrator of his dispute resolution mandate, took place in Germany. Hence, the claim, too, was to be filed with the German courts.

The Court's press-release does not contain any details on the case, but the GAR suggests that it concerned the USD 150 million dispute between Buzwair Automotive Co against the subsidiary of Audi Volkswagen in Dubai (*Saad Buzwair Automotive Co (SBA) v. Audi Volkswagen Middle East Fze*). The award was set aside after one of the arbitrators failed to disclose that he had already represented the Volkswagen Group before.

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| A Stake on Grounding

A judge of the US District Court for the Southern District of New York has dismissed a motion of a Las Vegas casino operator Global Gaming Philippines to ground a private plane Gulfstream G450 2010, allegedly owned by a Manila gaming resort owner and port tycoon Enrique Razon, at the runway of the international airport Newark Liberty. The exact reasons for dismissal were announced at the oral hearing, but it is reported that they are related to jurisdictional grounds.

Global Gaming tried to take control over the tycoon's plane to enforce a 2019 arbitral award issued in the dispute between the operator and the Philippines company Bloomberry Resorts, that has the billionaire as its CEO (*Global Gaming Philippines LLC and GGAM Netherlands BV v. Bloomberry Resorts and Hotels Inc. and Sureste Properties Inc.*). The dispute arose after Razon deprived Global Gaming of all rights related to the management of Solaire Resort and Casino – a luxury complex covering 16 hectares in the very heart of Entertainment City (the Philippines' own Las Vegas) – just six months after it opened in 2013. According to the award, Global Gaming was to receive a compensation of USD 296.6 million. Attachment of the plane, according to the operator, would curtail Enrique Razon's chances to conceal the assets of Bloomberry Resorts and avoid paying the compensation.

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India's Supreme Court Supports Party Autonomy in Arbitrating Disputes outside of India

The Supreme Court of India has concluded that Indian parties may agree on a foreign seated arbitration, without their choice entailing a violation of public policy.

The recent judgment of the Supreme Court of India in the *PASL Wind Solutions Private Limited v. GE Power Conversion India Private Limited* case has put an end to the long-standing debates as to whether Indian parties may refer their disputes to a foreign arbitration seated outside of India. The Court also recognized the parties' right, if necessary, to ask Indian courts for interim measures; the question of whether foreign law can be chosen as the applicable law, however, remains open.

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US Court Confirms the Non-Signatory's Right to Arbitrate against a Party to the Arbitration Clause

The Third District Court of Appeals has ruled in the *Kratos Investments vs. ABS Healthcare Services* case, that Kratos Investments' had a right to resolve a dispute with ABS via arbitration under the equitable estoppel doctrine, despite the absence of arbitration clause between the two companies.

In that case, ABS alleged that Kratos Investments had tried to steal its business by illegally soliciting ABS's customers and misappropriating ABS's confidential information and trade secrets in collusion with ABS's agents. ABS referred the dispute with its agents to arbitration in line with the arbitration clause made between those parties, while claim against Kratos Investments was filed with the court.

In substantiating Kratos Investments' right to have dispute resolved by the arbitration under the clause between ABS and its agents, the Court stated that those disputes were closely related, as well as noted that in its arguments, ABS itself invoked collusion between its agents and Kratos Investments.

Notably, the arbitration clause between ABS and its agents had a rather broad scope: “The Parties agree that any dispute arising out of or related in any way to the solicitation, negotiation, inception or performance of this Agreement ... shall be exclusively resolved and construed in accordance with the Commercial Arbitration Rules of the American Arbitration Association.”

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| Cyber Attack as a Ground Not to Enforce an Award

A São Paulo court has stayed enforcement of a partial ICC award pending an investigation into cyber attacks against one of the parties to the arbitration, J&F Investimentos (*CA Investment S.A. v. J&F Investimentos S.A., and Eldorado Brasil Celulose S.A.*, ICC Case No. 23909/GSS).

Under the ICC award, J&F was to perform an agreement for the sale to CA Investment of a 50.6% share in Brazilian pulp maker – Eldorado Brasil Celulose.

J&F made an effort to have the award set aside, arguing that the arbitration had been compromised and accusing CA Investment of arranging the hacking of its servers in order to get access to confidential communications, expert reports and other documents during the arbitration.

Allegedly, the cyber-attack took place from June 2019 through May 2020, resulting in the leak of around 70,000 J&F emails, including email exchanges with the company’s legal counsel regarding the arbitration.

J&F claimed that the arbitral tribunal failed to take any action when it learned of the accusations of cyber hacking and the news on a criminal investigation. CA Investment, on the other hand, believes that J&F never asked the tribunal to take any measures and has failed to point to CA Investment’s use of any illegally obtained evidence in the arbitration.

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INVESTMENT ARBITRATION NEWS

| Advocating the Avocado

After a failed attempt at growing coffee at Nicaraguan plantations, the American company Riverside Coffee had decided to try its luck with avocado plantations instead. Yet, Riverside claimed that in 2018 armed paramilitary formations with the support of the police and local authorities of Nicaragua seized the plantations, destroying crops and a private preserve for exotic broad-leaved trees and forcing the company's management to flee Nicaragua. The situation has pushed Riverside to file a USD 590 million ICSID claim against Nicaragua (*Riverside Coffee LLC v. Republic of Nicaragua*, ICSID Case No. ARB/21/16).

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| Unhappy Ending for Mexico's Movies

The Latin American Internet Association (ALAI) and the Mexican Business Coordinating Council (CCE) have warned Mexico that the proposed reform of promotion of Mexican films is unconstitutional. According to the agencies, the law obliging movie theaters to ensure at least 15% of screenings of Mexican products in total screenings, and streaming services, such as Netflix and Prime Video, – 15% of local content in their digital catalogs, will violate the existing investment agreements, including the USCMA that has replaced NAFTA, and may result in investment claims.

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| The German Energy Company Uniper Is Preparing a Claim against the Netherlands over a Coal Ban

Uniper has announced that it is about to file an Energy Charter Treaty claim against the Netherlands. This will be the second claim that the state will face after its decision to gradually phase out coal power plants due to the threat of global warming.

In May 2019, the Netherlands adopted a climate law introducing a step-by-step ban on the use of coal for power generation. The new law is aimed at reducing greenhouse gas emissions by 49% below the 1990 levels by 2030 and at achieving the goals under the Paris Agreement. In view of that law, Uniper must stop using coal at its Maasvlakte plant in Rotterdam by 2030 – that is less than 15 years after it was opened.

Such cases are interesting in that not only do they concern issues of investments and mining, but also the global agenda of the world's environmental crisis. Experts believe that they will also affect the problem of reforming investment dispute resolution and the future of the Energy Charter.

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An ICSID Arbitrator Pronounces an ICC Award in a Dispute between an Energy Company and the Bangladesh Power Development Board *Res Judicata*

NEPC that operates a power plant in central Bangladesh, and the Bangladesh Power Development Board had signed two contracts providing for ICC and ICSID arbitration, respectively. Disputes as to the price payable by the Board for power arose under each of the two contracts.

In 2017, NEPC filed an ICC claim. In 2018, shortly before the ICC's award in favor of NEPC, the company brought an ICSID claim under the second contract (*NEPC Consortium Power Limited v. Bangladesh Power Development Board (II)*, ICSID Case No. ARB/18/15), which concerned a later period than the first claim.

The core issue during the ICSID proceedings was whether the ICC award was *res judicata* – the effect of a private law ICC award on the ICSID case that touched upon the issues of public international law.

The arbitrator concluded that the ICC award was *res judicata*, and that the Bangladesh Power Development Board was to pay a similar amount to NEPC under the second contract.

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The High Court in London Refuses to Lift a Stay on Enforcing the Yukos Award

Although originally the stay was put in place before the judgment of the Court of Appeal of The Hague, on 14 April Mr Justice Henshaw ruled to maintain it until the Supreme Court of the Netherlands makes its final decision.

Mr Justice Henshaw reasoned that in his view Russia's appeal before the Supreme Court of the Netherlands stands a chance of success and is not aimed solely at delaying the procedure any further.

The Court also dismissed the Yukos shareholders' request to order that Russia provide security in the form of USD 7 billion. The High Court Justice noted that although Russia was opposing enforcement, there was no evidence of the state's intention to hide assets.

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The Paris Court of Appeal Reverses the *Russia v JSC Oschadbank* Award

The arbitral award ordering Russia to pay USD 1.1 billion worth of compensation to Oschadbank has been set aside in France on jurisdictional grounds.

The reason for reversal was that the bank's Crimean division had been functioning in 1991. The Court therefore ruled that the bank's assets were not covered by the Russia-Ukraine BIT that guaranteed investment protection only from 1992.

The Court also dismissed the bank's objections to the effect that those arguments had not been raised during the arbitration.

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ARBITRATION NEWS

| Updated Code of Conduct for Adjudicators in International Investment Disputes

The Secretariats of the ICSID and the UN Commission on International Trade Law (UNCITRAL) have released an updated draft of the Code of Conduct for Adjudicators in International Investment Disputes. Commentaries on the second draft are welcome and may be sent to the UNCITRAL Secretariat (uncitral@un.org) and the ICSID Secretariat (icsidsecretariat@worldbank.org).

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| ArbitralWomen Launches a Gender Diversity Survey

The ICCA's Cross-Institutional Task Force on Gender Diversity in Arbitrator Appointments and Proceedings, where ArbitralWomen plays an important role, has opened a call for participation in a survey aimed at analyzing the latest data on the appointment of women as arbitrators and defining the opportunities for promoting gender equality in international arbitration. The report on this survey for 2020 is available [here](#).

Filled-in anonymous questionnaires may be sent by 30 April 2021 to nicola.peart@threecrownsllp.com and jennifer.ivers@whitecase.com.

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| No More Mandatory Investor Arbitration Agreements in America?

A bill introduced in the U.S. House and Senate pronounces private investors free to choose between arbitration or litigation to resolve their disputes.

One of the initiators of the bill, Congressman Bill Foster, explains: "Individuals shouldn't need to surrender their legal rights because they choose to work with a financial advisor or broker dealer to plan for their retirement and invest their hard-earned money."

The bill is opposed by the Securities Industry and Financial Markets Association President Ken Bentsen, who stated, "The securities arbitration system has worked effectively for decades because it is subject to public oversight, regulatory oversight by multiple independent regulators."

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The Women's Forum "Mute Off Thursdays" Celebrates Its First Anniversary

In April 2020, Ema Vidak Gojković, an independent legal counsel and arbitrator, launched a unique project: female lawyers meet online every Thursday to discuss career progress in international arbitration and to share their invaluable experience.

Starting from 42 women participants, the virtual forum has grown exponentially to unite more than 500 female arbitration practitioners across the globe. Now the weekly meetings feature invited voice training, negotiations and branding coaches.

So far, the forum remains exclusive: one can only join by invitation, and only women with considerable experience in arbitration are invited to discussions.

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EVENTS ON ALTERNATIVE DISPUTE RESOLUTION

| Arbitration Battle Online

The Russian Arbitration Center is bringing its Arbitration Battle, now online, back to the St. Petersburg International Legal Forum – SPbILF 9 ¾. The Arbitration Battle Online suggests mock virtual hearing in international arbitration based on the real great fire in the St. Petersburg’s Winter Palace in 1837.

The participants, including specialists such as Nessi Sebastiano, Francis Xavier, Patricia Shaughnessy, James Dingley, Olga Tsvetkova, will discuss the possibility of filing a claim by a non-signatory to the arbitration agreement, as well as try to outline the scope of disputes falling within the arbitration clause. Additionally, the participants will reproduce one of the most challenging stages of oral hearing – cross-examination of an expert.

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| Resolution of Business Disputes: Mediation and Arbitration

On 13 May 2021, the Russian Institute of Modern Arbitration, Commission on Mediation with the Association of Lawyers of Russia (ALRF), and the Kamchatka Regional Department of the Association of Lawyers of Russia will hold a discussion panel on “Resolution of Business Disputes: Mediation and Arbitration.”

The discussion will concern the potential for resolution of domestic and international contractual disputes by mediation and arbitration, as well as for the use of hybrid means of dispute resolution.

The featured speakers include Georgy Ilyin (Chairman of the ALRF Commission on Mediation, Chairman of the Kamchatka Regional Department of ALRF), Elena Avakyan (Member of the Board of the Russian Federal Bar Association, Advisor at EPAM, member of the ALRF Commission on Mediation, Attorney), Yulia Yakovleva (President of the Association of Professional Mediators, member of the ALRF Commission on Mediation), Andrey Panov (Counsel at Allen & Overy, member of the Board of the Russian Arbitration Center), Yulia Mullina (Executive Administrator of the Russian Arbitration Center)

Participation is free. Register [here](#).

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Registration for the First International Construction Arbitration Moot

We are glad to present the International Construction Arbitration Moot (ICAM), organized with the support of the Russian Institute of Modern Arbitration and the International Construction Law Association.

The ICAM is the first competition in the field of arbitration of construction disputes in a form of a moot court. Participation in the ICAM is a great opportunity for professional growth for students interested in construction law and arbitration, as well as for international collaboration between academics, students and lawyers from all over the world.

The teams are invited to prepare Memoranda for the Claimant and for the Respondent, as well as the Arbitral Award based on applicable national law.

The oral pleading will take place in October 2021 via Zoom.

The ICAM Directors are Nikolay Scherbakov, Wolfgang Breyer and Yulia Mullina. The problem of the ICAM was prepared by the world's leading experts in the field: Prof. Stefan Leupertz, Christopher Ennis, Janet Walker, David Brown and Philip Bruner.

Registration for arbitrators is available via the [link](#).

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Focus on Sanctions

On 15 April, a round table was held at the Kutafin Moscow State Law University (MSAL) on the “Issues of Application by Courts of Laws on International Commercial Arbitration and Arbitration of Domestic Disputes.” The scholars and legal practitioners discussed, in particular, the transfer of arbitration of Russian domestic disputes to foreign jurisdictions, the issues of commercial courts’ trial of cases on the issuance of orders to enforce arbitral awards, the imperative principles and norms in arbitration, and the application of the pro-arbitration approach in assessing the validity of arbitration agreements.

Watch the video of the round table [here](#).

On 16 April, the International Law Department of the Lomonosov Moscow State University organized a [conference](#) on the impact of Western sanctions on resolution of disputes in commercial arbitration. The conference speakers included such experts as Natalia Kuznetsova (Klochenko & Kuznetsova) who spoke on “Sanctions vs. Commercial Arbitration”; Alexander Vaneev (BGP Litigation), on the “Enforceability of Arbitral Awards in Light of the Lugovoy Law”; Tatyana Neveeva (Egorov Puginsky Afanasiev & Partners), on “Sanctions vs. International Arbitration. How did the Lugovoy Law Come About?”; Viktor Rykov (JSC Nexign), on the “US Sanctions and English Law. Issues of Illegality, Unenforceability and Imperative Rules in Banco San Juan vs PDVSA: Case Study.” The conference was moderated by a leading expert on sanctions and sanctions law, lecturer at the International Law Department of the MSU Faculty of Law, Ph.D., Sergey Glandin.

Watch the video of the conference [here](#).

On 21 April, “The GAR Connect: Moscow Workshop” took place, bringing together leading arbitration practitioners and speakers from various countries, who discussed the most topical issues of international commercial arbitration. The conference comprised two sessions, one of which was “Sanctions and Arbitration in Russia: What Are the Implications of the Latest Law?”.

| EPAM Arbitration [de]Talks

On 21 April 2021, Egorov Puginsky Afanasiev & Partners Law Offices organized an arbitration discussion, where the leading experts and representatives of three leading Russian arbitral institutions discussed the concerns of the Russian arbitration community. The topics discussed were, in particular, the challenges that the arbitral institutions have faced during the pandemic, enforcement of arbitral awards in Russia, third-party funding of arbitration and securing the arbitration costs. Yulia Mullina, the Executive Administrator of the Russian Arbitration Center, spoke at the event.

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| HSE Science Days

On 22 and 23 April 2021, the HSE Faculty of Law and the Student Academic Community “Liberium Mare” held the 5th Annual Academic and Practical Conference for Undergraduate and Research Students “HSE Faculty of Law’s Science Days – 2021.”

This year, the conference spanned 14 panels on various areas of law, two round tables and a webinar.

The Russian Institute of Modern Arbitration was one of the Partners of the Conference.

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