Russian Arbitration Center

at the Russian Institute of Modern Arbitration

ARBITRATION DIGEST JUNE 2022

CASE LAW DEVELOPMENTS

Appointing the Same Arbitrator in Two Related Arbitrations: a Problem or a Solution

A court in Canada has refused to appoint the same arbitrator who has already considered a dispute stemming from the same agreement between the parties (*Aquanta Group Inc v Lightbox Enterprises Ltd* [2022] OJ No 2319, 2022 ONSC 3036). In the first arbitration, both parties agreed to appoint an arbitrator who subsequently rendered an award in favor of the respondent. After that, the claimant initiated new arbitral proceedings, seeking to challenge the agreement between the parties on the grounds not considered in the first arbitration. The claimant suggested appointing one of the candidates from the list (each highly qualified and authoritative, as follows from the judgement), while the respondent insisted on the appointment of the arbitrator who had considered the dispute between the parties earlier. As the parties were unable to reach an agreement, they asked a state court to appoint a sole arbitrator.

The claimant's main argument against the appointment of the same arbitrator was that the arbitrator would not be able to consider the second case between the parties objectively due to the circumstances that became known to him in the course of the first arbitration. The respondent, conversely, claimed that the arbitrator was better positioned to resolve the dispute given his knowledge from the first proceedings, including as contained in his personal notes. The court did not accept that argument of the respondent. The court observed that, under that scenario, the notes must be disclosed to the parties, a step that would violate the secrecy of deliberations in the course of the first arbitration. In the court's view, after an arbitrator renders an award, that award shall be considered and assessed independently of the arbitrator's opinion. Even though the court has refused to appoint the same candidate, it has agreed with the respondent's position that, if, in the course of subsequent arbitrations, the parties face an issue of the application of *res judicata*, it is reasonable to appoint candidates with judicial experience rather than those with commercial experience. The claimant's list of candidates featured two retired judges, and the court has ordered that the parties shall approach those judges in alphabetical order.

Read

US Supreme Court Clarifies Whether §1782 May Be Applied in International Arbitration

The US Supreme Court has finally ruled on whether federal courts may assist in the discovery of evidence in arbitrations under §1782 of the US Code. The Court has ruled that the provision does not extend to arbitrations, including those formed under bilateral investment treaties (BITs).

According to the Court, the terms "foreign and international tribunal" in that rule pertain to the bodies that are "imbued with official power", whether by one ("foreign") or several states ("international"). As a result, parties to international commercial or investment arbitrations may not approach the US courts seeking discovery assistance.

Read

A Peek at Arbitration

In 2016, an anonymous couple booked a condominium owned by Wayne Natt, for three days through Airbnb. Subsequently, the couple found out that Natt had installed hidden cameras all over the condominium, and those cameras presumably had been recording everything going on in the building. For that reason, the couple brought an action against Natt and Airbnb: Natt was sued for intrusion, while Airbnb was sued for constructive intrusion, based on the fact that Airbnb had not informed the couple of other interferences with private lives having occurred before in other premises booked through Airbnb; in addition, both defendants were sued collectively for loss of consortium (*Doe v. Natt*, 299 So. 3d 599, 610 (Fla. 2d DCA 2020)). Airbnb's Terms of Service, however, contained an arbitration clause incorporating the AAA Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes by reference. Eventually, all parties agreed that the couple was bound by the arbitration agreement. The question, however, arose as to who must decide whether the couple's claims against Airbnb were arbitrable – a court or an arbitrator?

In answering that question, the court of first instance held that, since the relevant provision incorporated the AAA Rules, it was the arbitrator who was to rule on arbitrability. Yet, the appellate court did not agree with that decision and reversed it, reasoning that (1) the arbitration clause did not explicitly say that an arbitrator must decide the issue of arbitrability and (2) the AAA Rules apply only after an arbitration is initiated.

The Supreme Court of Florida, in turn, decided to look at the intentions of the parties and ruled that the incorporation of the AAA Rules into the arbitration clause constituted "clear and unmistakable" evidence of the parties' intent to delegate the issue of arbitrability to the arbitrator, thus sustaining the practice already established under the Federal Arbitration Act.

Read

Interpreting the Parties' Intention to Refer Disputes to a Single Forum: When Does the Fiona Trust Principle Not Apply?

A court in Hong Kong has ruled that, in order to ascertain the parties' intentions to refer disputes stemming from different agreements to a single forum, it is necessary to interpret dispute resolution clauses in light of their context (*China Europe International Business School v Chengwei Evergreen Capital LP* (formerly known as Chengwei Ventures Evergreen Fund LP) and Others [2021] HKCFI 3513).

H and G entered into a contract, whereby H undertook to perform construction works for G's project in Hong Kong. The contract contained an arbitration clause. The contractual terms and conditions also obligated H to give a guarantee with respect to the waterproofing system in a separate document signed by H, G, and H's subcontractor or supplier. All disputes related to the guarantee must be referred to the "Courts of Hong Kong Special Administrative Region". When a dispute arose between the parties with respect to that very waterproofing system, G submitted claims to the arbitration, contending that H breached both the contract and the guarantee. H, in turn, was of the view that the arbitral tribunal did not have jurisdiction over the disputes arising from the guarantee. The guarantee provided for joint and several liability, therefore, any disputes arising out of it could not be arbitrated between H and G as stemming from the underlying contract between the parties. The arbitral tribunal found that it had jurisdiction, since the arbitration clause in the contract covered any issues arising out of the guarantee as well.

H applied to the court asking to set the award aside on the basis of the principle, under which all reasonable entrepreneurs intend their disputes to be resolved in a single forum, as laid down in the famous case *Fiona Trust & Holding Corp v. Privalov*, [2007] UKHL 40. The court has set the award aside, since the arbitral tribunal did not have jurisdiction to consider claims brought under the guarantee. The court has relied on the fact that, in the guarantee, the parties provided for a dispute resolution procedure different than that contained in the underlying contract. In the court's view, the Fiona Trust principle shall apply only when parties to contracts are the same. In this case, however, a third party – subcontractor H – was not a party to the agreement.

Read

Contentious Precedent: Between Substantive and Procedural Law

The English Commercial Court has dismissed India's request to set aside a partial arbitral award in an 11-year dispute with Reliance Industries Limited and BG Exploration & Production India Ltd related to the Tapti and Panna Mukta oil and gas fields off the Mumbai coast.

The product sharing agreements contained a joint cost-sharing arrangement and limited the amounts that Reliance and BG could claim from India in connection with oil and gas production. In 2010, Reliance and BG filed a claim against India under the UNCITRAL Arbitration Rules, asking the arbitral tribunal, among other things, to interpret the cost recovery provisions and apply them to the costs incurred by Reliance and BG.

In this protracted arbitration, the arbitrators rendered eight partial arbitral awards on the merits of the dispute, three of which India sought to challenge before the English courts. In the latest award, the arbitral tribunal applied the principle laid down in *Henderson v. Henderson*. That principle formulated in an English court judgement back in the 19th century disallows the parties from raising arguments that have not been, but could have been and should have been considered at earlier stages of the proceedings.

In the setting-aside proceedings, India argued that the res judicata doctrine, which encompasses the *Henderson v. Henderson* approach, is part of substantive rather than procedural law. According to India, as the contentious contract was governed by India's law, the arbitral tribunal was not allowed to apply the *Henderson v. Henderson* principles, without demonstrating that a similar approach existed in India as well.

In its judgement, the court has concluded that English law clearly indicates that the *Henderson v. Henderson* principle is a procedural one and, thus, could be applied by the arbitrator, given that the seat of arbitration was in England. The Court has also noted that the principle is intended to reduce abuses and recurring proceedings and arguments both in arbitration and in courts.

Read

How International Commerce Influences Arbitration

On 6 June 2022, in *Southwest Airlines Co. v. Saxon*, the US Supreme Court agreed with an airline employee Latrice Saxon, who objected against the requirement to arbitrate her claim on payment of wages to her and her colleagues, as the Federal Arbitration Act (FAA) did not apply to employees engaged in foreign or interstate commerce.

Latrice Saxon, a ramp supervisor, who trained and supervised ramp agents loading cargo on airplanes, brought a class action in court against her employer Southwest, notwithstanding the arbitration agreement. Southwest sought to refer the dispute with its employee to arbitration, but Latrice Saxon believed that the arbitration clause was not enforceable in light of the FAA provisions. The reason is that the FAA provisions on the enforcement of arbitral awards do not apply to employment contracts with seamen, railroad employees, or any other classes of workers engaged in foreign or interstate commerce.

The question arose before the Court as to whether Latrice Saxon, in view of her position, must be regarded as a person engaged in interstate commerce. The airline argued that the FAA exemptions applied solely to persons who physically move goods across the border, that is, pilots, ship crews, and locomotive engineers, but cargo loaders and supervisors were not covered. Conversely, Latrice Saxon believed that the FAA exemption must apply practically to all employees taking part in the principal activities of the airline.

The US Supreme Court disagreed with both parties and took quite a balanced view, concluding that the FAA did not apply to those "actively" engaged in transportation of goods across the borders or between states.

That decision does not exempt all employees of transportation companies from arbitration but only means that some arbitration agreements may be unenforceable under the FAA; however, those agreements may be enforceable under state arbitration laws.

Read

Who's the Last in the Line? I'd Like to Appoint an Arbitrator Real Quick

In 2016, a petitioner in the case *M/s Shree Vishnu Constructions v The Engineer in Chief, Military Engineering Service & Ors.*, SLP (C) No. 5306/2022 approached the Telangana High Court with a request to appoint an arbitrator in accordance with the 1996 Indian Arbitration and Conciliation Act. The Act provides that a court may appoint an arbitrator if (i) parties fail to reach an agreement with respect to the appointment of a sole arbitrator or if (ii) problems arise with respect to the procedure for the appointment of an arbitrator approved by the parties. The petitioner, however, had to wait for the High Court decision as long as until 2020.

In view of this situation and general concerns of judges over such delays – given that they "defeat the object and purpose" of the Arbitration Act – India's Supreme Court has directed High Courts to rule on the applications to appoint arbitrators that have been pending for over a year, within six months. Besides, courts are also urged to consider and decide on all incoming applications to appoint arbitrators within six months.

Read

Common Sense in Arbitration

The Indian Ministry of Railways awarded an agreement for the manufacturing and supply of 1,871 wagons to JIRL that offered the lowest price at the tender. The agreement contained an optional clause whereby the claimant was given the right to increase/decrease the ordered quantity of wagons up to 30% of the quantity stipulated in the agreement during the entire term thereof without changing the contractual price or other terms and conditions. Subsequently, the Ministry entered into an agreement for the supply of 1,075 wagons with the second participant of the tender with the lowest bid (the L-2 company), for the said price. JIRL, disagreeing with that determination of prices, sent a complaint to the Ministry requiring that a uniform price be set for the wagons. The Ministry, in turn, exercised its right to place an order for an additional quantity of wagons.

This situation led the parties to arbitration. The arbitrator did not agree with JIRL's position in terms of unequal treatment in fixing the price, but decided that the Ministry's order for the additional supply of wagons at the same price breached the contractual provisions. In view of this, the arbitral tribunal resolved that the Ministry had to compensate JIRL for the damage caused to it as a result of the supply of additional wagons at the price lower than the cost of their production.

Objecting to the arbitrator's conclusions, the Ministry sought to set aside the arbitral award rendered in that case, relying mostly on the argument that the arbitrator had disregarded the terms and conditions of the parties' agreement.

In setting the arbitral award aside, the Delhi High Court has noted that in that case the award itself was based on the arbitrator's reasoning that the contractual provisions shall not be interpreted literally if that runs counter to the common sense of the business relationship. Since the parties initially agreed to the possibility of an additional order of wagons at the price originally approved and offered by JIRL, the arbitrator should not have interpreted that provision so as to deprive the Ministry of its right to such an order, even where the performance in question became commercially unviable for JIRL. The Court deemed the arbitral award unlawful and contrary to public policy, as the arbitrator was not entitled

Read

Movie Ends Up in Arbitration

A dispute related to the distribution of the movie *The Matrix Resurrections* has erupted between the Warner Bros. studio and its financial partner Village Roadshow. Village Roadshow accused its partner of organising the movie's distribution simultaneously in cinemas and on its streaming platform HBO Max, causing damages to Village Roadshow. A claim was brought before the Supreme Court of California; however, the judge has decided that the claims must be considered in arbitration.

Further, the judge has refused to issue a court order for providing Village Roadshow with scenarios and the information on the budget and cast of the movies that the company may fund. This is because under the contract between Village Roadshow and Warner Bros., the latter is obliged to provide said information to its partner so that it can decide whether it wishes to co-fund the suggested projects. According to the claimant, at the moment, Warner Bros. is moving forward with a sequel to *I Am Legend*, the *Wonka* series, and a new

Ocean's Eleven movie, but, in breach of the contract, it has not provided the requisite information to its partner.

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Arbitral Award Confirmed by a State Court Is an Asset

That is the position taken by the US Court of Appeals for the Ninth Circuit in a dispute between Vitaly Smagin and Ashot Yegiazaryan. Previously, Vitaly Smagin filed a lawsuit against Ashot Yegiazaryan and 11 related individuals and legal persons under the US Racketeer Influenced and Corrupt Organizations Act (the RICO Act). The plaintiff alleged that the defendants undertook unlawful actions with a view to circumvent the enforcement of the arbitral award issued in Smagin's favor.

The arbitral award was rendered back in 2014; under the award Ashot Yegiazaryan had to pay more than USD 92.5 million to Vitaly Smagin over the misappropriation of a share in a shopping center in Moscow. In 2016, the US District Court for the Central District of California enforced the award, which came in good time, as, one year before that, Suleyman Kerimov and Ashot Yegiazaryan settled another arbitration, as a result of which the latter was to receive USD 198 million. Vitaly Smagin was hoping to get some of that money, but Ashot Yegiazaryan created a chain of offshore companies that allowed him to avoid seizure of the money obtained.

The court of first instance dismissed the lawsuit, reasoning that the plaintiff failed to prove the damage to his property in the US territory, which rendered the RICO Act inapplicable in that case. Yet, the Court of Appeals has noted that an arbitral award enforced by a US court is property, thus, in this case, the application of the RICO Act could not be ruled out. The case has been remitted for retrial to the first instance court.

Read

Misfortunes Never Come Singly: Troubles in Installing a Seawall in Iraq Lead to Arbitration

On 3 June 2022, the US District Court for the District of Columbia received an application for the recognition and enforcement of an ICC award in *Archirodon Construction (Overseas) Co. Ltd.* (Archirodon) *v. General Company for Ports of Iraq* (GCPI).

The dispute arose from a contract for the construction of a berth and a seawall for the Grand Port of Al Faw in Iraq that is, among other things, thought to be the largest in the world and is included among the Guinness World Records.

Archirodon approached the ICC with a claim for the recovery of extra costs and damages of EUR 291 million, as well as for an extension of the term of works and a refund of EUR 20 million, withheld as a result of penalty clauses invoked for a delay of around 1,095 days occurring due to various circumstances that prevented the company from meeting the deadlines.

After hearing the dispute, the tribunal concluded that:

- Archirodon was entitled to an extension of 726 days, but GCPI was entitled to a reduction of the contract price by 10% and a recovery of EUR 20 million from Archirodon for the delay;

- the ISIL attacks in Iraq were not force majeure and Archirodon could and took reasonable measures to mitigate the threat for its workforce;

- the issue of access to the construction site was also soluble, because there were alternative routes to the site – Archirodon could have sent construction materials by boat;

- soil condition indeed did not conform to the one represented as at the date of the bidding procedure, and the tribunal therefore agreed that soil conditions were unforeseen and given that Archirodon had been competently performing pre-construction works, recovered over USD 70 million from GCPI for extra construction materials and the collapses caused by soil conditions.

Read

Zero-Sum Game in Area 47: Indonesia v. Libya

The Indonesian power company Medco has filed an ICC claim against the National Oil Company of Libya. The claim was triggered by the disruption of a USD 900 million-worth oil and gas project by the civil war in Libya.

The agreement between the two companies provided for exploration and product sharing at the oil field known as Area 47. It is reported that the development of Area 47 was disrupted by political instability during the civil wars in Libya in 2011 and from 2014 to 2020.

Medco submits that it filed its claim in response to the attempts by the Libyan company to develop Area 47 in breach of the agreement and for its sole benefit, as well as for preventing Medco from fully participating in the development of the project.

Read

China's HNA Conglomerate Loses Arbitration and Finds Itself on the Brink of Bankruptcy

The American company SLG has applied for enforcement of a USD 185 million arbitral award against the Chinese conglomerate HNA.

The two companies had been jointly managing a 44-story skyscraper in the center of Manhattan. After one of the building's key tenants vacated its offices, serious controversies broke out between the investors. The

companies effectively accused each other of the exact same thing, namely, fraud and coercion aimed at taking full control over the building.

In the end, SLG filed a JAMS claim seeking payment under a deed of guarantee made with three HNA affiliates. In turn, the Chinese conglomerate alleged that SLG had misled NHA in order to execute a joint venture agreement and a guarantee, so as to eventually get hold of the property. Having examined the dispute, the arbitrator concluded that HNA had waived remedies for fraud prior to executing the agreement, when it signed an "absolute and unconditional" guarantee. The tribunal also noted that it did not find the conduct of the American company to be unlawful.

The Chinese conglomerate is struggling: at the peak of its development, the company was valued at more than USD 100 billion, whereas now it is on the brink of bankruptcy with debts assessed at USD 170 billion.

Read

"Love and Healing Frequency" Does Little to Help a US Company Prevail in Arbitration

The Californian company Lovetuner that specialises in selling flutes healing their owners with a 528 Hz frequency, has lost an ICDR arbitration.

Lovetuner filed a claim in April 2021 against HeavenSeven and one of its Swiss branches, as well as its CEO Daniel Grenzner. The American company alleged that the respondents had breached the confidentiality agreement and the project contract.

HeavenSeven, in turn, claimed that Grenzner's signature on the documents submitted by the claimant was fake. The parties engaged two experts and cross-interrogated them, before the arbitrator arrived at the conclusion that Daniel Grenzner's signature was indeed inauthentic. In the end, Lovetuner's claim was dismissed.

Read

ICC to Hear a Singaporean Company's Claim against a Qatar Authority over a Doha Sewage Treatment Plant

A subsidiary of the Singapore company Keppel KSES filed an ICC claim against the Qatar Public Works Authority over the termination of a contract for the construction of a sewage treatment plant in Doha. The claim is valued at USD 126 million.

In 2007, KSES began the construction of a sewage treatment plant not far from Doha. A technology, unique at the time, allowed transforming waste into organic fertilizer. There was a plan to complete the project in three years, but it was in fact completed as late as in 2015, with some areas finished in 2017.

The dispute arose when the Qatar Public Works Authority terminated its contract with KSES and came up with a new contract for the maintenance of the treatment plant, although the previous one provided for a 10-year post-construction maintenance phase. The claimant asserts that the claim concerns, among other things, violations committed at the project design and construction stages.

Read

It Is Called a State But It Isn't One

The US Court of Appeals for the District of Columbia has dismissed a Lithuanian company's application for the enforcement of a USD 20 million award delivered by a Vilnius tribunal against a Tajikistan national airline, agreeing that the court of first instance had no jurisdiction *rationae personae* over the Tajik flag carrier Tajik Air.

Skyroad initiated the US enforcement proceedings in 2020, claiming that Tajik Air should be deemed an agent of the Tajik state and that the court had personal jurisdiction over it under the US Foreign Sovereign Immunities Act.

The Court, however, ruled that Tajik Air was distinct from its state owner and, accordingly, Tajikistan's assets could not be attached. The Court held that Skyroad failed to prove that Tajikistan exercised "excessive control" over the airline that could allow the Court to assume personal jurisdiction under the US Foreign Sovereign Immunities Act.

The Court therefore concluded that it had no personal jurisdiction over Tajik Air.

Read

"Our Hands Are Tied": US Appeals Court Cannot Annul an Award Because of Its Own Precedent

The US Court of Appeals for the Eleventh Circuit has dismissed an application to set aside an ICC award, citing its previous rulings even though they contradict a US Supreme Court precedent.

The dispute between the Guatemalan companies Hidroelectrica Santa Rita (HSR) and AIC arose from a contract for the construction of a hydro power plant in central Guatemala. Due to protests by local indigenous communities, the contract was terminated, and HSR filed a USD 11 million ICC claim for damages. The arbitral panel supported the claimant's position, ordering that AIC pay USD 7 million towards the advance and interest, and refused to allow joinder of the Guatemalan subcontractor Novacom as a third party.

AIC approached a US District Court seeking to annul the award and arguing that the tribunal exceeded its mandate, including where it refused to allow the third party to join the proceedings. The District Court declined annulment, relying on a precedent of the US Court of Appeals for the Eleventh Circuit ruling that apparent excess of mandate did not constitute a valid ground for the annulment of an arbitral award.

Disagreeing with the District Court's position, AIC challenged the judgment. The Court of Appeals held that the previous decisions of the Court of Appeals were inconsistent with the Supreme Court's position on the matter, but a court of three judges could not change an established practice, and therefore upheld the District Court's ruling. The Court also expressed a hope that the case would be heard in bank, by a full bench of judges that will be able to bring the practice in line with the Supreme Court's approach.

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INVESTMENT ARBITRATION NEWS

Singapore Court Finds No Reasons to Set Aside an Award Based on Collateral Estoppel

A Singapore court has declined to annul an award issued in a dispute between investors and Laos, where the tribunal dismissed most of the claims based on the doctrine of collateral estoppel that precludes re-examination of issues raised and heard in a previous proceeding between the parties, whether based on the same claim or not.

The investors claimed that such a ruling by the tribunal violated their right to be heard, as well as public policy. The court disagreed with that argument. In its opinion, the arbitral tribunal observed the arbitral procedure in applying the doctrine: thus, the parties were given an opportunity to make their case on its application. That conclusion of the tribunal, according to the court, did not result in a violation of natural justice, where "common issues" arose in two arbitrations and one has already ended in an award.

Read

Admissibility vs Jurisdiction

A court in France has decided that a limitation period and a negotiation clause presumably contained in the Canada-Venezuela BIT pertain to the issue of admissibility of claims rather than that of jurisdiction of the arbitral tribunal.

In the course of the arbitration, the arbitral tribunal decided that the limitation period had expired with respect to some of the claims under the investment treaty; however, it satisfied the claims arising in connection with the other time period, finding that the government's actions constituted unlawful expropriation. In the view of the state court, the award of the arbitral tribunal concerned admissibility of the claims under consideration, rather than its jurisdiction. Therefore, said conclusion of the tribunal may not be viewed as a basis for objections against the tribunal's jurisdiction at the setting-aside stage.

In the court's opinion, the alleged failure to comply with a negotiation clause is also an issue of admissibility. Thus, it cannot be considered at the setting-aside stage.

Another argument raised by the applicant on the lack of jurisdiction on the part of the arbitral tribunal consisted in that a contractual clause on the settlement of disputes extended to disputes arising from actions that presumably breached the contract and caused damages to the investor (claimant). For the state, that interpretation would mean that a causal link between an alleged breach and perceived damages was a jurisdictional requirement. That argument has not convinced the court either. On the contrary, the judges pointed out that that interpretation "would amount to saying that jurisdiction of the arbitral tribunal depends on whether a claim is well-founded."

Moreover, the court has considered the applicant's argument that the arbitral tribunal overstepped its mandate in determining the fair market value of the investments and the valuation period. The state contended that the court disregarded the parties' agreement to the effect that a compensation must be calculated on the basis of fair market value of the investments and, instead, preferred to employ a mix of

three valuation methods. The arbitral tribunal considered that the calculation as agreed by the parties would be speculative, since no company aware of the political situation in Venezuela to any extent would invest into the country's gold mining sector as of the valuation date in 2011. On that basis, the arbitral tribunal decided to combine three valuation methods. In the court's view, in combining such three valuation methods, the arbitral tribunal did not overlook the parties' agreement; rather, the arbitrators sought to determine a fair market value on the basis of the combined approach, something that does not warrant a conclusion that the arbitral tribunal overstepped its mandate.

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A Bad Day for an Asset Freeze

In a long-standing dispute between Kazakhstan and the Stati family, the latter has suffered two not-insubstantial defeats at once. Previously, an SCC tribunal had awarded USD 543 million to Anatol and Gabriel Stati. More than that, the shares of a Netherlands-registered Kazakh oil and gas company worth almost ten times more than the amount awarded, had been attached to enforce the award.

The Hague Court of Appeal, however, ruled that the company's shares enjoyed sovereign immunity, since the object of its operations was increasing the national welfare of Kazakhstan, and lifted the attachment. Interestingly, the Statis had little chance of keeping the shares frozen, as in December 2021, the Supreme Court of the Netherlands held that the SCC award was obtained by fraud.

Practically on the same day, a Brussels court refused to suspend proceedings on recovering damages from the Stati family for attaching the assets of the Kazakhstan National Fund in the territory of Belgium. Earlier, the Court of Appeal in Brussels ruled that the award was obtained by fraud and lifted the attachment off the property of Kazakhstan in Belgium. The Statis challenged that judgment before the Supreme Court of Belgium and tried to have the procedure for the recovery of damages for attaching the assets adjourned for the duration of those proceedings, but failed.

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Bribes Don't Help One Get Control over a Mine

The ICSID has delivered an award in a dispute between BSG Resources and the Government of Guinea over the right to develop the world's largest iron ore deposit. The tribunal found that it had no jurisdiction to hear the dispute, but pointed out in its award that there was persuasive evidence that BSG Resources had procured the rights to develop the deposit through bribery.

Thus, according to the tribunal, the wife of Guinea's ex-dictator received at least USD 9.5 million from BSG Resources. Bribes had also been paid to other Guinean officials. Interestingly, Guinea's current government had filed a counterclaim against BSG Resources, seeking compensation of losses for violations of the country's laws, but the arbitrators ruled that the Guinean officials had themselves taken part in the bribery.

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What's Another Million to You?

The UK company Smartmatic that develops and implements electronic voting systems, has filed a USD 1.5 billion ICSID investment treaty claim against Venezuela.

In 2017, Venezuela used the Smartmatic technologies in the elections of its National Assembly. Having reviewed the official report of the National Electoral Council, Smartmatic accused the state of falsifying the outcome of the elections, or, to be more precise, of overstating voter turnout by more than 1 million people. The UK company also claims that Venezuela had threatened its assets and the lives of its employees to force Smartmatic to accept the voting results.

Read

Failure of a No Garbage Removal Neighbourhood

The Spanish developer Comervi has filed a EUR 407 million ICSID claim against Morocco over a thwarted project for the construction of two satellite cities.

The contract provided for the construction of three residential complexes that Comervi was to sell to third parties as part of the "Cities without Slums" initiative launched by Morocco in 2004. The initiative was aimed at combatting urban congestion by creating satellite cities.

Comervi accuses Morocco of failing to take care of the infrastructure necessary for the functioning of the residential complex and failing to amend urban plans. As a result, what was expected to become a "dream city", according to Comervi, was cut down to several isolated buildings without a garbage removal service and surrounded by illegal markets.

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ARBITRATION NEWS

Release of the 7th Edition of the "New Horizons of International Arbitration"

The Russian Institute of Modern Arbitration has published the 7th edition of the collection of articles "New Horizons of International Arbitration".

The collection is a product of the great effort undertaken in preparation for the Russian Arbitration Day – one of Russia's largest arbitration conferences – and includes the scholarly works of the conference participants. Although the conference itself was not held in 2022, it was decided to still issue the collection in traditional format. The readers are invited to inform themselves of the most topical issues and problems of commercial and investment arbitration and mediation, as well as of the unconventional and curious ways of solving them. The collection includes articles on investment arbitration, including on the notion of investment in the era of digital economy, as well as on "cooling-off period" clauses. Moreover, the authors have presented new takes on the traditionally controversial procedural aspects of arbitration, namely, the law applicable to the arbitration agreement, anti-arbitration measures with respect to sanctions disputes, and the use of hybrid (arb-med-arb) procedures in the context of international arbitration.

Read

Authorship Detection for Arbitral Awards

LinkedIn users have re-discovered a 2020 study that intended to answer the question of whether the arbitrators themselves author the arbitral awards made in investment arbitrations. The gist of the study can be summarized as follows.

Having selected 9 most active arbitrators who have acted as presiding arbitrators for analysis and inspired by a study by their WTO colleagues who concluded that the secretariat plays a considerable role in the writing of arbitral panel reports, the authors of this new study used the method of comparing arbitral awards with three academic articles, orders, and other decisions written by the arbitrator when not acting as a president of the tribunal. This list, according to the researchers, best demonstrates the style of presiding arbitrators and was therefore used as a starting point for comparative analysis.

These documents, coupled with a predictive machine-learning model and an analysis of the first words in sentences, function words, such as "a", "by", "if", "of", "their", and "who", sentence length, and punctuation used (all of the above serving as a sort of fingerprint, unique to each arbitrator), have allowed the researchers to assess whether an award was drafted with the participation of other arbitrators and/or assistants and secretaries of the arbitral institution.

As a result, the authors of the study found that the difference between scholarly works and procedural rulings, as compared to arbitral awards, is vast. Moreover, considerable stylometric deviations are present even in one work by a specific presiding arbitrator. The authors offer three explanations for this phenomenon: 1) their measurement could have suffered from the interference of "noise" in the form of citations, references, etc.; 2) the award text could be significantly changed by the co-arbitrators; 3) the presiding arbitrator could have replaced an assistant mid-arbitration. And although the researchers

themselves acknowledge that the methods they used proved to be far from perfect, it should not go unmentioned that this study has got the ball rolling and in the future we might well see multiple studies on matters of authorship and originality of arbitral awards.

Read

Have a Mediation – and Off You Drive into the Sunset

A recent 2019 study assessed four mediator strategies and their outcomes in the long-term and in the short-term.

The following tactics have been distinguished in the four strategies: eliciting potential participant solutions, neutral offering of solutions by the mediator, reflecting, and multiple private meetings with mediation participants.

When eliciting participant solutions, the mediation participants themselves put forward ideas to each other and brainstorm the best decision that might work. From the standpoint of short-term outcomes, the parties have noted that in using this strategy, they listened to and understood each other's arguments, took responsibility and apologized where necessary, all while retaining full control of the procedure, where the mediator merely helped them reach a settlement. Long-term results were also encouraging in view of their positive dynamics – thus, by changing the approach to conflict, the parties improved their relationship with each other, which eventually lowered their need to approach a court to enforce the settlement reached.

The situation was less rosy where a mediator himself/herself offered neutral solutions: there were no distinctive short-term outcomes, and in the long-term the parties ended up discontent with the agreed settlement that, moreover, did not work, and refused to recommend anyone to use mediation to resolve conflicts.

Reflecting – that is, identifying and analyzing the emotions and interests of the parties – proved to be another efficient strategy, where the mediator would empathically summarize and restate a party's position back to the other party. In the short term, that resulted in increasing the sense of justice and being appreciated for the parties, because their arguments were heard; the efficiency of a participant itself increased, and in the process, the participants talked to each other, apologized and took responsibility. The participants noted no special developments in the long term.

The least successful and most negative experience of mediation for the participants was the overuse of private meetings with one of the parties, where joint sessions took less time than private ones. As the mediator fully controls the process of mediation and its outcome, shortly after the start of mediation, the parties began feeling powerless, started believing that the conflict was negative, that the process was unfair and an outcome reached could not be implemented. That did not improve over time – thus, the parties continued to be dissatisfied with their own efficiency and attitude to the other party, and had a sense that the mediator did not care about the conflict or the party. When this strategy is used, it is very likely that the parties will return to court for enforcement in the year following the mediation.

Read

A Study of Public Policy in International Arbitration Practice

Research by Monique Sasson, published in the Journal of International Arbitration and based on an analysis of the judgments of national courts available in the Kluwer Arbitration Database, has shown that public policy defenses have been raised in 44% of enforcement proceedings and in 38% of setting-aside proceedings. The share of judgments where courts accepted such defenses was 19% and 21%, respectively. Yet, the number of cases where public policy defenses were upheld by courts, the study indicates, cannot be deemed insignificant.

It is noted that in interpreting public policy, courts follow either a broad or a narrow approach. Thus, the broad approach generally implies that a court reserves the right to resolve public policy issues and the possibility to look into public policy grounds and decide whether there was a violation of fundamental principles, even where the arbitral tribunal made a decision on the same issue. Pursuant to the narrow approach, courts are bound by the tribunal's opinion on public policy. According to the author of the research, the objection to the effect that the award contradicts public policy is, in a way, a "catch-all" objection. Judgments where courts accepted such objections are usually very detailed and concern extreme patterns of behavior that are not often seen in the practice. Her analysis has shown, however, that there are judgments where courts, in relying on public policy violations, revise the disputes on the merits, although such a development, the author believes, is fraught with risks for international arbitration.

Read

Russian Ministry of Justice Puts Ambitious Amendments to the Arbitration Law up for Public Debate

The draft federal law, posted on the unified web portal for draft normative acts, provides for new rules on *ad hoc* arbitration, as well as extends the competence of the Ministry of Justice to regulate arbitration.

Thus, it suggests stipulating a requirement that *ad hoc* arbitrators have at least 10 years of experience in resolving civil-law disputes. Another amendment expands the list of disputes that cannot be resolved by such arbitrators: these are disputes involving individuals, public authorities, public-law entities, as well as disputes entailing changes in publicly significant registers.

Where an arbitrator's awards have been set aside on multiple occasions or courts refused to issue writs of execution for his/her awards, the draft law suggests placing such an arbitrator on a list of bad faith arbitrators. The Ministry of Justice is put forward as the keeper of that list, but clearer criteria of inclusion thereon are yet to be revealed. That said, if a "bad faith" arbitrator issues an award in an *ad hoc* arbitration, it will be deemed delivered in breach of procedure (the draft law does not, however, clarify if that rule is intended to cover the arbitrator's awards issued before he/she was included on the list).

Additionally, the draft law focuses on such topics as third-party funding and interim relief. It is suggested that a party for whose benefit the arbitration is funded by a third party, must immediately disclose that to the other party and to the tribunal. An arbitration agreement, the draft law provides, may contain a reservation

on the right of a permanent arbitral institution to determine the procedure for entering interim relief prior to the constitution of the tribunal.

Read

Arbitration in Nigeria: New Arbitration and Mediation Bill

Changes in the regulation of arbitration have also affected Nigeria that has recently passed a new Arbitration and Mediation Bill.

After the bill is signed by the President, the parties to arbitration will be able to benefit from such institutes as third-party funding of arbitration, appointment of emergency arbitrators, issuance of urgent interim relief by courts, and the possibility of enforcement of interim relief.

At the same time, questions remain regarding the provision of the Bill that allows the parties to agree to revise an arbitral award if Nigeria is the seat of arbitration.

Read

ADR EVENTS

RIMA Summer Academy “Arbitration 101: From Agreement to Enforcement”

The Russian Institute of Modern Arbitration invites arbitration beginners to take part in the Summer Academy “Arbitration 101: From Agreement to Enforcement”. The Academy will take place offline from 8 through 13 August 2022.

During the Academy, the students will learn about the course of arbitration step-by-step, beginning from the drafting of an arbitration clause and up to the enforcement of an arbitral award by a court. Summer Academy teachers will share not only theoretical knowledge, but also their invaluable practical experience: thus, during the studies, the course participants will learn how to be successful in negotiations, draw an enforceable arbitration agreement, choose an arbitrator, submit evidence in arbitration, and a lot more.

The Academy will be held offline in Russian for maximum 20 attendees. Applications are open until 8 July 2022.

Apply here.

An application must include general information about a candidate, a CV, and a motivational letter. In your motivational letter, please indicate how the knowledge you are about to acquire will help you in the future and in your career.

Read

Arbitrating Space Collisions: What Mechanisms Can Companies Use?

On 6 July 2022, the Space Arbitration Association will organise an online panel where experts will discuss the dispute resolution mechanisms available to space companies. The panel will be in English. Join for free by registering here.

Read

Registration Open for the 6th National Moot Court on Arbitration of Corporate Disputes Named after Professor V.P. Mozolin

On 1 June 2022, registration opened for participants and arbitrators for the 6th National Moot Court on Arbitration of Corporate Disputes named after Professor V.P. Mozolin. Each year this moot court unites hundreds of law school students from dozens of Russian regions, making it one of the largest and most prestigious moot court competitions.

Ahead of the Moot Court, from 1 September through 2 October 2022, pre-moots will be organized throughout Russia to enable teams to receive valuable feedback from the arbitrators, as well as prepare for the preliminary and final rounds.

The Moot Court case this year concerns defining the applicable substantive law, liability for the conduct of an ex-employee, qualification of the dispute as a corporate or contractual one, and breach of confidentiality clauses in the contract.

Apply or read the Moot Court Case and Rules here.

Read

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