Russian Arbitration Center

at Russian Institute of Modern Arbitration

ARBITRATION DIGEST JULY 2021

CASE LAW DEVELOPMENTS

Put in a Word for the Tribunal's Secretary, Would You?

The Brussels Court of First Instance has upheld an ICC award in the *European Commission v. Emek and WTE* case delivered in favor of the European Commission and refused to set it aside on allegations that a "fourth arbitrator" was involved in its drafting.

The underlying dispute between the European Commission and two contractors – the Cyprus company Emek İnşaat Şti and the subsidiary of the German WTE Group – arose over the construction of sewage systems, a water pipeline and pumping stations in Famagusta under a EUR 10.6 million FIDIC contract. After defects were discovered in the system in 2012, however, the Commission accused the contractors of improper performance of works, while the contractors, in turn, accused the Commission of errors in designing the system.

Later, when the tribunal issued a partial award in favor of the European Commission, the contractors wrote personally to each of the arbitrators in the case asking how much of the award was drafted with the participation of the secretary to the tribunal. Following the admission that the secretary took part in award drafting as well as preparation of questions to the parties, the contractors demanded more information, including on the role of the secretary and bills for the secretary's work. That forced the presiding arbitrator to resign, albeit after confirming that the award did not have a "single phrase" that he had not double-checked.

In the end, the Belgian Court that considered the application to annul the award held that the drafting of "all or a part of an arbitral award" by the secretary was a common practice and did not, in and of itself, evidence that the arbitrators' decision-making mandate was delegated, until the award or its parts "are being checked and finalized" by the tribunal. Furthermore, the Court noted that because of the young age and lack of experience among lawyers acting as secretaries, their "influence on the decision-making process is insignificant or next to none."

Read

A Dispute over the Construction of an Eco Park Referred to the LCIA

A UK court ruled that a claim against the British subsidiary of Suez Group – Suez Recycling and Recovery Surrey Limited – over delays in the construction of a GBP 103 million "eco park" for waste processing in southeast England should be heard by the LCIA.

In 1999, Suez entered into a public-private partnership with the county of Surrey, undertaking to build two "mass burn" facilities (for burning waste without pre-processing). The project agreement was governed by the English laws and provided that disputes were to be resolved by a sole arbitrator under the LCIA Rules.

In 2010, due to objections against the building of "mass burn" plants, the parties agreed on an alternative – namely, the construction of an eco park with an anaerobic fermentation unit and a gasifier. It was also at that time that they further amended the agreement, including the dispute resolution clauses.

Surrey filed an action with the state Technology and Construction Court, claiming that Suez failed to ensure completion of construction of both the mass burn facilities and the eco park. The claimant argued that it was entitled to terminate the contract and that the dispute resolution clause, as amended in 2010, modified the initial agreement.

The judge disagreed with Surrey's argument that the 2010 amendments constituted a separate dispute resolution clause. He also noted that the initial 1999 contract provided for the possibility of amendments and that each of the amendments constituted a "variation" of the initial agreement, which, as the parties agreed, continued to be in effect. The judge held that the intentions of the parties were likely aimed at having all their disputes resolved by a single forum, namely, the LCIA.

Read

Parallel Appointments as a Ground for Removal: Myth or Reality?

ADC, an international consortium that won a contract in 2016 to construct the Anaklia port in the Black Sea, filed a claim against Georgia for terminating the contract. ADC filed an ICC claim in July 2020 under the investment contract. At the same time, one of ADC's key shareholders – Bob Meijer – filed an ICSID claim under the Netherlands-Georgia BIT. The claims are reported to total around USD 1 billion.

Georgia suggested that both disputes should be heard simultaneously by the same tribunal, since they partially overlapped, but ADC and Meijer declined that proposal, indicating that the parties and the legal causes of action were different.

Georgia proceeded to appoint the same arbitrator in both disputes, provoking objections on the part of both ADC and Meijer.

In an attempt to challenge the arbitrator, ADC argued that appointment of the same arbitrator may result in prejudgment in examining the issues in the ICC case, since that arbitrator would obtain additional information, unknown to the other arbitrators. The ICC court agreed with ADC and granted the challenge.

Bob Meijer filed a challenge against the same arbitrator in the ICSID arbitration after the ICC supported ADC's challenge. Although the grounds for challenging the arbitrator were not disclosed, it is quite possible that Meijer argued that a challenge of the arbitrator in the ICC case could result in prejudice against the second investor. After the other two arbitrators in the dispute failed to agree on challenge, that issue was referred to the President of the World Bank who refused to remove arbitrator from the tribunal.

Read

The Kempinski Hotel Group Loses an ICC Dispute against a South Korean Fishing Village

The dispute concerned the project to transform Yongyu-Muui, a fishing village in the vicinity of the Incheon International Airport, into a tourism, shopping, and gambling hub, capable of competing with such cities as Macao and Las Vegas. The plan was to build a theme amusement park, an aquapark, a concert hall seating 50,000, a Formula 1 racing track, and many other attractions in the heart of the area.

In 2007, Incheon signed a framework agreement with Kempinski on project development. The agreement was governed by the South Korean laws. Later, Kempinski founded the consortium EightCity that was put in charge of implementing the project in line with the framework agreement.

In 2013, Incheon abandoned performance of the framework agreement, arguing that Kempinski failed to perform its obligation to raise USD 40 million, required to make payments to the land owners of Yongyu-Muui.

In 2019, EightCity filed an ICC claim, initially seeking to recover USD 53 million for the agreement's termination, although subsequently the amount claimed was reduced. In late June, the arbitral tribunal held that the City of Incheon lawfully terminated its contract with EightCity after the main sponsor of the consortium failed to make available the necessary funding.

Read

An Arbitrator Explains His Vision of the Balance of Public and Private Interests in a Pandemic

A sole arbitrator has issued an award in the dispute between the Laborers' International Union of North America and two Canadian construction companies.

The gist of the dispute had to do with the fact that although during the first lockdown residential development in Canada was not suspended, serious restrictions were imposed with respect to workers. In particular, they were to maintain social distancing at the construction site and take an express COVID-19 test organized by their company twice a week. Anyone who violated those rules could be sent home or fired.

The Laborers' Union believed that to be an abuse of rights from the side of employer and filed for arbitration. Notably, it relied on the decision of the Supreme Court of Canada holding that random alcohol and drug testing violated privacy. The claimant also noted that not a single infected person was detected throughout the entire period of testing.

Nevertheless, the arbitrator sided with the employer, ruling that it acted reasonably in view of the high risk for the health not only of its workers, but also of the general public. In commenting on the finding that there were no infected employees, the arbitrator concluded that postponing measures until such employees were detected was not the most reasonable course of action.

Read

The EU Launches a WTO Dispute against Russia

As stated on the European Commission's website, it has requested consultations with the Russian Party on the issue of potential violations of the WTO rules. This stage is the first step of dispute resolution under the WTO rules.

The EU's claims concern the procurement procedure under Law No. 223-FZ in Russia. According to the EU, the Russian laws prescribe discriminatory rules against foreign suppliers, namely:

Pursuant to Resolution of the Russian Government No. 925 dated 16 September 2016, when assessing procurement bids under Law No. 233-FZ, the buyer must look at the bids by domestic manufacturers as though their suggested price was lower by 15%. The resulting contract, however, is executed at the actual price suggested in the bid;

When procuring foreign machine-building equipment, the entities subject to Law No. 233-FZ must obtain an authorization from the Import Substitution Commission;

For around 250 products, there is a quota: from 1% up to 90% of such products procured by the entities subject to Law No. 233-FZ must be domestically-produced.

Russia's Ministry of Economic Development has announced that it is ready to enter into the consultations and prove that the procurement procedures in question are consistent with the WTO rules.

Read

The EU-UK "Sausage Wars" Postponed until October

After the UK unilaterally prolonged the expired grace period for a number of products supplied to the Northern Ireland from other parts of the UK, the EU threatened to initiate an official process against the UK if the latter did not enter into negotiations. To recall, the grace period expired on 1 April 2021 and had been agreed upon with the EU as part of the Northern Ireland Brexit Protocol that covers frozen meat products among other things.

Eventually, negotiations between the parties did begin and, despite the EU's severe discontent with the result, ended in a prolongation of the grace period for sausages and other meat products for 3 more months, until 1 October 2021, just like the UK wanted. That said, the EU has not, however, withdrawn its claim from the European Court of Justice on the UK's incompliance with the Northern Ireland Protocol, to which it received a reply that London will seek to have the ECJ removed from the arbitration process.

Read

INVESTMENT ARBITRATION NEWS

Yet Another Defeat for Spain and the European Commission's Investigation

Another award rendered in *Biram and others v. Spain* (ICSID Case No. ARB/16/17) goes into the piggy bank of awards delivered against Spain in its disputes with investors over the regulation of tariffs for solar energy. This time, EUR 47.3 million worth of compensation for ECT violations and EUR 1.5 million of compensation of costs were awarded to four claimants – the German Sunflower Renewable Investments, its CEO, the German national Aharon Biram, the British Redmill Holdings Ltd, and the Spanish Gilatz Spain SL. The militant investors have already announced that if Spain refuses to pay the compensation, they will proceed with enforcement.

At the same time, the European Commission that has repeatedly tried to intervene in the arbitral proceedings as *amicus curiae* and filed objections in connection with the *Achmea* case (*Slovak Republic v. Achmea B.V.* (Case C-284/16)) and the EU internal law, has announced that it is launching its own investigation in another case, also related to renewable energy – *Antin v. Spain* (ICSID Case No. ARB/13/31).

The European Commission stated that unlike the revised 2013 renewable energy support scheme, the initial 2008 scheme was never registered by Spain in accordance with the appropriate procedure. That caused the Commission to believe that neither the benefits obtained by energy companies, nor an arbitral award of damages for having such benefits taken away was in line with the EU regulations on state aid. Additionally, the Commission invoked the decision of the Court of Justice of the EU in the *Achmea* case, arguing that intra-EU investor-State arbitrations undermined the system of legal remedies foreseen in the EU Treaties.

Read

Ups and Downs in the Yukos Case

As we mentioned earlier in the second issue of the Modern Arbitration: LIVE News Journal, in 2019 Canadian court rejected Russia's request to present new evidence in the proceedings for challenging arbitral tribunal jurisdiction under the claim brought by Luxtona. Justice Penny concluded that Russia did not provide reasons for accepting the evidence that was not submitted before the arbitral tribunal.

Divisional Court of the Ontario Superior Court of Justice did not agree with the Justice Penny in this regard, stating that according to the UNCITRAL Model Law, the court may consider the jurisdictional questions *de novo*. To support this position the Court relied, *inter alia*, on UK Supreme Court's ruling in Dallah Real Estate & Tourism Holding Co v. Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46.

As a result, Russia was granted the right to present new evidence in the proceeding. Upon the final resolution of this jurisdictional issue, the arbitration was suspended upon the agreement of the parties.

At the same time, on July 28, the Yukos Foundation (an entity that represents the interests of former Yukos shareholders) announced that the PCA Geneva-seated arbitral tribunal ordered Russia to pay USD 5 billion to Yukos Capital. The dispute concerned the loans of Yukos Capital to its parent company, that never have

been returned due to its insolvency. As stated by Yukos Foundation, the arbitral tribunal found that Russia expropriated loans as well as denied justice in the Russian courts.

Tatneft's New Successes in the Enforcement of Award

The US District Court for the Southern District of New York disagreed with Ukraine's position, requesting to block Tatneft's application to disclose information on the assets that may be potentially attached among 25 financial organizations for the purposes of further enforcement of the award. Ukraine argued that the information in question was confidential, as well as irrelevant for the case, since the assets of the organizations that Tatneft was interested in for the enforcement proceedings could not be attached.

Nevertheless, the Court found that Ukraine's interest in the protection of confidential information did not outweigh the probative value of that information.

In November 2020 Digest, the Russian Arbitration Center already mentioned this case – the dispute arose after Tatneft was deprived of its share in the Kremenchug Oil Refinery, causing the company to file for an ICC arbitration, where it was awarded USD 144 million of damages. Now Tatneft is taking vigorous action to enforce this award globally. The High Court of Justice (England and Wales) and the US District Court for the District of Columbia have already upheld the award as lawful.

Read

No Arbitration for Dual Nationals

In 2018, a UNCITRAL tribunal found that it had no jurisdiction over the USD 1 billion dispute of the French-Mauritian businessman Dawood Rawat initiated over Mauritius's revocation of Rawat's banking licence and the political arrests of his family (*Dawood Rawat v. The Republic of Mauritius*, PCA Case 2016-20).

Although the France-Mauritius BIT did not expressly limit the scope of its protections for dual nationals, the tribunal noted that it did provide that the agreements related to the investments made in the territory of the contracting states (that is, France and Mauritius) were to contain an ICSID arbitration clause. Therefore, there was a clear distinction between the interpretations of the term "ressortissant" (which can be simultaneously translated both as a national, and as someone born in a given country) under the BIT and under the ICSID Convention. Furthermore, according to the tribunal, France and Mauritius, in relying on the ICSID Convention that prohibits claims filed by nationals against their own states, have implicitly excluded dual nationals from the BIT's scope. It is on this basis that the tribunal proceeded to find that it had no jurisdiction over the dispute.

Disagreeing with the tribunal's findings, in the same year, Rawat applied to the Brussels Court of First Instance to have the award set aside, but the Belgian Court sided with the UNCITRAL tribunal and dismissed his application. According to the Court, the contracting parties' attempt to exclude dual nationals was supported both by a reference to the ICSID Convention and by the exclusion of such persons from the later

unratified France-Mauritius BIT. Finally, Rawat's investments did not conform to the object and purpose of the BIT, namely, the enhancement of economic cooperation between the two states, and the meaning of the term "ressortissant" was irrelevant for the issue of jurisdiction.

Read

Failed Oil Transportation May Spill into an Arbitration

The Keystone XL project of the Canadian energy company TC Energy Corporation, aimed at the construction of a pipeline for transporting bitumen oil from the Canadian province of Alberta to the American states of Oklahoma and Texas, has long been causing negative response of the environmentalists, since bitumen may generate 30% more greenhouses gases than regular oil. At first, the Obama Administration refused to issue permits for the project based on environmental concerns; then Donald Trump signed a number of orders to resume it and made it one of the key points on his presidential campaign's agenda; still later, Joe Biden annulled all previously issued permits on his first day as US President.

That was the final straw for TC Energy: the company announced that it was canceling the project and sent a notice of its intention to file a legacy NAFTA claim for USD 15 billion, as provided by the 2020 United States-Mexico-Canada Agreement (USMCA).

Read

An Investment Agreement with a Bank Is Not the Judiciary's Problem

An interesting conclusion was made by a PCA tribunal in *National Investment Bank (NIB, S.A.), Superior Investments LLC and Dr. Paulo Miguel Corte-Real Mirpuri v. São Tomé and Príncipe* (PCA Case No. 2019-16): it held that a 2004 investment contract with an investor was binding on the government of São Tomé and Príncipe, but not on its judiciary.

The dispute arose as a result of a number of judgments issued by the São Tomé courts with respect to the local division of the Portuguese National Investment Bank (NIB) that withdrew the bank's licence for five years without operations, what resulted in an attachment of the NIB offices in the country and the impossibility of any further business.

The claimants argued that the judgments were unlawful, contrary to due process and the aforementioned investment contract, but a UNCITRAL tribunal dismissed the claim on jurisdictional grounds, obliging the claimants to compensate the legal costs.

Read

Egypt's Court of Cassation Reinstates an Annulled Arbitral Award of One Billion US Dollars to a Kuwaiti Investor

Last year, Egypt's Court of appeal set aside a USD one billion award that the tribunal delivered in favor of Mohamed Abdulmohsen Al - Kharafi & Sons Company under a claim against Libya.

The facts of the investment dispute were such that the investor undertook obligations to Libya to construct and develop the entire infrastructure of a resort just outside of Tripoli. The company, however, had to abandon performance of the contract after it faced numerous claims with respect to land plots underlying the purported construction. After dropping its idea to construct a tourist resort in another place, the investor found itself in a situation where the contract was terminated on Libya's initiative.

That caused the investor to file for arbitration in 2011; the dispute was referred to an *ad hoc* tribunal with a seat in Cairo. In setting aside the tribunal's award on the recovery from Libya of USD 936 million (or USD one billion according to the current exchange rate), the Cairo Court of Appeal reasoned that that compensation amount was disproportionate to the effects of the breach.

Egypt's Court of Cassation disagreed with such conclusions and upheld the award. It is reported that the award has been recognized in France and already partially executed out of the assets held by the Libyan Investment Authority in France.

Read

ARBITRATION NEWS

Russian Arbitration Center signs a Memorandum of Understanding with Arbitrator Intelligence

To hasten the growth of transboundary cooperation and ADR, the RAC supports wider implementation and utilization of various innovative services. The collaboration with Arbitrator Intelligence (AI) – online system that provides users with unique data and analytics to enable them to make informed arbitrator selection and case strategy decisions – is timely as a new milestone in implementing and advancing virtuosic dispute resolution services that respond proactively to contemporary challenges, facilitating a move to more user-friendly arbitration.

The agreement signed by Yulia Mullina, Executive Administrator of the RAC, and Catherine Rogers, Founder and CEO of AI, states that both parties will cooperate with the common goal of making the arbitrator selection process more efficacious and predictable, and promoting diversity in the pool of international arbitrators. Both parties will make joint efforts towards the establishment of a framework for a safe, efficient and user-friendly ADR system in the CIS region and beyond.

Read

VIAC Rules of Investment Arbitration and Mediation Enter into Force

1 July 2021 marked the entry into force of the Vienna International Arbitral Centre's (VIAC's) Rules on Investment Arbitration and Mediation 2021. The first part of the Rules concerns the resolution of investment disputes involving states, state-controlled entities, and international organizations. Key to the new Rules is the provision whereby by consenting to arbitration under the Rules, a party waives jurisdictional immunities; a waiver of immunity from enforcement of the award, however, must be express. Furthermore, the Rules provide that the nationality of the arbitrator shall be different from that of the parties, unless the parties agreed otherwise.

The second part of the Rules deals with the settlement of investment disputes by mediation. Here, one can find a series of rules on mediation sessions, on the appointment of a mediator, on the conduct and completion of the procedure, on the principles of mediation and the costs of mediation at the VIAC.

Read

ICC Calls for Applications to Participate in a Task Force on Disability Inclusion and International Arbitration

The International Chamber of Commerce has launched a call for candidates to participate in the newly-created Task Force on Disability Inclusion and International Arbitration, formed under the ICC Commission on Arbitration and Alternative Dispute Resolution.

The idea to create the task force belongs to Claudia Salomon, the ICC President, and is intended to "reflect the global business community, we must enable the active participation of all skilled practitioners, including those with disabilities."

To participate in the task force, interested candidates are invited to send a statement of interest indicating:

- whether they have a disability, or
- are engaged in research or advocacy on disability inclusion, or
- if they wish to participate as an ally, and
- whether they seek a leadership role.

The deadline for applications is 31 August 2021.

Read

CAS Shares Plans for the Tokyo Olympics

The Court of Arbitration for Sport has announced that it will be opening two temporary offices in Tokyo for the Olympics. The first one will be the CAS Ad Hoc Division, traditionally active during all Winter and Summer Olympics since 1996, as well as during other major sports events; it will resolve disputes arising during the Games. On urgent matters, the Ad Hoc Division will render decisions within 24 hours.

The second office is the CAS Anti-Doping Division that will be established for the third time (the first time, it was active during the 2016 Summer Olympics, and for the second time, during the 2018 Winter Olympics). The division will function as a court of first instance for doping-related disputes referred to it by the International Testing Agency according to the International Olympic Committee's anti-doping rules.

Both offices will be functioning on the basis of the Japanese International Dispute Resolution Center. Due to the restrictions in effect in Tokyo, all CAS hearings will be conducted by video-conference. Some arbitrators will also work remotely from their countries.

Temporary CAS offices in Tokyo will be headed by the CAS Director General Matthieu Reeb. The Court's announcement states that it will be able "to guarantee [to the athletes] free access to high quality dispute resolution services conducted within a timeframe consistent with the competition schedule."

Read

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