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MODERN ARBITRATION LIVE

NEWS JOURNAL

HIGHLIGHTS OF ALTERNATIVE DISPUTE RESOLUTION

The second issue of Modern Arbitration: LIVE News Journal offers a comprehensive analysis of Russian and foreign news in the field of alternative dispute resolution for the second half of 2020. Modern Arbitration: LIVE News Journal comprises overviews of arbitral awards and legislative amendments, interviews and commentaries by experts, as well as notes on the most topical issues of arbitration and mediation.

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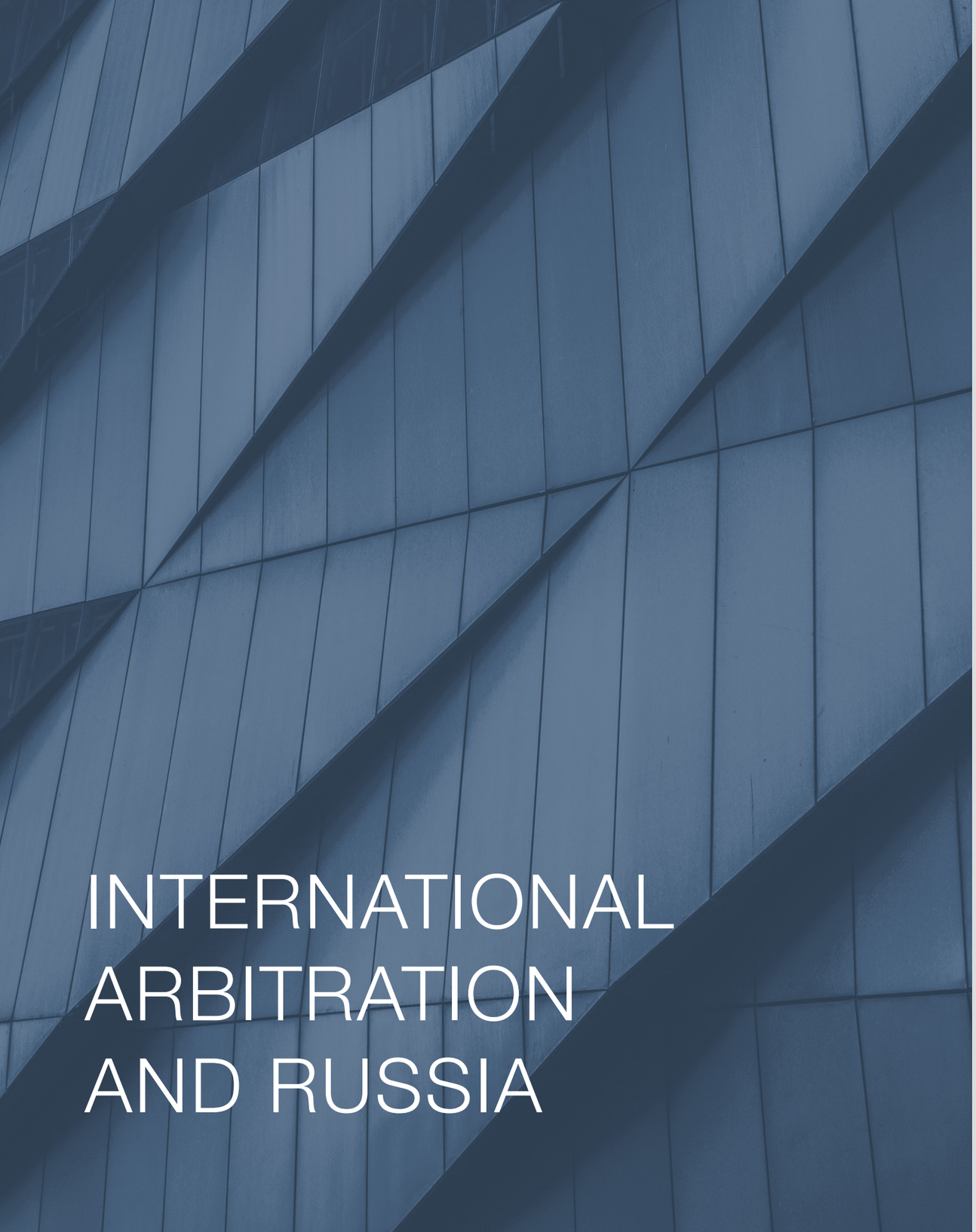

INTERNATIONAL ARBITRATION AND RUSSIA

The Delovye Linii Conflict: Highlights of Recent Developments

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This November, the Commercial Court of Saint Petersburg and the Leningrad Region refused to recognize and enforce an LCIA award recovering USD 58 million from the co-owner of Delovye Linii, Alexander Bogatikov.

In support of this position, the Russian court indicated that in calculating the damages that the claimant incurred as a result of an unexercised option, the LCIA erroneously added the purported "tax risks" to the value of the enterprise, instead of deducting them.

The LCIA acknowledged the mistake but refused to correct it, reasoning that the mistake did not affect the calculation of damages and was a technical one. The Russian court disagreed with this: according to the court, an error in the decision such as this was contrary to the fundamental, basic legal principles of the Russian Federation and the constitutional legal guarantees of judicial protection of the rights of Russian nationals.

One could justly note that the English court took a similar stance, ordering ordering the LCIA to revise the quantum of its award. The court considered the tribunal's error to be material and noted that the tribunal made "the sort of simple mistake any of us can make," but "with the most unfortunate consequences." The English court judged that such an arithmetic mistake could result in "substantial injustice" for Bogatikov's company.

The conflict before the LCIA arose in 2017, when a Delovye Linii top manager Mikhail Khabarov was dismissed from his office in the company, failing thus to exercise an option to buy 30 % in the company's shares valued at USD 60 million. In January 2020, the LCIA rendered the award at issue, awarding USD 58 million to a Cyprus company (which Mikhail Khabarov used to control Delovye Linii).

Notably, the LCIA eventually corrected its mistake later on.

Enforcement of Yukos Award

2020 abounded with news related to the attempts by the Yukos shareholders to enforce the arbitral award that ordered the Russian Federation to pay over USD 50 billion to Hulley Enterprises, Yukos Universal, and Veteran Petroleum.

Thus, in late May, the shareholders tried to resume the recognition and enforcement proceedings before the US District Court for the District of Columbia. The US case has remained adjourned since September 2016, pending a decision on the legality of the arbitral award issued in the Netherlands.

In mid-June, Russia filed a request against resuming hearings in that US case.

The US Court granted Russia's request and stayed the proceedings until 18 November 2022 or until the Netherlands Supreme Court hears Russia's cassation appeal that it admitted in the end of June. The hearing of the appeal took place on 5 February 2021.

The Russian party has tried to stay enforcement of the awards in the Netherlands, too. The country's Supreme Court, however, eventually dismissed Russia's motion.

Notably, as regards the actual recoveries under the award, the last six months have proved rather unfortunate for the Yukos shareholders. Thus, in October, the Supreme Court of the Netherlands lifted the attachment of the Russian vodka brands in the Benelux countries, relying on the provisions of the Russian Civil Code that stated that public enterprises were not responsible for the debts of their founder (the Russian Federation).

Simultaneously with the main proceedings in the Netherlands, smaller cases are pending in other jurisdictions under claims by minority shareholders. Before the Ontario Superior Court, Russia continues its efforts to submit Russian law expert opinions that had not been put forward when the arbitration seated in Toronto was considering the issue of its jurisdiction. Previously, in December 2019, Judge Penny dismissed Russia's request in question, holding that the requesting party had to prove the following:

- the evidence could not have been obtained with due care;
- the evidence is relevant to the case;
- the evidence is authentic;
- one may expect that evidence, in conjunction with all other evidence filed, will affect the outcome.

According to the Canadian Judge, Russia failed to prove any of these circumstances, hence its new evidence could not be admitted. Pursuant to the resolution of the Ontario Superior Court of 4 August, the Russian party can appeal this decision.

Notably, such a position is at odds with the opinion of the French Cassation Court in a non-Yukos case. In December 2020, the French Court, on the contrary, ruled that where jurisdiction is concerned, parties are not prohibited from offering new arguments that were not addressed in the arbitration.

Russian Athletes in Arbitration

On 11 December 2019, the World Anti-Doping Agency (WADA) banned Russian athletes from the Olympics and world championships for four years.

By its 17 December 2020 award, the Court of Arbitration for Sport (CAS) upheld WADA's decision, but shortened the duration of Russia's ban to two years, providing for a number of restrictions for that period. Until 16 December 2022, athletes will be able to compete in the Olympics and Paralympics, as well as world championships only under a neutral flag and provided that they go through additional doping tests.

Earlier, on 24 September, CAS overturned lifetime bans on participation in the Olympics imposed on three Russian biathletes – Olga Vilukhina, Yana Romanova and Olga Zaytseva – for alleged doping (*Olga Vilukhina, Yana Romanova and Olga Zaytseva v. the International Olympic Committee*). For Ms. Vilukhina and Ms. Romanova, the panel held that their conduct did not go beyond "mere suspicion" of potential anti-doping rule violations, annulled the bans appealed, and ordered to reinstate all their results in individual events at the Sochi Olympics. Ms. Zaytseva, conversely, violated anti-doping rules, but instead of imposing a lifetime ban, the panel ruled that she was banned from competing in subsequent Winter Olympic Games after Sochi. Since Ms. Zaytseva did not take part in the PyeongChang Olympics in South Korea in 2018, she will now be able to compete in the future Olympics.

The Moscow and Moscow District Commercial (Arbitrazh) Courts Agreed with an *Ad Hoc* Award Rendered with Respect to Non-Signatories of the Arbitration Agreement

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On 3 November 2020, the Commercial (Arbitrazh) Court for the Moscow District upheld the ruling of the court of first instance which refused to set aside the arbitral award in question.

In support of their arguments, the applicants submitted that the arbitration agreement had been signed by only one of the seven respondents. Yet, the Moscow Commercial Court, and later the Commercial Court for the Moscow District both confirmed that the arbitration clause extended not only to its signatory, but also to the affiliates of the latter.

In this regard, the Moscow Commercial Court cited the arbitral award in its ruling:

"Para. 8.2 of the Settlement Agreement stipulates that all parties thereto are responsible for the recognition by their affiliates of the final nature of that Agreement. Therefore, if the affiliates – here, meaning also any legal entities — face claims under the said agreements or in view of their termination, the arbitration clause must apply as well."

The court also noted that the respondents never contested the arbitral tribunal's jurisdiction during the arbitration and were actively participating in the proceedings in the case.

ENFORCING ARBITRATION AGREEMENT IMPOSSIBLE TO PROHIBIT. SANCTIONS AS AN OBSTACLE TO ACCESS JUSTICE. APPLICATION OF A FOREIGN LAW IN LIGHT OF SANCTIONS

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Articles 248.1 and 248.2 Russian Arbitrazh (Commercial) Procedure Code (CPC) represent a novel concept of Russian procedural law encompassing, respectively, two problematic institutes of modern legal order: restrictive measures related to Russian citizens and corporations *(sanctions)* and injunctions against international arbitration.

Although the new law has been enacted just a half year ago (date of enactment – 19.06.2020), the first case law is already available: Judgement of Sverdlovsky Region Commercial Court (*Court*) dated 05.10.2020, case No A60-62910/2018 (*Judgement*). Judgement relates, mostly, to application of art. 248.1 CPC and briefly touches upon an issue of determining foreign law contents. Accordingly, I discuss in this article the first case law and highlight certain issues of the foreign law application.

1.

The first arbitration agreement non-enforceability claim based on art. 248.1 CPC

A dispute in commercial courts of Ural region has started prior to enactment of the new law and concerns several legal entities.[1] For the purposes of the current article, it would be sufficient to state that the dispute concerns a contract for the purchase of trams and spare parts between Russian customer, Uraltransmash, JSC (*Claimant*) and Polish supplier (*Respondent*). The contract contained an arbitration agreement, which directed parties' disputes to be resolved in accordance with the Rules of Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

Initially, in 2019, courts of two first instances rejected Claimant's claims due to numerous reasons.[2] However, a cassation court reversed judgements of lower courts, pointing out that Claimant's allegations regarding unenforceability of the arbitration agreement have not been sufficiently examined, especially in the light of new CPC articles.

Court dismissed reinstated Claimant's claims, giving detailed reasons why the arbitration agreement is enforceable and why art. 248.1 should have no bearing on the Court's conclusions.[3] At the same time, art. 248.2 (antisuit injunctions) was not applied by the court, because Claimant rather based its claims on art. 248.1(4).

[1] At time of writing, the dispute is still pending before an appellate court.
[2] See e.g., Judgement of Sverdlovsky Region Commercial Court dated 04.10.2019.
[3] Besides, the court stated that claimants are not entitled by procedural law to bring a claim that the arbitration agreement is unenforceable (see, p. 6 Judgement). This court's conclusion was based on the application of company law, its analysis being beyond the scope of this article.

Court highlighted several key aspects: (*1.1*) exclusive jurisdiction; (*1.2*) relevant exemptions; (*1.3*) claimant's burden of proof; (*1.4*) burden of proving contents of a foreign law.

1.1.

> *Court exercises exclusive jurisdiction over sanctioned persons, subject to relevant exemptions.*

Court interpreted art. 248.1(1) CPC literally as establishing Russian courts' exclusive jurisdiction over sanctioned persons *'if otherwise is not provided under international treaty, to which Russia is a party, or under the parties' agreement'*. Based on the facts of the case, Court pointed out that the dispute should be resolved under auspices of SCC.

Although it might be obvious, this is important to note that Court preferred literal interpretation and not attempted, for example, to use purposive interpretation. For instance, Court could invoke legislator's intention declared in the explanatory note to the draft of CPC amendment.[4] Literal interpretation is better suited, as the circumstances allow applying art. 248.1 without any recourse to external interpretation sources.

1.2.

> *There are two exemptions from Russian courts' exclusive jurisdiction: a valid arbitration agreement and its enforceability irrespective of the sanctions applied to a claimant.*

Courts of three instances have confirmed validity of the arbitration clause at issue, as there were no credible reasons to find otherwise. At the same time, Court of the first instance have carefully examined enforceability of the arbitration clause in light of sanctions, after its initial judgement was reversed on cassation.

Claimant justified its allegations by reference to the Council of the EU Decision No 2014/512/CFSP and Regulation No. 833/2014 dated 31.07.2014. These EU legislative sources, in the Claimant's opinion, prevented enforcing the arbitration agreement in accordance with parties' intentions. Court has not accepted claimant's position. After scrutinising sectoral sanctions promulgated by the Council of EU, it found that the deal with Respondent regarding supply of trams does not fall in the list of restricted transactions. Accordingly, Respondent as an entity under EU jurisdiction was not barred from entering in the deal with Claimant.

Hence, Court underlined how EU sanctions affect procedural rights of a claimant under art. 248.1 CPC: the fact of sanctions existence, in general, should not form a basis for rendering an arbitration agreement unenforceable, and, consequently, may not be a sole basis for pronouncing exclusive jurisdiction of a Russian court.

Most likely, a subject matter in dispute should coincide in full or partially with the categories of restricted transactions. At the same time, correct interpretation should be a narrow one: only a part of the deal directly affected by restrictive measures could be taken out of the arbitration agreement scope.

1.3.

> *A party desiring to benefit from the new procedural law should produce evidence of sanctions themselves and evidence of arising out of sanctions procedural obstacles to access justice.*

Burden of proving existence of sanctions lies with a claimant. As was pointed out above, Court rejected to interpret widely existence of sanctions as such against a Russian legal entity. Seemingly, instead Court expected evidence how exactly Claimants' contractual rights have been encumbered by foreign law.

From the formal point of view, Court could dismiss Claimant's case on the sole basis that no foreign sanctions affecting the deal at issue have been enacted. However, Court proceeded to examine and dismiss Claimant's allegations of procedural violations during the arbitration clause enforcement.

Court has studied case materials of the arbitration under SCC Rules to ensure whether Claimant had an access to justice. First, the case materials confirmed that Claimant had access to the reasonable legal support. Furthermore, Claimant's ability to make payments by means of EU banking system was not restricted. This was confirmed by the fact that Uraltransmash, JSC credited payments into Polish supplier's account for the five years, already after US and EU sanctions have been in place.

Court further underlined that relevant EU and US legislation have not disturbed Claimant's ability to make payments due under SCC Rules. This is not clear from Judgement whether this fact was positively demonstrated by evidence or Court made such conclusion because Claimant has not discharged its burden of proof.

[4] According to the explanatory note, sanctions enactment as such indicates that Russian persons 'in fact have no recourse to protect their rights' in the foreign forums'. See, https://sozd.duma.gov.ru/bill/754380-7.

Importantly, Court accepted correspondence with SCC as an adequate evidence. Particularly, Court relied on the information from SCC that there was no need for Claimant to authorise its payments with Swedish state authorities. Such acceptance of evidence received from foreign arbitration institution may be considered as a positive factor. I believe such approach should be a default one.

Uncertainty remains as to how Russian courts will approach existence of some formal authorisation requirements for making payments needed for accessing justice via the arbitration route. It seems that arbitration institutions should not request such authorisation at all, as the right of the access to justice is an absolute one.

1.4.

> *Proving foreign law contents.*

Under art. 1193 Russian Civil Code, the court is entitled to request evidence of foreign law contents from the parties to a commercial dispute. EU sanctions have been examined by Court. However, Court also has not accepted Claimant's arguments regarding US sanctions exterritorial application. In the Court's view, Claimant has not proved that relevant US legislation is mandatory within Swedish or EU territory.

Probable exterritorial application of US sanctions is a non-trivial issue deserving a separate discussion. Influence of US sanctions is tremendous due to loyalty of corporations around the world desiring to access the US stock market and to run business with persons under US jurisdiction. Nevertheless, if a contract is subject e.g. to English law, English courts do not automatically recognise US sanctions as a mandatory law.[5]

In any case, Court made no sweeping conclusions in its Judgement regarding applicability of US sanctions within the EU and correctly stated that burden of proving foreign law contents lies with Claimant.

2.
First Conclusions and Open issues on Applying New Procedural Law

Judgement analysed herein is well balanced and does not call for any material criticism. However, Court's balanced approach is likely based on two factors: the deal's subject does not match with a list of EU restricted transactions, and Claimant was found to be acting in bad faith in the previous Court's judgement.[6] The Court's task could be much more challenging if a deal's subject did match with a list of restricted transactions.

> *The new law and the first case law allow highlighting following aspects: (2.1) positive impact of art. 248.1 in comparison with previous case law; (2.2) an issue of foreign law application; (2.3) a risk of parallel proceedings; (2.4) ways to mitigate risks of art. 248.1 application for parties of the arbitration clause.*

2.1.

Prior to the new law enactment, there was a chain of commercial courts' decisions in the case No A40-149566/2019 representing a non-satisfactory precedent on the issues of enforceability of the arbitration clause and application of a foreign law.[7]

Regarding an arbitration clause enforceability, the court stated that existence of US sanctions evidences that parties' arbitration agreement is unenforceable.[8] It is worth mentioning that even in absence of art. 248.1, court's conclusion contradicts the principles of arbitration law. Sanctions existence as such may not evidence unenforceability of an arbitration clause. Instead, evidence is required how exactly sanctions prejudice one's right to enforce a clause.

At the same time, art. 248.1 provides a better legal test: one should demonstrate how sanctions inhibit a right to access justice. In light of art. 248.1, Russian courts are expected to dismiss arbitration agreement unenforceability claims in the circumstances similar to the case No. A40-149566/2019.

2.2.

In international disputes an issue applying foreign law almost always goes hand-in-hand with an issue of applying an arbitration clause. In the case No. A40-149566/2019 the court replaced English law governing parties' contract with Russian law based on art. 451 Russian Civil Code (fundamental change of circumstances).[9]

[5] §47, *Banco San Juan Internacional Inc v Petroleos De Venezuela SA* [2020] EWHC 2937. Moreover, English courts differentiate primary and secondary sanctions: see, *Lamesa Investments Ltd v Cynergy Bank Ltd* [2020] EWCA Civ 821.

[6] P. 16-17 Judgement of Sverdlovsky Region Commercial Court dated 04.10.2019.

[7] E.g., pp. 4-5 Judgement of 9th Arbitrazh Appellation Court dated 10.02.2020.

[8] Ibid, p. 4.

[9] Supra, 7.

In the court's opinion, US sanctions enactment represented fundamental change of circumstances with regard to the choice of a law applicable to the contract. I believe such application of art. 451 Civil Code is not reasonable. First, negative consequences of the changes in a foreign law is a normal commercial risk. Second, a claimant was, at least, expected to prove how exactly US sanctions fundamentally change contents of English law.[10]

In any case, the court had no just reasons to alter parties' agreement regarding applicable law in its entirety. Rejecting application of English law in part directly related to US sanctions enforcement may be seen as a more reasonable approach.

2.3.

Correct application of art. 248.1 raises an issue of parallel proceedings, because in case of the arbitration clause non-enforceability a court has jurisdiction only over a part of the deal influenced by sanctions. A court has no basis to establish jurisdiction over a complex international contract simply because some obligations of the parties have been affected by sanctions.

Thus, application of art. 248.1 may create jurisdiction of different forums under the same contract. However, this fact in itself may not justify overstepping Russian court's powers granted under art. 248.1.

2.4.

The new law raises risks for international counterparties: non-enforceability of a foreign arbitration award (art. 248.1) or even a loss of property held in Russia (art. 248.2(4)). In turn, a Russian counterparty risks becoming less competitive due to the fact that foreign companies may be hesitant to resolve contractual disputes within Russian territory. Risks could be mitigated in several ways.

First, one of the ways to avoid art. 248.1 application is to conclude an alternative arbitration clause which only becomes effective if sanctions are enacted. However, this raises a problem of legal drafting: more complex a construction, more chances to face issues when enforcing it.

Second, a straightforward way of risk mitigation is to entrust arbitration to Russian arbitration institution (e.g. RAC) and with Russia as a designated place of arbitration.[11]

Uncertainty remains as to whether permanent arbitration institutions (HKIAC, VIAC) fall within art. 248.1 negative definition of Russian institutions. Third, a more nuanced approach will be to agree on the institution in a foreign jurisdiction, where courts and arbitrators may be most reluctant to apply sanctions legislation e.g. HKIAC.[12]

[10] English courts are not of the view that US sanctions is a mandatory law applicable in England by default: see, *Supra 5*.
[11] See, pp. 9-11, *Russian Arbitration News, Modern Arbitration Live News*, Issue 1/2020.
[12] See, pp. 63-64, Konstantin I. Kroll, *Impact of Sanctions on International Arbitration Involving Russian Parties, Коммерческий Арбитраж, №2(4) July-December 2020*.

NEW TRENDS IN INTERNATIONAL ARBITRATION

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

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

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

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

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

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

An Arbitrator to Pay Over 300 Thousand Euro of Damages to the Parties for a Gross Violation of the Principles of Impartiality and Independence

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A sole arbitrator, who is given a fictional name of "Juan Ignacio" in the judgment of the Court of Appeal of Asturias, was chosen as an arbitrator in two arbitrations under separate syndication agreements between the shareholders of two companies rendering funeral services, La Montañesa and El Alisal in Santander.

In the awards issued on the same day in 2017, the arbitrator ordered that two shareholders in La Montañesa pay EUR 24 million of compensation. Juan Ignacio requested EUR 800,000 as his fee.

Both awards were later challenged by the shareholders, as the arbitrator had been a legal counsel for La Montañesa and El Alisal since 2013 and continued to perform that role even after the filing of the claims. The Court found that Juan Ignacio had been earning around EUR 12,000 per year for such consulting services.

After the reversal of the awards, the parties also filed a separate lawsuit invoking a violation of Art. 21 of the Spanish Arbitration Act that provides that arbitrators may be personally liable for the damages caused by bad faith, recklessness or fraud, and claimed over EUR 500,000 of damages (including the costs related to the shareholders' bankruptcies).

In its recent judgment, the Court of Appeal of Asturias agreed with the court of first instance that Juan Ignacio had been guilty of "serious negligence" and ordered him to pay a compensation in amount of EUR 339.635 to both parties. In doing so, the Court expressly relied on the IBA Guidelines on Conflicts of Interest in International Arbitration, ruling that Juan Ignacio's conduct was a "Red List" situation.

TO DISCLOSE OR NOT TO DISCLOSE – THAT IS THE QUESTION

Author: Arina Akulina

One of the most remarkable trends of the past six months are the frequent attempts of states to challenge arbitrators for non-disclosure by the latter of some information. News of such attempts arrived almost every month, irrespective of the stage of arbitral proceedings.

Thus, in early July, it became known that Germany has again failed in its attempt to challenge arbitrators in *Vattenfall AB and others v. Federal Republic of Germany* (ICSID Case No. ARB/12/12), where the Swedish company Vattenfall has taken Germany on concerning the latter's termination of the use of nuclear energy under a EUR 4.7 million claim. One of the grounds for the challenge was the 2014 ***separate opinion by one of the arbitrators*** on an issue that was central to the pending arbitration – that is, on the jurisdiction established in *PV Investors v. Spain*, with respect to Article 26(7) of the Energy Charter Treaty. The World Bank President David Malpass dismissed the challenge, stating only that it did not meet the standard set out in Article 57 of the ICSID Convention.

Later, in August, Spain approached the ICSID with a challenge in *Landesbank Baden-Württemberg and others v. Kingdom of Spain* (ICSID Case No. ARB/15/45), once again determined by Malpass. The dispute concerned funding by the claimants of 78 renewable power plants in Spain via the disbursement of the total of EUR 1.76 billion worth of loans, before the state enacted a number of reforms in the sector that considerably diminished the benefits earned. Spain tried to challenge two arbitrators for ***misrepresentation of information on their ability to travel*** to an in-person oral hearing in the case and ***failure to disclose the fact of their participation*** in the Frankfurt Investment Arbitration Moot Court (FIAMC). In December, Malpass rejected the challenge, judging that holding an in-person hearing was based on an assessment of "risk and profitability", while the participation in moot court did not prove any "relations" between the arbitrators and the Moot's organizer.

Parties are now also increasingly looking for events long past seeking grounds to challenge arbitrators, sometimes going back as long as decades ago.

Thus, for instance, in *Hope Services v. United Republic of Cameroon* (ICSID Case No. ARB/20/2) Cameroon attempted at challenging an arbitrator for non-disclosure of information on ***having been a legal counsel*** in *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* (ICSID Case No. ARB/81/2), that took place ***over 30 years ago***, in 1989. The current ICSID case deals with a dispute by a French businessman with a claim of almost USD 1 billion with Cameroon, related to his imprisonment and alleged expropriation of an online platform that helped sponsor public projects. The arbitrator explained that he did not disclose the information as it had slipped from his memory after so many years and assured that he had not received any remuneration for his work (Cameroon had not even mentioned him among its counsels in the case) and had not had any ties with Cameroon or its leaders ever since. The co-arbitrators therefore refused to order that arbitrator to recuse himself.

The result was different in the Scythian gold case, where Ukraine prevailed in challenging a Dutch judge after he ***repeatedly erred in stating the dates of his work at Clifford Chance ten years ago*** and collaborated with the lawyers of Houthoff - dutch law firm that represented Russia in the litigation related to the Yukos assets.

Finally, one cannot fail to omit cases questioning the non-disclosure by arbitrators of information on cross- and re-appointments in cases arising from similar circumstances. Thus, in the case that had gained world renown very recently, *Halliburton v Chubb*, the UK Supreme Court concluded that an arbitrator's failure to disclose information on his ***repeated appointments in other cases stemming from one and the same incident*** – the explosion of the Deepwater Horizon oil platform in the Gulf of Mexico in 2010 – and concerning partially identical issues (in one instance, involving one and the same party), did not raise reasonable doubts as to the arbitrator's impartiality, sufficient to recuse him/her.

INSOLVENCY AND ARBITRATION

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

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

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

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

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

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

Buffet's Conglomerate Drops Jones Day Suit

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

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

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

Read more about arbitration and bankruptcy in the expert interview.

EXPERT COMMENTARIES

Pavel Sementsov

Co-chair of Young IMA, Senior Associate, Regionservis Law Firm

1 Is the enactment of strict limitations on arbitration during insolvency a worldwide trend or something specific to Russia? What has triggered such limitations?

Bankruptcy and arbitration are not entirely incompatible. Let us look into their correlation from several standpoints.

> *First, bankruptcy does not affect the arbitrability of "outgoing" claims by the bankrupt party under its contract with a counterparty.*

If the counterparty and the insolvent party had agreed on an arbitration clause, it should be generally complied with. This is important not only for the counterparty, but also for the insolvent party itself and for its creditors. After all, even where the counterparty is based in a different country, to enforce an international arbitral award would normally be much easier than to enforce a judgment of a Russian state court. Bankruptcy judges acknowledge the importance of filing such claims to replenish the assets and thus equate the arbitration fee to a state duty, attributing such costs to first-priority current payments.[13]

Moreover, the bankrupt claimant's financial hardship may be regarded as the cause of non-enforceability of the arbitration clause.[14]

Only those claims would be non-arbitrable that concern the return of assets by challenging the debtor's transactions to the detriment of creditors. These must be heard in the bankruptcy case under special rules. The right to challenge transactions in bankruptcy is vested in a limited number of actors and is inextricably linked to the bankruptcy case. That limitation is, therefore, quite logical.

Foreign approaches here do not always coincide with the Russian approaches. Thus, in the recent months there have been debates on the injunction[15] issued by the High Court at the request of Riverrock Securities Limited against the International Bank of St Petersburg. The Court judged that the bankrupt bank was bound by the arbitration clause even though the claim was filed in bankruptcy, since, among other things, the bankruptcy receiver would be the one to file the claim on the debtor's behalf (Bankruptcy Law, Art. 61.9(1)).

> *Second, the Russian bankruptcy laws contain no express prohibition of arbitration of disputes between current creditors and the bankrupt party.*

In the recent years, court practice has been dominated by the approach on the non-arbitrability of such disputes, as arbitrating them could violate the creditors' rights to challenge decisions in terms of spending the insolvency estate.[16]

[13] *See, e.g.*, Resolution of the Commercial Court for the Urals District No. F09-4841/17 dated 6 October 2020 in Case No. A50-20115/2016.

[14] Ruling of the Judicial Chamber on Economic Disputes of the Russian Supreme Court dated 12 July 2017 in Case No. 307-ES17-640, A56-13914/2016.

[15] https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Comm/2020/2483.html

[16] *See, e.g.*, Ruling of the Russian Supreme Court dated 21 October 2014 in Case No. 301-ES14-1657, A79-10231/2013; Resolution of the Commercial Court for the Moscow District No. F05-3318/2017 dated 28 March 2017 in Case No. A40-151600/2016; Resolution of the Commercial Court for the West Siberian District No. F04-3618/2016 dated 1 September 2016 in Case No. A45-25363/2015; etc.

One can, however, see a different approach by courts to the permissibility of arbitration of disputes on current payments as well.[17]

> *Third, undoubtedly non-arbitrable are the claims by separate creditors to a bankrupt debtor once the bankruptcy proceedings have commenced.*

A bankruptcy case is the pool into which all of the debtor's creditors are drawn. On the one hand, this allows the creditors to tackle each other's unfounded claims, as well as allows the court to divide all creditors into levels of priority. On the other hand, that prevents spending the insolvency estate in favor of one creditor and contrary to the Bankruptcy Law's rules.

Here, the prevalent approach in many countries and the one in Russia are, as far as I am aware, the same.

It is important to understand, however, that bankruptcy not only makes the claims against the debtor non-arbitrable, but also alters the jurisdiction over disputes among state courts. It no longer matters where the dispute under a counterparty's claim was to be heard: whether in a court of general jurisdiction, a commercial court based on agreed jurisdiction or in arbitration – instead, now any claim is to be filed in the bankruptcy case. Here, too, there is a number of exceptions (Bankruptcy Law, Art. 126(1)(7)).

2 What potential difficulties may a creditor face under an arbitral award when entering its claims on the register of creditors' claims?

In bankruptcy, special status will be accorded to creditors with the so-called "awarded" claims, that is, claims supported by a judicial act that has entered into legal force. A court in a bankruptcy case would not verify such claims on the merits, but would merely assign their level of priority. Any other arguments against such claims would not be heard, except for differences related to the execution or revision of judicial acts (Bankruptcy Law, Art. 16(10)(2)).

If the other creditors or the court-appointed administrator of the debtor believe the judgment to be unlawful, they may challenge it in the same case where it was delivered (Resolution of the Plenum of the Russian Supreme Commercial Court No. 35 dated 22 June 2012, para. 24).

The same status would be enjoyed by the creditors whose claims are confirmed by an arbitral award, if a state court has issued an enforcement writ with respect to that award. The creditors and the court-appointed administrator may in that case challenge the ruling on the issuance of the enforcement writ for the arbitral award following the procedure set forth in para. 24 of Resolution of the Plenum of the Russian Supreme Commercial Court No. 35 of 22 June 2012.

If, on the other hand, a creditor's claim is supported by an arbitral award where no enforcement writ has been issued, the court equally does not have to verify the arbitral award on the merits, and the only objections aimed against its inclusion on the register that can be proffered would be those on the existence of grounds to refuse to issue a writ of execution to enforce the arbitral award, as provided in Article 239 of the Russian Commercial Procedure Code or Article 426 of the Russian Civil Procedure Code (Resolution of the Plenum of the Russian Supreme Commercial Court No. 60 dated 23 July 2009, para. 4(4)).

Nevertheless, courts in their practice rather broadly construe such a ground for non-enforcement as inconsistency with the public policy. The ground covers, among other things, the situation of unsupported recovery of debt from the future bankrupt party (Review of the Russian Supreme Court dated 26 December 2018, para. 25).[18] If a court suspects that the award legalizes a fictitious debt, it will not be included on the register, as contrary to public policy.

In practice, that allows the court-appointed administrator and the other creditors to get into the merits of the arbitrated dispute and contest the facts established there.

A creditor with an arbitral award, in turn, has to re-submit arguments and evidence on the merits of the dispute, other than the award itself, as defenses. This is scarcely different from the regular inclusion on the register of creditors' claims.

In practice, one can also face difficulties in entering on the register the costs of paying the arbitration fee, where the arbitral award was rendered after the introduction of the bankruptcy proceedings. A court would then refuse to recognize the award and demand that the creditor demonstrate its claim's merits, which is natural. Why, though, a court would ignore the costs of paying the arbitration fee incurred before the bankruptcy procedure was introduced and in the situation when 'quitting' the arbitration is not entirely in the claimant's control, remains a mystery for me.[19]

3 Did the arbitration reform affect the changing attitude of courts to arbitral awards issued with respect to a bankrupt party?

It is essential to understand that bankruptcy judges have a distorted view of arbitral proceedings. For them, each arbitral award is potentially a new "scheme" intended to have unfounded claims entered on the register; while each creditor with an award is a potential "fraudster."

This view of the courts has been forming for years, facilitated by the wealth of practice of using "pocket" arbitral tribunals for the bad faith purposes of "just getting that award before going to court."

Certainly, the arbitration reform has drastically curtailed this practice. Encountering a creditor with an arbitral award in a bankruptcy case is now a much, much rarer occasion.

Has that changed the courts' attitude to awards in bankruptcy cases? I think we will inevitably be there, but it is way too early to say now. Courts make an effort to check each creditor with an award under a magnifying glass. Sure, courts may leave their doubts as regards the integrity of PAIs and arbitrators, but that does not mean that the arbitral proceedings were not "orchestrated" by the claimant and the respondent. Such proceedings are arranged by future debtors with "friendly" creditors not only in arbitration, but in state courts as well.

This approach of the bankruptcy judges is to an extent true. Imagine an arbitrator who realizes that the arbitral proceedings have been orchestrated by the claimant and respondent for bad faith purposes. What can he/she do? PAI rules are silent in this regard. Would the arbitrator have enough determination to terminate the arbitration and turn down the fee is a big question. Whether one must in such a case abandon adversarial proceedings by placing an additional burden of proof on the claimant is a topic that requires serious research.

[17] *See*, *e.g.*, Resolution of the Commercial Court for the Moscow District No. F05-3006/2018 dated 26 March 2018 in Case No. A40-189594/17; Resolution of the Commercial Court for the Urals District No. F09-2185/15 dated 27 May 2015 in Case No. A50-27063/2014.

[18] Review of the Practice of Examination of Cases Related to Courts Performing the Functions of Assistance and Control with Respect to Domestic and International Commercial Arbitrations (approved by the Presidium of the Russian Supreme Court on 26 December 2018).

[19] *See*, *e.g.*, Ruling of the Commercial Court of the Sverdlovsk Region dated 13 November 2020 in Case No. A60-59676/2020.

EFFECT OF INSOLVENCY PROCEEDINGS ON ARBITRATION: A VIEW FROM THE STANDPOINT OF FOREIGN JURISDICTIONS

Author: Mikhail Makeev

The new coronavirus pandemic has turned for most of the world's businesses into colossal hardships: even at its present stage, the economic downturn is being compared to the Great Depression, to say nothing of the fact that the pandemic has not ended yet and continues to adversely affect the global economy.

Without doubt, the wave of bankruptcies will not spare, among others, the entities that have an arbitration clause in their contracts, hence an analysis of legal practice in that sphere is now especially relevant.

In foreign jurisdictions, the issue of how bankruptcy procedures influence arbitrations is as acute as it is in Russia. In various legislations and even in different legal systems the principles underlying arbitration are practically identical, just like the principles underlying bankruptcy. Consequently, the existing contradictions between the principles of arbitration and those of bankruptcy raise similar legal issues across the globe.

The search for common points between the centralized, public bankruptcy procedure that engenders consequences for an unlimited group of persons, and the decentralized, confidential arbitration that only affects the parties, is equally difficult in Russia as it is in foreign jurisdictions. Thus, for instance, the US Bankruptcy Court for the Southern District of New York recognized in *In re Bethlehem Steel Corp* that the policy underlying the Bankruptcy Code may be in conflict with the policy underlying the Federal Arbitration Act.

The example of American regulation is of interest for this analysis in view of the mechanism that the US laws provide for those wishing to proceed with arbitration during the respondent's bankruptcy procedure. When such a procedure is introduced, all civil proceedings (including the arbitration) are automatically stayed; however, a party to the arbitration may ask the bankruptcy court to lift the ban for the purposes of a specific arbitration.

In resolving this issue, the bankruptcy court will need to look into four questions:

1. whether the parties agreed to the arbitration;
2. whether the claim falls under the arbitration clause;
3. whether the claim concerns core or non-core issues;
4. whether the court must stay all non-arbitrated claims until the completion of the arbitration.

Before filing an application to lift the ban, the party must in any event file its claim with the court which can decide bankruptcy cases, and such an application will not be deemed a waiver of the arbitration agreement.

A decision to suspend the ban on claims out of bankruptcy remains at the court's discretion; yet, the US federal district courts tend to generally suspend bans on claims that concern non-core issues.

A permissive mechanism equally exists in England, where a court or the bankrupt party's administrator may authorize an arbitration where it believes that such a process will not impede achieving the aims of bankruptcy. The creditor in question, in turn, must prove that depriving it of the right to resort to arbitration would be unjust.

In France, the legislation approaches this issue in a more lenient manner and in any event allows arbitrations where the dispute relates to the bankrupt party's contractual relations; however, the specifics of French regulation consists in that the arbitral tribunal cannot force the bankrupt party to pay the debt, but may merely establish the existence and scope of that debt.

In Germany, introduction of the bankruptcy procedure does not affect arbitrability of disputes with the bankrupt party, and the only requirement concerns the need to give the administrator enough time to read the case files. It is, however, important to remember that from the moment when the debtor is declared bankrupt, it is the administrator who manages all its property, hence the arbitration claim is to be filed against the administrator specifically.

The problems of diverging approaches to the correlation of arbitration and bankruptcy procedure are especially apparent in cross-border bankruptcies. For example, in *Fotochrome, Inc. V. Cop Co.* the US court enforced an arbitral award issued by a tribunal with a seat in Tokyo with respect to an American debtor undergoing bankruptcy. It explained its position by ruling that a Japanese company (the claimant) and an arbitration with the seat in Japan were not covered by the jurisdiction of American courts.

EU Regulation on Insolvency Proceedings No. 848/2015 to an extent regulates the problems of cross-border bankruptcies. It provides that the decision to introduce the bankruptcy procedure with respect to a debtor in one of the EU member states shall be automatically recognized in all EU states, and the law of the state where such a bankruptcy procedure has been introduced shall be applied to determine the consequences of bankruptcy for all of the debtor's contracts in the EU states. That said, the arbitrability of the dispute that involves the bankrupt party is governed by the law of the seat of arbitration. Thus, in *Elektrim v Vivendi* a London tribunal found that it had jurisdiction to resolve a dispute involving a bankrupt Polish company based on English regulations. A Polish court later enforced the London tribunal's award, although under the Polish laws, the tribunal had no jurisdiction over the dispute.

ARBITRATION AND PHARMACEUTICALS

2020 became the year when everyone at last realized the importance of medicine and pharmaceuticals, and COVID-19 was not the factor that affected the state of affairs all that much (although one cannot fail to note that the pandemic proved to be a true challenge and ordeal for us all). Nevertheless, life goes on, and arbitration does not stand still, paving a road for itself even in these circumstances of crisis.

State Procurement of COVID-19 Testing Kits Arbitrated in Zimbabwe

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In July, it transpired that a Lugano-registered company Drax Consult – a subsidiary of Drax International in the UAE – filed a notice of arbitration against National Pharmaceutical Company (Natpharm) in Zimbabwe with the LCIA (*Drax Consult SALG v. National Pharmaceutical Company* (*Zimbabwe*)). The dispute arose after in June 2020 Natpharm terminated a 2019 contract for the supply of materials, including COVID-19 testing kits and medical masks, worth USD 60 million for reasons of public interests. The situation is aggravated by the scandal related to the fact that the contract was overpriced and was executed without a proper procurement procedure, as well as by a criminal investigation into the criminal abuse of office connected with this procurement by the former Zimbabwe Health Minister Obadiah Moyo.

Painless Arbitration

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In July 2020, an arbitral tribunal issued an award in *SymBio Pharmaceuticals Limited v. The Medicines Company*. The Tokyo company SymBio Pharmaceuticals filed a claim with the ICC against the subsidiary of the Swiss pharmaceutical group Novartis in the US, The Medicines Company (MDCO), which Novartis had acquired in January for USD 10 billion. SymBio's 2015 licence agreement with MDCO vested the Japanese company with exclusive rights to develop and commercially distribute the needleless patient-controlled pain management drug "IONSYS" (or SyB P-1501) – the "new alternative" to traditional intravenous analgesia. In 2017, however, MDCO announced that it intended to discontinue commercialization of IONSYS and quit the US and European markets. Then, SymBio filed a claim with the ICC for compensation of USD 82 million – the putative value of IONSYS sales in Japan; while MDCO brought a counterclaim in view of the suspension by SymBio of the Phase 3 clinical trial. The tribunal dismissed both SymBio's arguments to the effect that MDCO failed to provide adequate guarantees of its operations under the agreement, and MDCO's counterclaim, awaring USD 5 million, that is, half of the legal costs and fees, to SymBio.

A Japanese Company Is Being Forced to Execute an Award in a Dispute on the Distribution of Products for Diabetes Sufferers

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Trividia Health, the Florida-based subsidiary of the Chinese Sinocare Group, has filed with the United States District Court for the Southern District of New York an application to enforce an ICC award against its former Japanese parent Nipro Corporation worth USD 22.6 million (*Trividia Health, Inc.* (*U.S.A*) *v. Nipro Corporation* (*Japan*), ICC Case No. 23464/MK/PDP). Sinocare acquired Trividia from Nipro in 2016, having executed a 5-year agreement and undertaken to distribute blood glucose meters and related goods of the American enterprise in around 80 countries. After the companies failed to agree on the minimal volume of products to be procured for the third year of cooperation, Trividia initiated an ICC arbitration in 2018 and then proceeded to terminate the agreements in 2019, claiming over USD 56 million, including for the unlawful use of its trademarks. The tribunal in its final award noted that if it was impossible to agree on the procurement volume, the parties were to use the figures for the preceding year, and that even Nipro's erroneous interpretation of the agreement did not release the latter from obligations, thus dismissing some of Trividia's claims on trademark infringements and awarding Trividia USD 17.4 million under contractual claims plus 2 % interest, as well as USD 2.9 million as costs and fees.

A Tribunal Is in Place in the Pharmaceutical Dispute over Qatar's Blockade

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Back in 2017, Saudi Arabia severed its diplomatic, trade and tourist relations with Qatar, as well as limited access by land, sea or air to its nationals and arranged for their deportation, together with the UAE, Bahrain, Egypt, and other states accusing Qatar of supporting terrorists and Iran. Because of these circumstances, Qatar Pharma, which had a valid claim to be called the leading pharmaceutical company in the Persian Gulf, suffered after Saudi Arabia annulled long-term contracts made with the Saudi Arabian Ministry of Healthcare on the distribution of over 540 products, including intravenous solutions, solutions for kidney dialysis and topical drugs, refusing to pay USD 24 million for the products already supplied. Moreover, Qatar Pharma was forced to close its warehouses in Riyadh, Jeddah and Dammam, which effectively destroyed all supplies and share offering prospects and cost the company USD 270 million. In March 2019, Qatar Pharma filed a claim under the 1981 investment treaty between the members of the Organisation of Islamic Cooperation (OIC), treating Saudi Arabia's conduct as expropriation and arguing that the state had violated the OIC investment treaty standards (*Qatar Pharma for Pharmaceutical Industries and Dr Ahmed Bin Mohammad Al Haie Al Sulaiti v. Kingdom of Saudi Arabia*).

In October 2020, it became known that a tribunal was being formed to examine the claim and that the parties already agreed on the presiding arbitrator. Notably, the pool for selecting the presiding arbitrator included the OIC Secretary-General – according to GAR, that is the first time when an OIC Secretary-General was named a candidate to preside over an arbitration in a case where the tribunal was fully constituted with the cooperation of the parties under the OIC treaty. The seat of the arbitration, the applicable rules, and the arbitral institution are yet to be agreed by the parties.

There's No Stopping the Drug Development

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In October, the Austrian pharmaceutical company AOP Orphan Pharmaceuticals prevailed in its ICC dispute against the Taiwan corporation PharmaEssentia, have received unanimous support of the panel of arbitrators and EUR 2 billion of compensation (*AOP Orphan Pharmaceuticals AG v. PharmaEssentia Corporation*). The dispute arose after PharmaEssentia tried, in 2017, to terminate its 2009 licence agreement with AOP. Under its terms, PharmaEssentia had agreed to provide to AOP a substance for the development and commercialization of a leukemia drug, known as BESREMi, and clinical trials before BESREMi was released into the market. AOP, in turn, completed its work on the formulation, clinical trials and regulations on the drug's circulation in the EU, but after PharmaEssentia's attempt to rescind the contract, filed a claim with the ICC, demanding that the contract be upheld as effective and that PharmaEssentia compensate it for delays in the project. The tribunal held that the purported termination of the transaction by PharmaEssentia was invalid and ordered a compensation of AOP's damages, costs and interest.[20]

It is very likely that next year we will witness an increase in the number of cases related to supplies of medicinal products and the COVID-19 vaccine. All we can do is hope that private commercial and investment interests can find a balance between their own benefit and the development and production of vital medicines, drugs and other products that human lives – the most valuable good in our world – depend on.

Read more about arbitration of pharmaceutical disputes in the expert interview.

[20] Interestingly, in March it became known that the award has been upheld by the Higher Regional Court of Frankfurt.

Expert Commentaries

ARBITRATION OF PHARMACEUTICAL DISPUTES IN RUSSIA AND ABROAD

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1 How is the practice of arbitration of pharmaceutical disputes evolving in Russia?

The Russian laws do not provide for any specifics of arbitrating pharmaceutical disputes. It does, however, set forth general limitations on resolving certain disputes by arbitration, including some categories of disputes in the sphere of intellectual property and proceedings in the sphere of supply for public and municipal needs. These prohibitions are directly relevant to pharmaceutical disputes, which by their very nature normally arise from contractual relations (including state procurement) or concern intellectual property rights (between the manufacturer of the original drug and the manufacturers of its equivalents). That is why a great number of disputes may be resolved only in state courts.

Within the last 5 years, in Russia only one pharmaceutical dispute received some publicity: it arose in 2016 between a Russian company Pharmstandard (the claimant) and a Latvian company Grindeks (the respondent) and concerned trade in the drug called "Mildronate" in the Russian territory. The agreement between the parties contained an arbitration clause in favor of the ICAC at the Russian CCI. Pharmstandard filed two claims, on the recovery of a fine and the marketing costs incurred, and in both cases the ICAC sided with the claimant. The respondent, in turn, succeeded in having both ICAC awards annulled by a state court that found that the tribunal violated the principles of legal certainty and legality (by imposing on Grindeks liability that exceeded its obligations dozens of times) and held that enforcement of the awards would result in the breach of public policy.

Statistics do not reflect information on the consideration of pharmaceutical disputes in arbitration – from among the largest arbitration centers only the RAC is dividing the overall number of cases by economic sectors; and the share of pharmaceutical disputes in 2019 was minimal.

> *Nonetheless, on the whole, the Russian regulation and practice have laid the necessary foundation for the possibility of arbitrating pharmaceutical disputes.*

Save for some general prohibitions, the parties are free to refer their pharmaceutical disputes to arbitration.

2 Which recent trends prevail in the resolution of pharmaceutical disputes abroad?

Unlike the Russian practice, foreign practice can boast a higher number of pharmaceutical disputes resolved by arbitral tribunals. This can be explained by the fact that the major players in the pharmaceutical market, the so-called Big Pharma, are foreign companies which prefer all their standard contracts to have arbitration clauses in favor of international arbitral institutions (ICC, LCIA, UNCITRAL, AAA, etc.).

Most frequently, such disputes are divided into three main categories: in the sphere of patents, licence agreements, and M&A. One may observe an increase in the number of pharmaceutical disputes that are arbitrated. According to the GAR, while in 2018 only three large disputes were heard by arbitral tribunals (ICC, SIAC, and *ad hoc*), where two ended in settlement, based on the results of 2020 the GAR already reports six such disputes. The LCIA statistics for 2019 and 2020 show that disputes in the field of pharmaceuticals account for 2 % of the total number of disputes.

The parties to such disputes are most often smaller regional pharmaceutical companies (PharmaEssentia, Puma Biotechnology, Biocryst Pharmaceuticals) or the subsidiaries of the Big Pharma (The Medicines Company, Seqirus).

> *In view of the boost that the pharmaceutical industry had to have in 2020 due to the COVID-19 pandemic, one may expect an even greater surge of pharmaceutical disputes in the years to come.*

For example, as late as in summer 2020, the Swiss company Drax filed a notice of arbitration against a Zimbabwe state pharmaceutical company (Natpharm) in connection with the termination of a contract for the supply of COVID-19 tests worth USD 60 million. Similarly, during the pandemic, companies have entered into numerous contracts for clinical testing, production and procurement of the vaccine, supply of tests, etc. In cases of exports, it is feasible to have the contract include an arbitration clause with the seller's law as the governing law and arbitration in the seller's country. We believe that here the manufacturer/supplier has more benefits in terms of presenting their case and collecting evidence, especially as regards the issues of quality and safety of medicinal drugs and products. In entering into an agreement for clinical tests and studies, the parties are more likely to apply the law of the party in charge of performance that is decisive for the contract.

In the recent years, we have also seen investment arbitrations involving pharmaceutical companies. We now know about the pending investment disputes involving Qatar Pharma[21] and SM Pharma.[22] The specific feature of such disputes is that to get protection for their rights in the arbitration, the investors must meet two cumulative conditions: the home state of the investor and the host state must have a bilateral investment treaty (BIT) and this treaty must provide for a wide definition of "investment" that covers intellectual property, including patents.

[21] *Qatar Pharma and Ahmed Bin Mohammad Al Haie Al Sulaiti v. Kingdom of Saudi Arabia.*
[22] *Raimundo Santamarta Devis v. Bolivarian Republic of Venezuela.*

For instance, such a clause is found in Russia's treaties with Argentina, Belgium, Germany, Spain, Canada, China, France, etc. If a foreign manufacturer's vaccine is supplied from one of such countries on the condition of basing the production facilities in Russia, the BIT will serve as an additional guarantee for the investor (the manufacturer) should its rights be infringed. At the same time, for Russia, such a clause also carries a further risk that the investor will file a claim against it. In this regard, very illustrative is the precedent of the first application by the Russian Government of the mechanism of compulsory licensing of the Russian company Pharmasyntez: the Government allowed it to use the inventions protected by a patent of the American company Gilead Sciences Inc and its affiliate for a year, without the patentholders' consent. Such use was necessary to produce an antiviral drug (INN "Remdesivir") to supply it to the Russian population. At present, Russia and the US have signed, but not ratified their BIT. If the Russia-US BIT had been in force, the Russian authorities' conduct would create a risk of Gilead resorting to investment arbitration to protect its investment in the form of intellectual property. In turn, Russian companies would also be able to use investment arbitration in view of the economic sanctions introduced by the US. In the present circumstances, however, neither American, nor Russian companies have access to such a mechanism.

3 Is arbitration a promising dispute resolution mechanism for disputes in the pharmaceutical sphere in Russia?

Arbitration has undeniable advantages for resolving pharmaceutical disputes. First, its key advantage is the confidentiality, essential to prevent disclosure of insider information and public commentaries. Additionally, the parties may choose institutional rules that would bind them by confidentiality or include an express obligation to that effect into their arbitration agreement. In some cases, however, it is precisely the publicity and openness guaranteed by state courts that are aimed at ensuring transparency of the proceedings. Here, we should mention disputes on state procurement, where non-arbitrability of disputes is intended to prevent corruption.

> *Just like any other sector-specific disputes, pharmaceutical disputes are rather unique by their nature, and their resolution requires special expertise in the area of pharmaceutics. Arbitration allows the parties to participate in the appointment of arbitrators with the requisite experience and level of expertise, which enables a more thorough examination of their dispute. State courts do not enjoy this opportunity.*

We must particularly emphasize the role of arbitration in cross-border agreements that are common in pharmaceuticals. Thus, the 1958 New York Convention has made it easier for the prevailing party to enforce an arbitral award, rather than a judgment, in the majority of jurisdictions. At the same time, it is necessary for the dispute to be arbitrable in the territory where enforcement is sought. This is especially relevant in IP disputes.

> *The evolution and efficiency of arbitration of pharmaceutical disputes are directly affected by the level of development of the pharmaceutical industry as a whole. In Russia, it is much less developed than in the leading foreign states.*

As we noted earlier, the Big Pharma companies (and especially their subdivisions developing new drugs and substances) are based abroad, and the disputes involving them are usually heard by foreign arbitral institutions. Still a great number of disputes concern patents and are non-arbitrable, while abroad (for example, in the US, Germany, etc.) the law allows arbitrating such disputes. We would suggest that the cost of having a dispute heard by a Russian commercial court, too, affects the choice of forum for resolving the dispute – thus, for instance, a dispute arising from a simple supply contract is significantly less costly, and the automatic receipt of a writ of execution also seems to be a benefit.

In view of the foregoing, in our opinion, the most practically feasible area of pharmaceutical arbitration in Russia is investment arbitration, where a foreign company would be the investor, and Russia, the host state. As the experience of Gilead shows, there is indeed potential for such arbitrations. Here, we must also separately point at the special investment contracts (SPICs) that are currently gaining popularity; the Russian Federation executes them with corporate investors in various industries under Federal Law No. 488-FZ dated 31 December 2014 "On the Industrial Policy of the Russian Federation." Foreign pharmaceutical companies, too, may act as such investors. Notably, the earlier model SPIC contained a clause on the resolution of disputes before a Russian court (the model form applied to contracts made before 3 August 2019, but this provision may be equally included into subsequent contracts), which may result in a conflict between an arbitration clause in the relevant BIT and the choice of prorogation clause in the agreement of the parties. In practice, the majority of arbitral tribunals resolve this conflict in favor of the BIT, recognizing tribunal's unconditional jurisdiction (*Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3) or holding that the parties had not expressly ruled it out in the contract (*SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3). This approach allows foreign investors that have executed SPICs in the pharmaceutical industry, to resort to arbitration, if allowed by the BIT between Russia and their home state. One thus faces a situation where an attempt to relocate Russia's disputes with investors into state courts has still left room for the arbitration of such disputes, which can only be avoided by expressly ruling arbitration out in the SPIC text.

Thus, state courts in Russia remain the preferred mechanism for resolving pharmaceutical disputes due to a substantial presence of the state (*via* state procurement), as well as the low cost and accessibility of remedies in commercial courts. We see the development of pharmaceutical arbitration in major commercial disputes with a high amount of claim that justifies the costs of arbitration, as well as in investment disputes under BITs as the most promising areas.

INVESTMENT ARBITRATION NEWS

Ponzi Scheme Victims Filed US Treaty Claims

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The investors who suffered from Allen Stanford's Ponzi schemeare moving ahead with claims against the US for over USD 511 mln under several investment treaties, claiming that the government violated investment protection standards due to its failure to put an end to the fraud earlier. They blame the Dallas Division of the US Securities and Exchange Commission (SEC) which failed to stop the Ponzi scheme, despite having been aware of it for seven years.

Mexican and Canadian investors are seeking to initiate a NAFTA arbitration, while other investors are making claims under the US-Chile Free Trade Agreement and the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA).

Belgium Seeks ECJ Opinion on the Energy Charter Treaty

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The Federal Public Service of Foreign Affairs of Belgium has requested the ECJ's clarifications on whether the investor-state dispute resolution mechanism in the draft ECT is compatible with the EU law.

According to Belgium, an ECJ opinion is necessary, since the draft Treaty's dispute resolution mechanism may be interpreted as allowing investors from EU member states to initiate arbitrations against other EU member states.

Belgium's concerns as to the legal uncertainty were triggered by the ECJ's judgment in the *Achmea* case, where the Court made a ruling on the incompatibility with the EU law of the clauses on resolution of disputes by way of investment arbitration, contained in the investment treaties between the EU member states. In May, the majority of EU member states signed an agreement terminating all intra-EU BITs in light of that case.

India to Pay Vodafone

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

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

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

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

Notably, it is not the only case where the tribunal sided with the Claimant: in *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India*, PCA Case No. 2016-7, the tribunal awarded Cairn with USD 1 billion for India's violations of tax regime. For further information see the link.

Kazakhstan Is Not Bound by a Soviet BIT

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A UNCITRAL tribunal dismissed a USD 917 million claim by a Canadian company Gold Pool against Kazakhstan, finding that Kazakhstan was not bound by the Canadian-Soviet BIT, as it was not a successor under that BIT and never "acquiesced" to succession. In March 1996, Gold Pool received management rights over the Kazakhstan state company Kazakhaltyn JSC and three gold mines. Gold Pool was to pay off the company's debts, restore and modernize production, but as early as in 1997, it practically went bankrupt, resulting in the termination of the agreement between the investor and Kazakhstan. Interestingly, another UNCITRAL tribunal that heard a case under the same BIT concluded that Kazakhstan could be held liable under the Canadian-Soviet BIT. This case is seen as the first case where a state other than Russia was deemed to have succeeded the USSR's obligations under investment treaties.

In Mid Air: Blocked Aerospace Deal Prompts Threat against Ukraine

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The Ukrainian enterprise Motor Sich develops, produces, repairs and maintains gas turbines for airplanes and helicopters, as well as industrial gas turbine installations. In 2017, the Chinese investor Beijing Skyrizon Aviation entered into a transaction for the acquisition of a controlling interest in the company to enhance China's military potential. But, as early as July 2017, the Security Service of Ukraine initiated a criminal case with respect to a series of "transactions for the sale and purchase of a controlling interest in the company to foreign entities that intend to relocate the company's assets and production facilities outside of Ukraine, which will cause its liquidation and destruction." Motor Sich shares have been attached since April 2018.

John Bolton, former US National Security Advisor, also made a statement on Washington's intention to take steps to prevent Skyrizon's acquisition of the Ukrainian engine-building plant Motor Sich due to risks for the US national security.

In December 2020, Chinese investors into Motor Sich PJSC have notified the Government of Ukraine of an international arbitration against Ukraine to recover USD 3.5 billion under the 1992 China-Ukraine Bilateral Investment Treaty.

The press releases omit the name of the arbitral institution, but, in view of the BIT text, one may suggest that the dispute will be heard in an *ad hoc* arbitration.

SPANISH SAGA

Author: Arina Akulina

For nearly a decade, Spain has been reforming its renewable energy sector, a reform that has turned into a real war between the foreign investors and the Kingdom of Spain since 2013. In the previous issue of Modern Arbitration: LIVE News Journal we summarized this story of confrontations and the then trends observed in the arbitrations of investors from all across the globe; now, six months later, we will take stock of the developments that occurred since then.

Back in 2010, the Spanish authorities tried to support the development of alternative energy sources: as a result, the state budget simply ran out of funds for sponsoring solar plant owners by as early as 2013. The government then decided to retroactively lower the profitability of energy companies to 7.5 % per year until 2026. Investors retaliated by filing around 50 claims totaling USD 7.3 billion against Spain.

Spain tried to find a way out by first making an effort to prevail in these disputes and challenging arbitral tribunals, and as much as possible seeking to set aside unfavorable awards. Moreover, in November 2019, the government approved a law offering some benefits to the investors – a new "rate of return" of 7.4 % for the period from 2020 through 2031, available only if the claims against Spain were dropped. Those who refused the offer or failed to accept it by December 2020 would have to deal with a reduction of the relevant performance ratio to 4.7 %.

These new rules caused some investors indeed to abandon their claims in favor of the new renewable energy incentives. Thus, for instance, a group of German investors into solar energy, including RWE, Ferrostatal, and Stradtwerke Munchen refused to resume EUR 420 million ICSID proceedings (*Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Kingdom of Spain*, ICSID Case No. ARB/15/1), and a Dutch investor Masdar Solar & Wind Cooperatief (indirectly owned by the government of Abu-Dhabi) also waived its right to seek enforcement of an ICSID award for approximately EUR 80 million (*Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1), just like the several claimants in the *PV Investors* case that waived their claim of compensation under an earlier EUR 91 million award (*AES Solar and others* (*PV Investors*) *v. Spain*, PCA Case No. 2012-14).

There are, however, those who did not abandon their claims and went all the way. Thus, in *STEAG Gmbh v. Spain* (ICSID Case No. ARB/15/4) an ICSID tribunal deemed Spain liable of violating the legitimate expectations of a German investor into solar energy as a result of the reform, but reduced the damages awarded by 25 %, since the company had sold its investments. Similarly, in *Cavalum v. Spain* (ICSID Case No. ARB/15/34), the tribunal concluded that Spain's reforms undermined the expectations of the Portuguese company Cavalum to the extent that the investor's income did not correspond to a reasonable rate, given the value of money in capital markets, and left it to the parties to agree on the reasonable rate of return.

Then there are those who directly opposed the new regime. The Japanese conglomerate Mitsui & Co filed an ICSID claim against Spain with respect to a solar energy project worth EUR 260 million. The project was the joint venture Guzman Energia, created in 2010, whose generated power was to be sold to the network as per the then effective reduced tariff schedule in Spain (*Mitsui & Co v. Spain*, ICSID Case No. ARB/20/47). According to Mitsui, the new regime of state incentives for renewable energy sources violated the Energy Charter Treaty, since it caused investors to waive new proceedings or withdraw the existing claims by exerting additional pressure on the investors' rates of return.

Finally, ICSID tribunals have come to a number of unusual conclusions.

For example, the ICSID has for the first time held that third-party funding – namely, a loan extended by the Dusseldorf-based Portigon AG that renders financial services to renewable energy companies – falls under the definition of investments under the ECT and the ICSID Convention, and found that it had jurisdiction over the dispute (*Portigon AG v. Kingdom of Spain*, ICSID Case No. ARB/17/15).

Furthermore, in *SolEs Badajoz GmbH v. Kingdom of Spain* (ICSID Case No. ARB/15/38) the ICSID *ad hoc* annulment committee has for the first time extended a deferral of performance of a EUR 41 million award without asking for a financial guarantee from the state because of the risk that after the award is set aside, the state would be unable to compensate the amounts paid, since they will have been distributed between the investors of the parent funds of SolEs Badajoz.

We can only make guesses about how the arbitration practice will change after the Spanish cases. Yet, even now one cannot fail to notice the emergence of new trends and precedents in international arbitration that will be very interesting to monitor in the future.

ARBITRATION ON THE LOOKOUT FOR NATURE

Environment-Conscious: a UK Oil and Gas Company Has Put Slovenia on Notice

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The UK oil and gas company Ascent Resources has notified Slovenia of its intention to bring an investment treaty claim after it was denied a permit to boost productivity at two natural gas wells without an environmental impact assessment (EIA). According to Ascent, the Slovenian laws do not require to carry out such an EIA, and, more than that, its preliminary screening application had been filed only "out of an abundance of caution" by the investor. The company thus claims that Slovenia's conduct violated the protections under the Energy Charter Treaty and the relevant BIT.

Potential Arbitration against Peru over Cocoa Plantations

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A cocoa plantation owner, Tamshi SAC, has sent letters to the Ministries of Agriculture, Environment, and Economy of Peru as a preliminary step before filing an ICSID claim against Peru after it had to face a PEN 129 million (USD 35 million) fine imposed by the Environmental Evaluation and Enforcement Agency of Peru for continuing operations without the necessary environmental permits and for the unlawful disposal of hazardous waste in the Amazon river.

Tamshi was ordered to immediately leave the region and remove all equipment and seedlings, as well as restore the degraded forest ecosystems, "to guarantee no material adverse effects for the environment."

Notably, before it was purchased by its new owners in 2018, the company was called Cacao del Peru Norte and was notorious due to its ties with Melka Group, charged with felling over 13,000 hectares of tropical forests.

Investment Arbitration against Kosovo

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A UK energy company has filed a EUR 20 million ICSID claim against Kosovo over a frustrated plan to build a power plant.

In 2017, ContourGlobal signed an agreement with Kosovo to construct a 500-MW power plant running on lignite (brown coal). The company announced that it expected the launch of construction and the financial closing of the deal in late 2018 – early 2019.

At the same time, the Kosovo Government applied to the World Bank for partial guarantees from risk that could secure better loans to build the power plant. The then World Bank President Jim Yong Kim, however, stated that the World Bank would not back the project, as building a brown coal power plant was not the best option, in view of the existence of renewable energy sources.

As a result, in March 2020, ContourGlobal announced that the project would not continue, as the Kosovo Government was unwilling to work with the company under the project, and, even worse, the country's Prime Minister Albin Kurti publicly opposed it.

Notably, 90 % of power in Kosovo is now generated by two coal power plants seen as some of the worst polluters in Europe.

On 1 December 2020, Kosovo declared that it was notified of ContourGlobal's ICSID claim.

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NEWS JOURNAL

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ARBITRATION AND TECHNOLOGY

A Class Action against a Crypto Trading Platform Referred to Arbitration

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In April, a user of the MakerDAO blockchain platform, Peter Johnson filed a class action lawsuit against Maker Foundation, Maker Ecosystem Growth Foundation and Dai Foundation after the meltdown of Ethereum quotes and withdrawal of more than USD 8 mln from the MakerDAO system (*Johnson v. Maker Ecosystem Growth Holdings, Inc.*, Case No. 20-cv-02569-MMC (N.D. Cal. Sep. 25, 2020)). The claimant accused the respondents of misleading the investors and deliberately misrepresenting the risks.

Maker Foundation argued that the claimant violated the terms of the arbitration agreement that became binding after the claimant joined the service in 2018.

The court agreed with Maker, that a class lawsuit filed due to a "Black Thursday" meltdown had to be referred to arbitration. In particular, the court held that the American Arbitration Association must determine whether Johnson's complaints fall under the arbitration clause included into DAI's terms of service that the investor accepted in 2018.

Proceedings are suspended until the completion of the arbitration.

USING AI AND AUTOMATED DECISION-MAKING TECHNOLOGIES IN ONLINE ARBITRATION: FRANCE EXPERIENCE

Author: Svetlana Grubtsova

The increasing influence of digital technologies on the life of the present-day society is obvious, and justice and arbitration are by no means exempt from it.

Thus, at the level of the European Union, Recommendations CM/Rec (2009)1 on electronic democracy (e-democracy) have long been in place, adopted by the Committee of Ministers of the Council of Europe on 18 February 2009.

Special importance here should be given to the issues of use and introduction on the legal plane of artificial intelligence (AI), as well as the ethical aspect of the use of AI technologies, governed by a whole range of acts and policy papers.

Investments into AI projects that increase with every passing year and the risk of AI's implementation in separate socially important spheres have prompted the EU to develop White Paper COM (2020) 65 On Artificial Intelligence – A European approach to excellence and trust of 19 February 2020, designed to ensure the transparency of such technologies and human control over them.

At the same time, the need to renounce any attempts to use AI for mass surveillance, predicting human behavior, and state supervision of every individual, was emphasized in the EU *AI HLEG Policy and Investment Recommendations* of 8 April 2019, adopted by the European Commission and prepared by the High-Level Expert Group on AI (*AI HLEG*).

So far, the most debatable and acute question of using AI technologies in law that do not fit into the classical concept of human-made justice, is the question of ethics. The impossibility, in the current conditions, of ignoring the introduction of AI poses before the representatives of the legal community an agenda of the appropriate limitations and the scope of use of such technologies, today addressed in the CEPEJ European Ethical Charter CEPEJ (2018)14 on the use of artificial intelligence (AI) in judicial systems and their environment, adopted in December 2018 by the European Commission for the Efficiency of Justice at the level of the updated Ethics guidelines for trustworthy AI of 8 April 2019. The last was adopted by the European Commission and prepared by the *High-Level Expert Group on AI* (*AI HLEG*), as well as "Ethically Aligned Design: A Vision for Prioritizing Human Well-being with Autonomous and Intelligent Systems" of 12 December 2017, adopted by the Institute of Electrical and Electronics Engineers (IEEE).

The issues of AI, predictive justice, and automated litigation are also regulated on the domestic level.

"In March 2019, France became the first country in the world to expressly prohibit studies of individual behavior of judges." This new rule, E. Ermakova suggests, was triggered, among other things, by "the publication of results of studies on the use of machine learning for comparing the behavior of judges in asylum cases that revealed great discrepancies between individual French judges."

Specialists note that as regards the AI technologies and online arbitration, "the French Programming Act for Justice 2018-2022 (the "Programming Act") contains specific provisions on online arbitration, intended to lift some workload off the French courts, swamped with the constantly increasing lawsuits."

Pursuant to the provisions of this act, "no personal data related to judges and secretaries can be reused in any way for the purpose or as a result of assessment, analysis, or projections concerning their actual or purported professional practice." In this regard, E. Ermakova distinguishes three main provisions of the act: 1) the prohibition of fully automated decision-making; 2) the requirements on the protection of data and confidentiality; and 3) certification of online arbitration as a guarantee for the parties.

In prohibiting fully automated decision-making in the field of arbitration, the French Programming Act effectively follows the philosophical concept, according to which "justice can only be human-made."

SPACE ARBITRATION

October 2020 has also proved to be rather remarkable in the field of discovering space for the international community.

First, on 13 October 2020, the founding countries signed the Artemis Accords in an online ceremony. The Accords are expected to lay the legal bases for the creation, before the end of this decade, of a permanent lunar base and the launch of mining in space.

Second, on 28 October, rather extraordinary news appeared on SpaceX, Elon Musk's space company, refusing to recognize international law on Mars, if one is to trust the Terms of Service of Musk's Starlink Internet project. "No Earth-based government has authority or sovereignty over Martian activities," SpaceX claims. The section of the Governing Laws, according to which on the Earth, Starlink's services are regulated by the laws of California, while Mars is a "free planet", provoked heated debates, especially given Musk's plans to create a self-sustaining city on Mars that would be fully independent from Earth, as the inventor announced a week before.

For more details on the Artemis Accords, the possibility of space arbitration, and the legal analysis of Musk's colonization plans, read the expert commentary below.

Expert commentaries

Mariam Yuzbashyan

General Counsel on International Space Law and Private International Space Law, Ph.D, Associate Professor, MGIMO University, the MFA of Russia

1

What are the Artemis Accords signed on 13 October 2020?

I would suggest looking the Artemis Accords, executed by NASA with the first eight state-partners of the eponymous US lunar program, namely, as at the end of 2020: Australia, Italy, Canada, Luxembourg, the UAE, the UK, Japan, and Ukraine (that is, the states that the US has been recently cooperating with in the specialized areas of outer space activities as regards politics, technologies, economy and, accordingly, law), in two senses.

First, in a wider sense – as a "political commitment" (according to Section 1 of the Accords) to the principles of cooperation in exploring and using the Moon, Mars, comets and asteroids for peaceful purposes, contained in the Accords and to be applied by the civil space agencies of the partner states. In this context, the Accords effectively mirror the approach of the US to the implementation of the fundamental 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (the Outer Space Treaty), as well as other treaty sources of the international space law that develop separate provisions of the 1967 Treaty. Naturally, this approach cannot be seen as an authentic interpretation of the aforementioned treaties. This is implicitly acknowledged in the Artemis Accords, too, in the recognition of the role of multilateral fora, such as the United Nations Committee on the Peaceful Uses of Outer Space ("COPUOS"), in furthering efforts toward a global consensus on critical issues regarding space exploration and use. Therefore, the US, too, now understands, at least, the long-term need to regulate a number of the most relevant issues making the subject matter of international space law precisely on the multilateral level, which would prevent many international disputes.

Second, in the special context of the systemic approach of the US to the legal regime of space resources that consists in construing Article II of the Outer Space Treaty as not extending the prohibition of appropriation of the outer space to the natural resources extracted from celestial bodies. In this sense, the Artemis Accords should also be viewed as elaborating the approach found in the 2015 US Space Resource Exploration and Utilization Act and the US President's Executive Order on Encouraging International Support for the Recovery and Use of Space Resources of 6 April 2020 that expressly proclaim the rights of persons and entities under the US jurisdiction, as well as, potentially, under that of the Artemis partner states, over the space and asteroid resources they extract. Specifically, Sections 10 and 11 of the Artemis Accords deal with these issues, stressing, in particular, the critical importance of resources in ensuring the safety of outer space operations; the intention to use space resources in line with the provisions of the Outer Space Treaty (including the waiver of claims of sovereignty over outer space); the intention, in using the experience under the Accords to contribute to the negotiation of universal international legal rules on the recovery and use of space resources; the commitment to duly account for the respective mutual interests of the subjects of outer space activities and other obligations under Article IX and other applicable provisions of the Outer Space Treaty.

These principles make relevant, in particular, the question of the extent and form of the balance of interests, including economic interests, between the various subjects of outer space activities and, among others, those that are not parties to the Artemis Accords. Accordingly, the global community now has a priority task of applying efficient, potentially new diplomatic approaches to settling a number of topical international space law issues on a multilateral and universal basis. The US initiatives discussed above are effectively capable of indirectly altering the way the international space law will develop further. Thus, in view of the relevant factors, both the international and domestic legal "responses" could be regarded as especially desirable.

2

The Artemis Accords are modelled on the 1998 International Space Station Intergovernmental Agreement that suggests resolving any arising controversies by conciliation procedures and will be implemented through the execution of bilateral agreements between the US and partner states for the Moon exploration with the US in the lead. Given that the Permanent Court of Arbitration published optional rules for arbitration of disputes relating to outer space activities back in 2011, how possible, do you think, is arbitration on matters concerning outer space, objects launched into outer space, etc., and when should we expect such disputes?

The US treats the Artemis Accords as a political document that reflects the approach you just described to the implementation of a number of special principles and rules of the existing international space law, while the Memorandum of Understanding signed on 27 October 2020 by NASA and the European Space Agency (ESA), in turn, contains specific obligations of the parties related to the lunar outpost Gateway, namely, on the flight of three European astronauts in exchange for the ESA's construction of two service modules. The execution of such memoranda in 1988 and 1998 preceded the ISS's construction, too. Thus, the legal framework is in place for a future lunar outpost. Based on both the approach of the Artemis Accords and the experience of the 1998 IGA, it is logical to expect, equally with respect to the future lunar program, that the conciliatory procedure of resolving differences by consultations will apply. This choice is also due to the specific nature of outer space activities, in particular, high risks that cause the parties to the majority of international space projects, whether intergovernmental or non-governmental, to include clauses on reciprocal waiver of liability claims to each other for the long-term purpose of being able to implement the project.

From a somewhat different angle, the 2011 PCA Optional Rules for Arbitration of Disputes Relating to Outer Space Activities reflect, on the one hand, the need to duly consider the specifics of international space law, and, on the other, although over a relatively long term, the reasonable need to create the conditions for arbitrating international disputes – that is, in fact, the only efficient way to resolve them for private actors in this sector. Several nuances are noteworthy here: first, specialized disputes will largely be precisely

international in nature, since the complexity of implementation of outer space projects effectively rules out their purely "domestic" character; second, although the trends toward the commercialization and privatization of outer space activities are no longer new, the emergence of such disputes today is "deterred" due to the direct involvement of private actors in governmental programs (with many recent examples from the US), which manifests in the use of conciliatory procedures. Further risks of international disputes between actors from the same level are balanced out by the inclusion of the aforementioned clauses on the reciprocal waiver of liability and various types of specialized insurance.

At the same time, as economic activities in outer space develop, it would be reasonable to expect a wider recourse to arbitration in the nearest decade, which may be relevant for both states and international organizations, and private parties. Such disputes could concern all "traditional" space technologies, goods and services, such as, for example, launch, use of satellite communications, transfer of ownership to objects launched into outer space. In the relatively long term, solely because such disputes will be complicated by a technological element, it would also be logical to expect arbitration in the area of outer space mining activities. As regards the latter, it would be best if by the time such disputes potentially arise, the special international legal regime of outer space resources will have been set forth universally, so that in practice, the resolution of related economic disputes would not be exacerbated by the need to first establish the scope and effect of the applicable international law rules by approaching the ICJ.

3

Which fundamental principles of space exploration will be critical in arbitrating disputes? And in which international instruments do we find them?

First and foremost, the 1967 Outer Space Treaty principles of international space law must be observed by all subjects of space activities, in particular: that the exploration and use of outer space are "the province of all mankind"; that outer space and celestial bodies are not subject to national appropriation; that the state of registration of an object launched into outer space shall retain jurisdiction and control over it while in outer space; that the ownership of objects launched into outer space is not affected by their presence in outer space, etc. Moreover, in the context of dispute resolution, the special provisions on state responsibility will be of particular importance. Article VI of the Outer Space Treaty provides for international political responsibility of states for all their national activities in outer space, including that of non-governmental entities, and for ensuring that such activities should be carried out in conformity with the Treaty provisions. Article VII of the Outer Space Treaty, elaborated by the 1972 Convention on International Liability for Damage Caused by Space Objects, provides that a launching state (the term is first used in the 1972 Convention, but the Treaty refers to four categories of states) is internationally liable for damage caused by objects launched into outer space or their component parts on the Earth, in air or in outer space, including the moon and other celestial bodies, another state, or its individuals and legal entities. In both cases, states bear international responsibility for the activities of any entities subject to their jurisdiction or, accordingly, for any damage caused as a result of, for instance, the launch of an object into outer space by any party from the territory or facility of the respective state, which remains relevant and justified, given that any activity in outer space is hazardous activity.

Therefore, without going into all the special international legal acts, I must note that in resolving private international law disputes, it will be especially important to look at the classical conflict of laws and substantive private international law rules through the prism of the specifics of international space law. That also makes relevant the issue of the emergence of private international space law as a special area of law, capable of accounting for both the private law nature of the relations it will govern and the peculiarities of the international space law.

4

What can you say from the legal perspective (in terms of both international space law and international dispute resolution) about the Terms of Service used by Starlink (the global satellite-based Internet service offered by SpaceX) that features the following provision:

"For Services provided on Mars, or in transit to Mars via Starship or other spacecraft, the parties recognize Mars as a free planet and that no Earth-based government has authority or sovereignty over Martian activities. Accordingly, Disputes will be settled through self-governing principles, established in good faith, at the time of Martian settlement."

Is this provision acceptable and lawful in your opinion?

I would say that this provision is somewhat absurd, given the fact, to say the least, that it concerns potential Mars-based operations by a legal entity incorporated in the US. In this context, the absurdity is "doubled" by the following factors: the US participation in the 1967 Outer Space Treaty, which among other things, provides for the international responsibility of states for assuring that national activities in outer space, including "Mars-based" activities, are carried out in conformity with the provisions of the Treaty; as well as those of the Artemis Accords that envisage principles specifically of Martian activities, including the principles of dispute resolution on Mars. Inclusion of the clause cited above in Starlink's Terms of Service is hard to assess in terms of acceptability or legality, but I will note that the parties to any terms of service are not entitled to define the legal regime of a celestial body, so the clause in its current wording contradicts the international obligations of the US.

ISSUES OF THIRD-PARTY FUNDING

Six Leading Third-Party Funders (TPF) Have Founded the First Ever Global Association of Litigation and Arbitration Finance Providers

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The International Legal Finance Association (ILFA) was founded in Washington on 8 September. According to the ILFA, its members have over USD 10 billion available and are ready to represent the interests of the legal funding industry before state authorities, international organisations and professional associations, as well as serve as a centre for exchanges of topical information, research and data on the use of commercial legal funding.

Notably, third-party funding is one of the issues that states consider when discussing potential reforms in the area of resolution of investment disputes.

Third Party's Funds Deemed an Investment under the ECT and ICSID Convention

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An ICSID tribunal has upheld jurisdiction over a German lender's Energy Charter Treaty (ECT) claim against Spain (*Portigon AG v. Kingdom of Spain* (ICSID Case No. ARB/17/15)). The ICSID has for the first time held that project funding by a third-party – namely, a debt capital provided by a Dusseldorf-based financial services company Portigon AG to renewable energy companies – fell under the definition of "investment" under the ECT and ICSID Convention.

An Unsuccessful Challenge of Canadian Counsel

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The Federal Court of Canada has refused to remove the legal team of the Canadian Government from the USD 2.5 billion NAFTA arbitration in *Theodore Einarsson, Paul Einarsson and Russel Einarsson and Geophysical Service Inc v. Canada*. The challenge was due to the potential conflict of interests with the former employment of one of the lawyers of the team with the company funding the claimants; the Court held that the issue was to be dealt with by the tribunal resolving the dispute.

The mentioned counsel, Ms. Alexandra Dosman, was an employee of Vannin Capital – the funder of the initial claim – at the time of its filing. By then, however, she had already received an offer from the Trade Law Bureau of Canada that represents Canada in all investor-state disputes, and completed her move there in July of the same year.

GSI sought to have Ms. Dosman eliminated from the case due to an alleged conflict of interest, as well as remove all members of the Bureau's team Ms. Dosman had liaised with. In a letter to the claimants, the Bureau agreed to temporarily suspend Ms. Dosman as a gesture of "good faith." Then GSI resorted to judicial review, asking the Court to establish a conflict of interest in the Bureau's team and ban it from working on the case.

In its judgment, the Court ruled that irrespective of whether it had jurisdiction, there was "serious doubt" as to the existence of a conflict of interests, since there was "little unambiguous evidence that she received information that would cause" such a conflict, while the Bureau's letter could not be "construed as a public matter which ought to be resolved through public law."

THIRD-PARTY FUNDING OF LITIGATION AND ARBITRATION IN RUSSIA

Authors: Ekaterina Piskunovich, Arina Akulina

The decision to participate in litigation or arbitration[23] may well be determined by the potential legal (arbitration) costs. In some cases, companies might not have sufficient resources to bear such costs, even where their position in the dispute stands a good chance. In order to minimize legal (arbitration) costs and the associated risks, practice has developed various mechanisms for raising third-party funding, one of them being the third-party funding agreement.

The practice of making third-party funding (TPF) agreements originates from Australia, where it emerged in the end of the 20th century, to be later successfully borrowed by the legal systems of the UK, US, Canada, and subsequently Germany, the Netherlands, South Africa, and New Zealand. This practice continues to spread into other countries, playing an important role in international commercial arbitration. Thus, for instance, the development of TPF has even resulted in recent amendments in the legal systems of states where litigation funding had been originally banned (Singapore, Hong Kong), allowing to execute agreements on funding international arbitrations.

Based on an analysis of the approaches to TPF found in the global practice, the Report of the ICCA-Queen Mary Task Force[24] elaborated the following definition: "'third-party funding' refers to an agreement by an entity that is not a party to the dispute to provide a party, an affiliate of that party or a law firm representing that party,

- funds or other material support in order to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases, and
- such support or financing is either provided in exchange for remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute, or provided through a grant or in return for a premium payment.

> *Thus, third-party funding can in essence be perceived as investment, where a third party, after analyzing the claims and the associated risks, agrees to extend funding to cover the costs of one of the parties (normally a claimant) with respect to a litigation or an arbitration, that is, the costs of paying fees to the counsel, experts, interpreters (translators), the costs incurred by witnesses, and other arbitration costs referred to in the agreement between the third party and the party to the dispute.*

In exchange, if the claims are granted, the party will share some of the amount awarded with such a third party, usually a percentage of the value of claims. Accordingly, the funder bears the risk of covering the party's expenses associated with the proceedings, and in some cases, if the agreement between the parties or the applicable law so provide, also the risk of compensating the opposing party's expenses if the claims are unsuccessful. Here, if the funded party wins the case, the funder will be able to receive a compensation for the amounts invested, together with interest.

A funder may be an external entity, such as, for instance, a corporation, a bank, another financial institution, an insurance company, as well as a law firm or the party's counsel paid on a "success-fee" basis. Therefore, TPF may effectively take various economic forms, while retaining its essence of re-allocation of a party's risks of having to bear the arbitration costs.

> *Russia's current legislation contains no special provisions governing third-party funding of litigation or arbitration.*

Although there is no express prohibition of funding, for a long time that uncertainty had been preventing that sphere from developing in Russia. Nevertheless, one sees an increasing proliferation of the institutes of funding the

[23] For the purposes of this article, the terms *treteyskoye* (referring to arbitration) and *arbitrazhnoye* (for Russian law, referring to commercial state courts) both have the same meaning of "arbitral".

[24] International Council for Commercial Arbitration (ICCA). Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, The ICCA Reports No. 4, p. 50, at https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Third-Party-Funding-Report%20.pdf (last accessed on 26 December 2020).

proceedings and a growing interest in such institutes, amont other things due to the shift a shift in the attitude of state courts to some forms of such funding, discussed below.

The institute of assignment of claims has become the most popular mechanism in Russia to solve the issue of lack of own funds to cover legal or arbitration costs and risks. Under an assignment agreement with respect to claims to the debtor, the investor receives the claimant's claims to the respondent in exchange for a payment of a specific sum. When the claim passes to the investor, the latter enters the procedure in the claimant's place, fully controlling the management of the case and becoming the party to receive the amount recovered in its entirety if the claimant's claims are granted. If the case is lost, the investor might have to cover the legal costs of the opposing party.

This instrument is not third-party funding of arbitration in the ordinary meaning of this institute, since the third party becomes a direct party of the dispute after the substitution of parties in an obligation.

Among instruments for raising funds to fund proceedings in Russia that are used and available one can distinguish:

Loan or credit agreements

Unlike the option described above, when raising funding from a third party in this way, the claimant retains full control over the case, as well as continues to bear the associated risks. In view of the need to repay the money lent and pay interest for its use, where the claimant has no guarantees that its claims will be granted by the court and that the judgment will be actually executed, this option is a highly risky one. Moreover, the need to secure the creditor's claims by pledge (which is frequently required) creates additional risk factors for the party.

Insurance of legal costs

The Russian laws envisage another means to raise third-party funding to fund the proceedings, namely, insurance of legal costs. This option, however, has its specifics. Thus, insurance of legal costs is generally offered as part of liability insurance coverage and in view of the nature of insurance, such an agreement may be made only before the insured event occurs or the ground to commence the proceedings arises. Overall, insurance of legal costs in Russia is currently underdeveloped.

Simple partnership agreement

Furthermore, some authors observe that one can raise funding using the already existing institute of simple partnership agreement (or contract of association), although that has not as yet become widespread in practice.[25] Thus, creating a simple partnership to fund an arbitration or a litigation is not inconsistent with the Russian Civil Code, where two or more parties (the partners) undertake to unite their contributions and act jointly without incorporating a legal entity in order to earn a profit or achieve another goal that is not contrary to the law (Russian Civil Code, Article 1041). The parties may agree on the amount of their contributions for the purposes of the proceedings, on the allocation of amounts awarded; however, the Russian Civil Code stipulates that the participants of a simple partnership are liable jointly and severally.

All three of the aforementioned ways for a party to raise funds from a third party to fund the proceedings may either constitute a form of TPF or not, depending on the specific terms of the agreement, namely, whether it provides that the third party in question would be remunerated if the claims are satisfied.

> *One could say that the effective Russian legislation already provides for a form of TPF in the execution of a legal services agreement containing a "success fee" clause.*

For a long time, courts demonstrated a predominantly negative attitude to "success fees". That position originated from Information Letter No. 48 dated 29 September 1999 "On Certain Matters of Court Practice Arising in the Examination of Disputes Related to Agreements on Legal Services" of the Presidium of the Supreme Commercial Court of the Russian Federation which pointed out that it was unacceptable to grant contractors' claims on the payment of remuneration (fees) if such a term was conditional upon an agreement clause that made the amount payable for services dependent on the future decision of a court or a state authority. This position was also confirmed later in Resolution of the Constitutional Court of the Russian Federation No. 1-P of 23 January 2007. The Resolution indicated that the parties may not condition the payment of a fee by the issuance of a specific judgment, since in the system of the existing legal rules a judgment can make the object neither of somebody's civil rights (Civil Code, Article 128), nor of any civil law agreement (Civil Code, Article 432).

Starting from 1 March 2020, however, amendments into Federal Law No. 63-FZ "On Lawyers and Legal Practice in the Russian Federation" dated 31 May 2002 entered into force and permitted including into an attorney's agreement with their client a clause on the fee that would depend on the result of legal support rendered. Moreover, such a success fee may be a fixed amount or a share of the amount claimed. It would seem that the official legislative recognition of the possibility of making agreements with "success fee" clauses is a favorable push towards the development of the institute of TPF of litigation and arbitration as a whole.

> *Although at present there is no special statutory rule governing the agreements on TPF specifically, one can say that such an agreement may nevertheless be regulated by the general provisions of the Civil Code.*

This is made possible by the principle of freedom of contract that permits entering into an agreement even if it is not listed in the Code. There are also certain preconditions favoring the emergence and development of relevant rules.

Thus, for instance, at the plenary session of the IV Moscow Legal Forum in 2017, the chairman of the Russian Judges Council Viktor Momotov called for the development of the legal investments market in Russia,[26] and in 2019, a working group of lawyers and attorneys, under the lead of the founder of one of the platforms created for attracting investments into litigation (PLATFORMA), prepared a draft law "On Third-Party Funding",[27] intended to make a statutory provision, in Part 2 of the Russian Civil Code, for a separate kind of agreement, namely, an agreement on the funding of legal costs of a party to the dispute.

Further, at the business breakfast during the IX Saint Petersburg International Legal Forum in 2019, Denis Novak announced that the State Duma had adopted, in the first reading, a draft law regulating the procedure for the consideration of class actions as regards the protection of the rights and interests of the claimants, which refers to the possibility of executing an agreement on the funding of litigation, and such an agreement on the allocation of costs would have to be approved by the court in advance.[28]

Therefore, at present, there are several forms for raising TPF to cover litigation and arbitration-related expenses in Russia, and the most common one is a claims assignment agreement. Later, in response to the industry's need for funding which would reduce the burden of legal (arbitration) costs, the legislator introduced such a form of funding as the "contingency fee" (or "success fee") in the letter of engagement for legal services, as well as raised the issue of legislative provisions for the special rules that would govern TPF agreements. One cannot omit that an important role in the process of formation of dispute funding mechanisms – new for the Russian law – also belongs to the efforts of specialized dispute funding projects (for example, Platforma, Sudinvest.ru, National Legal Finance Group, Sudfinans), as well as the interest and increasing trust in TPF among Russian lawyers.[29]

Overall, due to the novelty of TPF, there are at present many uncertainties both for the legislator and for the potential users of the system. Given how logical and how necessary it is to develop this institute, it is evident that raising TPF in judicial and arbitral proceedings may cause substantive changes in the Russian dispute resolution as a whole, as well as affect Russia's image as a seat of arbitration, in particular. We would like to think that the emerging and already positive trends towards the legal regulation of TPF will strike a balance between the existing global practices in this area and the Russian reality, to become a traditional phenomenon both in litigation and in arbitration.

[25] Daria Zhdan-Pushkina, Agreement on the Funding of Litigation, at https://zakon.ru/blog/2020/8/9/dogovor_finansirovaniya_razbiratelstva_spora (in Russian) (last accessed on 26 December 2020).

[26] The event is described at https://pravo.ru/company_news/view/142026/?cl=NC (in Russian) (last accessed on 26 December 2020).

[27] For more details on the discussions of the draft law, *see* https://delo-ros-msk.ru/events/obsuzhdenie-zakonoproekta-o-finansirovanii-sudebnykh-raskhodov-tretimi-litsami/ (in Russian) (last accessed on 26 December 2020).

[28] For more details, *see* https://tass.ru/obschestvo/6431068 (in Russian) (last accessed on 26 December 2020).

[29] According to a study conducted by NLF Group and Pravo.ru, available at https://pravo.ru/story/215274/?desc_search (in Russian) (last accessed on 26 December 2020).

WOMEN IN ARBITRATION

The First All-Women Law Firm opens in Paris

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Four lawyers — Marie-Laure Bizeau, Valence Borgia, Caroline Duclercq and Delphine Pujos —have founded Paris-based litigation and arbitration boutique Medici Law Firm.

The partners of the firm stated that they would work within an innovative and flexible structure and promised to donate 10 % of client fees, by prior agreement, to an endowment fund which will promote equality, address gender-based violence and campaign against discrimination.

The European Commission Improves Gender Balance in Trade and Investment Arbitration

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The European Commission adheres to the principle of gender equality. This means taking measures to ensure equal economic independence of women and men, the elimination of a gender pay gap, advancing gender balance in decision-making, ending gender-based violence and promoting gender equality beyond the EU. Having become a participant of the Equal Representation in Arbitration Pledge, the European Commission has introduced a new system for appointing arbitrators. By this new system, the Commission strives to reinforce compliance with trade agreements and maintain gender balance. In order to solve the issue of gender inequality, the European Commission intends to create a large pool of arbitrators and experts: one for settling trade law disputes between the EU member states, and another one, on trade and sustainable development. Candidates will need to demonstrate knowledge and experience in trade and investment law, trade and sustainable development, as well as settlement of international disputes.

The Commission believes that gender balance in appointing arbitrators will contribute to its goal of ensuring gender equality in dispute settlement.

Registration as an arbitrator or expert was open until 15 February 2021, and the instructions for candidates can be found here.

The ICCA Publishes a Report on Gender Diversity in International Arbitration

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The representatives of the world's leading arbitral institutions, such as the VIAC, HKIAC, ICC, and ICDR, have produced a Report on gender diversity in arbitral appointments and proceedings as part of the Reports of the International Council for Commercial Arbitration (ICCA). The Report contains a detailed analysis of the issue of the lack of gender diversity in arbitration, possible solutions, as well as the statistics of appointment of women as arbitrators at various arbitral institutions.

The document highlights a positive trend: the number of women arbitrators has doubled in the last four years. This growth is largely the result of efforts of arbitral institutions on the appointment of more women arbitrators. Yet, in 2019, women still accounted for a little more than 21 % of the appointed arbitrators, which signals the need for improvements in this area.

The Report lists potential impediments on the way to diversity, as well as various solutions to these problems. These instruments include: databases of qualified female candidates for appointing as counsel or arbitrators; councils for the elimination of unconscious bias; opportunities for female specialists to enhance their qualifications; advice for less experienced female lawyers wishing to bolster their career.

It should be noted that in 2017, the Russian Arbitration Center joined the international Equal Representation in Arbitration Pledge movement that supports women practitioners in international arbitration and calls for maintaining the gender balance. In this view, the RAC's annual statistics include information on the number of women appointed as arbitrators.

We shall recall that the previous issue of Modern Arbitration: LIVE News Journal discussed the annual reports of the world's leading arbitral institutions, including their results as regards the appointment of female arbitrators.

Women in Arbitration initiative (HKIAC) Approves the Composition of Its New Committees

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In February 2018, the HKIAC launched WIA – an initiative aimed at promoting and enabling the success of female practitioners in international arbitration in China. WIA's goal is to discuss current topics, networking, expanding business relations, as well as helping develop the next generation of women practitioners.

From its inception, WIA was based in Shanghai, Beijing, and Hong Kong. Discussions took place in the form of round tables, debates and public events on matters of arbitration, as well as professional and personal growth.

WIA committees will be in charge of shaping the policy and activities of WIA for the purposes of promoting gender diversity in arbitration in China. WIA committee members are based in a variety of locations across China which serves the purpose of extending the reach of WIA's work.

Promoting Women in Arbitration Is Underway in Russia with Russian Women in Arbitration

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In 2020, Russian Women in Arbitration has held a series of interviews with prominent women specialists in arbitration: Sophie Nappert, Carolyn Lamm, Wendy Miles, Patricia Shaughnessy. The participants of the interviews discussed the issues of gender diversity, shared their unique experience of building careers in arbitration and gave advice to aspiring lawyers. Watch the interviews on the Russian Women in Arbitration Youtube channel.

For more details on Russian Women in Arbitration, read an interview with the movement's founders below.

INTERVIEW WITH THE FOUNDERS OF RUSSIAN WOMEN IN ARBITRATION

Elena Burova
Senior Associate, Ivanyan & Partners

Veronika Burachevskaya
Associate, EPAM

Tuyana Molokhoeva
Senior Associate, BCLP

1 What triggered the creation of Russian Women in Arbitration in Russia?

Elena Burova:
It is hard, I think, to single out any specific events that definitely inspired us to start working with *gender diversity* in arbitration in Russia, and, on even a wider scale, in dispute resolution in Russia generally. Rather, we have come to an acute realization that this agenda was very pressing for our professional community and that, although we are living amidst the ideas of *women empowerment* and the situation in the Russian professional community as a whole is relatively favorable, we still have a lot to do and a lot of efforts to make in this area. Personally, I can say that I have been interested in this issue for a long time, including in how it is addressed in the global arbitration context, and that back when I worked at the Russian Arbitration Center, my colleagues and I were the first of the Russian arbitral institutions to join the *Equal Representation in Arbitration Pledge* movement and take care to always pay special attention to gender balance among arbitrators in RAC-administered disputes, which the RAC statistics, as well as the composition of the RAC Administrative Office continue to show.

In summer 2019, we started meeting to discuss forming a group that could in the future take up the issues of developing gender balance (and, later, other aspects of this larger agenda as well, such as age and nationality) and, in general, supporting women in arbitration in Russia. We are grateful to our colleagues in the arbitration community – Olga Tsvetkova, Izabella Kharlamova (Baker Botts), and Marina Akchurina (Cleary Gottlieb), who helped us connect. Gradually, our discussions and research crystallized into a shared vision of our goals and potential areas of focus for our future union that eventually developed into Russian Women in Arbitration.

Veronika Burachevskaya:
I would like to talk more specifically on how we came up with the idea of creating Russian Women in Arbitration.

As paradoxically as it may sound, the idea of creating a union to promote the ideas of gender equality in Russia came about outside of the country. Some time ago I was studying and working in Sweden, where I became familiar with the work of *Swedish Women in Arbitration Network* (*SWAN*) – a Swedish professional community of women interested in arbitration. That is when I saw how one could implement the ideas of promoting women in arbitration in practice and how efficient events in thisarea may be. But I was even more stunned by the fact that even in such relatively favorable regions as the Scandinavia, the issue of gender equality in arbitration is very much poignant.

Upon returning to Russia in late 2018, I realized that our arbitration community, too, takes an interest in this problem and holds a great potential for solving it. This raised a very logical question: why not create an organization that would help women in Russia share their experience and promote the ideas of gender balance in arbitration?

After meeting Tuyana and Elena and discussing the concept, we applied our joint efforts to this that idea into reality. I should note that we felt a response in the Russian arbitration community straight away. The number of people who registered for our March 2020 event that we, alas, had to cancel because of the pandemic, exceeded all our expectations. Once again, we were assured that we were doing something much needed.

2 What results have you achieved and what is the goal of your movement?

Elena Burova:
The key goal that Russian Women in Arbitration pursues is to form a professional community of women interested and engaged in arbitration and dispute resolution in Russia (and abroad) so as to support and promote women in these spheres. Russian Women in Arbitration is on a mission to build a platform for networking among the women who practice arbitration and dispute resolution in Russia, where they could talk, share ideas, and discuss problems that women engaged in arbitration may face, be inspired by each other's experience, collaborate and open new horizons for themselves. Russian Women in Arbitration also poses a wider objective of drawing the attention of the Russian professional community to the issues of gender balance in arbitration and to everything we can improve in that sphere together.

3 What are, in your opinion, the challenges that a woman engaged in legal practice (especially in arbitration) in Russia encounters?

Elena Burova:
We, like many our colleagues with whom we have discussed gender equality in Russian arbitration and Russian legal profession in general, believe that in this country, the situation is rather favorable and women have access to many opportunities for professional realization in the legal practice. This, however, does not mean that there is no room for further improvement.

Among the main challenges for a woman practicing law in Russia one may name the prejudices and stereotypes that can unfortunately still be found in terms of how women are perceived by men as professionals and sometimes by other women. Sadly, one can still hear stories from female lawyers that in choosing between them and their male colleagues, a client, a judge, another colleague or partner would prefer to take the most complex issues up with male lawyers, although a woman in a similar situation may be on par with them, let alone sometimes be an objectively better choice in terms of the experience, qualifications and skills required. This is more of an issue at the level of psychology and mentality, which is why it is not easy to address and a lot of time needs to pass before any developments in the mindset can be felt. That is why it is vital for the new generation of practitioners to form in a different context.

4 Are you seeing any positive developments in Russia in the recent years?

Tuyana Molokhoeva:
In the beginning of this year, we have launched a study on gender diversity in arbitration, where we have collected statistics on the gender ratio among arbitrators appointed in arbitrations administered by Russian arbitral institutions. It follows from the data collected that in the last five years the number of appointed women arbitrators has been steadily growing. It is, however, yet too early to speak of gender balance: male arbitrators still get appointed twice or thrice as frequently as female arbitrators.

Of course, the issue of gender should not be the princi-

pal criterion when choosing an arbitrator. But the existing imbalance can hardly be explained away by the want for female Russian lawyers with the necessary qualifications in arbitration. Although few would admit it, the prejudices and stereotypes that Lena has mentioned are still affecting the choice of arbitrators not only in Russia, but in other countries as well.

We are planning to gather similar statistics on counsel and inhouse lawyers, too. It is as yet difficult to see the objective big picture, but lately one increasingly finds news on women appointed to senior positions in law firms and large companies. So we are likely to see a positive dynamic in this sphere as well.

5 Has Russian Women in Arbitration managed to hold any events in 2020? And what are the plans for 2021?

Tuyana Molokhoeva:
In March, 2020 we were planning to hold a major event for the launch of our association, but we had to cancel it due to the unfavorable epidemiological situation. Then we switched to the online format and took a series of interviews with prominent female practitioners in international arbitration: Sophie Nappert, Carolyn Lamm, Wendy Miles, and Patricia Shaughnessy.

In 2021, we are planning to continue our online interviews, as well as host a number of webinars on various topics. For instance, we held a webinar on *Russian Women in Arbitration Abroad*, where we spoke to female Russian lawyers practicing arbitration abroad. We also intend to complete and publish our study on gender diversity in arbitration.

We very much hope to be able to have in-person events soon. Since one of the key goals of Russian Women in Arbitration is to create a professional community, we believe it is essential for the members of Russian Women in Arbitration to have the opportunity to communicate and share their experience.

6 How does one become an RWA member?

Tuyana Molokhoeva:
We have very recently launched membership in Russian Women in Arbitration. To join, one should fill in a short form here. RWA membership is free of charge and open to all Russian and foreign lawyers practicing arbitration or related spheres, irrespective of sex and age. We will welcome anyone who shares our goals and wants to contribute to reaching them.

7 What advice could you give to women who are only starting on their path in arbitration / law?

Veronika Burachevskaya:
This question is especially important to Russian Women in Arbitration: after all, one of the things we strive to do is support and inspire women who are making their first steps in the legal profession. It is essential for a woman at this exact stage to have before her a shining example of the successful career of senior colleagues and a confidence that her knowledge and skills will be sought after.

Apart from this, I think that for a woman starting on her path in arbitration, it is important not to be afraid of experimenting and making herself seen and heard. Women tend to underestimate their professional skills. You should not shun opportunities without even trying to take them. A solution can be found for the most demanding tasks if you are not scared to try and tackle them.

It is also important to be patient and prepared for the fact that building a career in international arbitration is a process that demands a lot of energy and time, especially given the length of international proceedings. As they say, "it is a long journey," and one has to learn to enjoy the process itself.

I would also recommend seeking out and using any opportunities to acquire new experience and knowledge. International arbitration disputes are extremely diverse, they can concern a whole range of issues starting from oil well drilling technologies and up to peaceful resolution of territorial disputes. That is why it is crucial for a practitioner in international arbitration to remain broad-minded and miss no opportunities for continuous growth.

Finally, I advise all aspiring professionals to join Russian Women in Arbitration. We strive to create a platform for connecting lawyers in international arbitration and related areas. By participating in Russian Women in Arbitration events a woman beginning her career in arbitration will be able to greatly expand her professional circle and become a part of the arbitration community. Although networking skills are often undervalued, they are exactly what helps an aspiring lawyer succeed.

I also recommend watching the videos of our interviews with prominent women in international arbitration where they share their own invaluable advice for young female lawyers.

8 There are other initiatives promoting gender equality in the world, such as Arbitral Women, Equal Representation in Arbitration Pledge. Are you cooperating or planning to cooperate with any of them in the future?

Veronika Burachevskaya:
Indeed, globally there already are several organizations in the field of gender equality in international arbitration that have in many respects inspired us to launch Russian Women in Arbitration, and we will be very happy to collaborate with them. Both *Arbitral Women* and *Equal Representation in Arbitration Pledge* have made a great contribution into creating the conditions for promoting women in international arbitration, increasing the number of female arbitrators and building a professional women's community. We have also been inspired by the *Swedish Women in Arbitration Network*.

We definitely plan to cooperate with these organizations and hope to be able to have joint projects next year. Cooperation may take various forms: joint research and studies, comparative analyses of various aspects of women's representation in arbitration in different countries, joint events held by the representatives of all platforms and initiatives promoting gender equality in international arbitration.

We are hopeful that the next year will yield more opportunities for joint events, including offline.

9 Who among the women in arbitration inspires you and who do you look up to?

Veronika Burachevskaya:
We are inspired by many outstanding women in international arbitration both in Russia and abroad. Some of them we have already interviewed; with others, we look forward to collaborating in the future.

But in fact, every woman who decides to dedicate her life to international arbitration and show her best professional skills is a source of inspiration for us!

ARBITRATION IN THE COVID-19 ERA:

VIRTUAL HEARINGS

In the early days of the new coronavirus pandemic it seemed that the measures aimed at a partial shift towards online arbitration would only be temporary. Almost a year later, however, these "temporary" measures have practically become a part of our everyday routine, as well as the subject of all sorts of studies. Thus, the previous issue of Modern Arbitration: LIVE News Journal analyzed the advice of the leading global arbitral institutions on holding online hearings. Since then, the practice of such virtual hearings has only expanded, and the interest in virtual hearings significantly increased.

CASE LAW

The Singapore Court Explains the Right to Present One's Case

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In *China Machine New Energy Corp v Jaguar Energy Guatemala LLC*, the claimant sought to set aside an arbitral award on the basis of a breach of its due process rights. The claimant relied on the arbitral tribunal's orders that allegedly caused it to lose preparation time and the possibility to meaningfully review the evidence in order to file the key documents on time.

The Court found that the right to present one's case under Article 18 of the UNCITRAL Model Law was not an unlimited one. The right of the parties to be heard may be limited out of considerations of reasonableness and fairness. The Court also noted that the conduct and orders of an arbitral tribunal should be assessed while taking into account the arbitrator's awareness of the purported unfairness that a party invoked. Furthermore, the injured party cannot complain that its rights had been violated after the award has been rendered, but must make it known during the arbitration and try to have the dispute suspended until the perceived violation is rectified. Additionally, the Court opined that the alleged violation should have caused real injury to the party in question.

The position of the Singapore Court of Appeal described above leads one to a conclusion that an arbitrator may decide to hold the hearings online despite a party's wishes, if, for instance, he/she believes that the objecting party has the relevant equipment and preparation time. Moreover, if no difficulties arise during the virtual hearing, this party will later have a tougher time invoking the online procedure as a ground for setting aside the resulting award.

The Egyptian Court of Cassation Affirms Arbitration-Friendly Principles and Trends

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The Egyptian Court of Cassation has ruled that arbitration is gradually moving away from traditional notions, especially in terms of such principles as the "'seat/place of arbitration" / "geographical venue" of arbitration. In its judgment, the Court also expressly acknowledged that "virtual hearings" are increasingly used in arbitrations across the globe.

The Court has for the first time referred to "virtual hearings" (and in English, too) in its decision. Effectively, the Court allowed holding oral hearings online, although the Egyptian law neither expressly prohibits, nor expressly permits virtual hearings. This position of the Court is ground-breaking.

The Austrian Supreme Court Holds That a Virtual Hearing Does Not Breach the Rights of the Party That Does Not Want to Join Online

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The Austrian Supreme Court has considered the topical issue of permissibility of virtual hearings in a case on a challenge filed by the respondents against an allegedly not impartial and independent arbitrator who ordered an oral hearing online over the party's objections. The Supreme Court rejected the respondents' argument that such an order was, in itself, tantamount to an unfair process, which could raise doubts as to the arbitrator's impartiality.

The Supreme Court held that appointment of a virtual hearing against the will of one of the parties is not inconsistent with Article 6 of the European Convention on Human Rights; is permissible and compatible with the principle of fair trial under Section 594(2) of the Austrian Code of Civil Procedure (Zivilprozessordnung). This principle not only guarantees the parties' right to be heard, but also their access to justice and, consequently, effective legal remedies. The Court also observed that in light of the COVID-19 pandemic, online hearings facilitated an organic balance of both aspects of this due process guarantee.

DISCUSSIONS IN THE PROFESSIONAL COMMUNITY

Maxi Scherer (WilmerHale & Queen Mary University of London) Discusses the Advantages and Disadvantages of "Asynchronous" Hearings

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Maxi Scherer has described the new concept of "asynchronous" hearings, that is, pre-recorded videos of the representatives of the parties where they are presenting their case. An "asynchronous" hearing, Maxi Scherer says, has both undeniable advantages (the opportunity to listen to the positions of the parties an unlimited number of times, as well as to record in any place and at any time), and inherent drawbacks, such as, for instance, the impossibility of asking questions on the spot, no live communication or reactions.

Mohamed Abdel Wahab Draws a Decision-Making Checklist for Online Hearings

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In one of the issues of the GAR, Mohamed Abdel Wahab has given practical advice on situations where domestic rules expressly provide for in-person hearings; where rules allow using modern technologies; and where rules are silent on or only partially regulate this issue.

Mohamed has developed a chart designed to guide an arbitrator in a jurisdiction unfamiliar to the tribunal. Thus, the first point describes a situation where domestic rules expressly prohibit virtual hearings. If an arbitrator decides to hold the hearings online in such conditions, failing to get the parties' consent, the risk of the award being annulled will be high. If the legislation contains no provisions on the possibility of online (virtual) hearings, Mohamed suggests analyzing the nature of the domestic rules on oral hearings (whether it is prohibitive or permissive), the powers of the tribunal, as well as taking into account the procedural principles, such as the right of the parties to present their case and, of course, considering the will of the parties themselves.

Prominent Specialists in Arbitration Discuss the Pros and Cons of Virtual Hearings at the SIAC Congress

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The SIAC Congress, held online in 2020, featured debates on the topic "This House believes that Virtual Hearings are just as effective as In-Person Hearings." The discussions involved some of the illustrious experts in arbitration: Gary Born, Joy Tan, John P. Bank, Rob Palmer; the debate was moderated by Edmund J. Kronenburg.

In the first round of arguments, Joy Tan named the following benefits of virtual hearings: costs and time efficacy; increased participation and access to justice; increased use of electronic documents; and, importantly, the reduction in environmental externalities. In response, John P. Bang raised doubts as to the efficiency of virtual hearings, pointing at the fact that adequate high-speed internet connection is not always or globally available. He added that video-conference fatigue would also exacerbate time zone differences and potentially render unacceptable lengthy and intense cross-examination sessions.

In the second round of arguments, Gary Born offered an example of the work of arbitral institutions and national courts, now currently holding hearings online, as well as noted a great number of published guidelines and protocols describing the nuts, bolts and technicalities of virtual hearings. In response, Rob Palmer observed that he did not believe virtual hearings to be as efficient as in-person hearings. The impossibility of ensuring full confidentiality in light of the use of technologies, especially in arbitrations involving states, was emphasized as one of the key issues of online hearings.

After a series of rebuttals and a Q&A session, 54 % of viewers expressed their preference for in-person hearings. Despite this outcome of the voting, however, the arbitral community will obviously continue adapting to the developments of the day.

ONLINE SYSTEM OF ARBITRATION OF THE RUSSIAN ARBITRATION CENTER

The Best Solution to Automatize Legal Functions

The Online System of Arbitration created by the Russian Arbitration Center won the first prize at 2017 Skolkovo LegalTech Leader Competition.

Entire Arbitration Online

In case of expedited arbitration the entire process from filing a claim to adoption of an arbitral award could be carried out through the Online System.

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The Online System provides its users with fast and convenient opportunity to commence arbitration, follow the process online and at any time download documents as well as from mobile devices.

DISPUTE RESOLUTION IN THE DIGITAL ERA

A LOOK AT THE WESTERN BORDERS: KALININGRAD AS A PROMISING SEAT OF DISPUTE RESOLUTION

As we know, arbitration in Russia today is concentrated around five arbitral institutions entitled to administer disputes based on their status as permanent arbitral institutions (PAIs).

Such institutions are instructed to perform a special role – to promote and popularize arbitration in the regions both by holding educational events and expanding their own presence. It was to this end that in September 2020 the Russian Institute of Modern Arbitration arranged a business meeting on "Private Law and Arbitration" in Kaliningrad – Russia's westernmost region – bringing together Russia's and the region's leading specialists in arbitration and private law.

The choice in favor of Kaliningrad is not accidental – this is a Russian region that enjoys the status of a special economic zone, attracting Russian and foreign companies. This is achieved, among other things, through the status of the Oktyabrsky Island, part of the region, as a special administrative region (SAR) that offers a number of benefits to businesses.

This section deals with the issues and specifics of development of Russia's regions in the context of alternative dispute resolution and other legal institutes. Vadim Egulemov will present his view of the development of arbitration and Kaliningrad's potential in this sphere, while Dina Iskanderova will discuss the complex corporate institute of redomiciliation of foreign companies into special administrative regions (SARs).

Expert commentaries

Vadim Egulemov

Branch Manager (Kaliningrad), Senior Partner, Attorney at Law, LOYS*

1 Are Kaliningrad's proximity to Europe and its position as Russia's exclave relevant to the region's economic development and, accordingly, to the choice of particular means of dispute resolution by representatives of regional businesses?

Absolutely, the Kaliningrad Region's unique geographical position affects the nature of the emerging economic ties of the area. This manifests in the active development of foreign economic relations with neighboring states, as well as in the formation of cooperation between the representatives of the regional business community and foreign partners.

In general, to efficiently resolve their disputes arising both within the region and in their relations with foreign partners, the representatives of regional businesses resort to such alternative means as arbitration. In my opinion, the possibility of arbitrating any "differences" that arise in the territory of the Kaliningrad Region is a factor increasing the region's investment appeal for foreign companies.

2 Is arbitration a popular dispute resolution method as compared to state courts? Which of the two would you recommend to your clients?

At present, alternative methods of dispute resolution, including arbitral proceedings, are becoming increasingly important. When choosing the best instrument to resolve the controversy at hand, one must take account of a multitude of factors in each specific case, since the outcome depends on it. If the dispute is arbitrable and such aspects as keeping the dispute resolution confidential; quicker consideration of the dispute as compared to state courts; the possibility of choosing an independent arbitrator with deep expertise in the areas of law and business directly relevant to the relations at issue; the possibility of choosing the place where the dispute will be heard, are all material to the client, I would advise them to consider arbitration.

3 Which categories of disputes are the most common in the region?

For the Kaliningrad Region, the most common are the disputes related to improper performance of obligations on international supplies and generally the disputes concerning violations of the procedure for performing contract terms involving a foreign element. Arbitration is also preferred where the relations at issue are governed by foreign law, which requires special knowledge in that sphere from an arbitrator.

4 What do you think of the efficiency of Russia's recent arbitration reform in view of the reduction of the number of arbitral institutions and, consequently, their presence in the Russian regions?

The key objectives of the arbitration reform were to raise the level of authority of arbitral tribunals in the society; to improve the quality of dispute resolution by arbitral tribunals; to inspire trust in the society that their awards are just and valid.

One of the results of the reform was a significant decrease in the number of arbitral institutions active in Russia, an outcome that received an arguable welcome in the legal community.

On the one hand, the reduction of the number of arbitral tribunals came as a logical response to the law's raising of standards that arbitration must meet, which allowed to form a highly qualified institute of arbitration, trusted by Russian and foreign companies, as well as by public authorities.

On the other hand, a dramatic reduction in the number of arbitral institutions, especially regionally, has created limitations in terms of access to arbitration. The currently existing permanent arbitral institutions in Moscow (and their few branches in some of the regions) are evidently not enough for such a large country as Russia; hence, in the majority of Russian regions, there is no possibility to choose an arbitral institution, making this dispute resolution method less accessible, for instance, for the representatives of regional medium-sized businesses.

5 What measures, including legislative, would you say could help develop regional arbitration?

In my opinion, the rate at which regional arbitration will develop depends not only on legislative measures taken to that end, but also on increasing the level of the society's trust for arbitral tribunals, raising the overall level of legal culture among the representatives of the business community as regards their awareness of the possibility of resolving disputes other than in state courts, reinforcing arbitration's authority as a means to resolve controversies and achieve a well-founded and just award, as alternative to state courts.

6 Do you believe Kaliningrad to be a promising seat for dispute resolution? Are there any factors already in place that may serve to reinforce arbitration in the region? Who, in your opinion, could become the "champion" of such progress in Kaliningrad's professional community?

The Kaliningrad Region is important in supporting Russia's foreign economic ties and building stable economic relations with foreign business partners, which, I think, makes Kaliningrad indeed a promising place for developing the

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Russian institute of arbitration. Be it as it may, the representatives of the regional business community will have a good alternative to the system of state courts for resolving their disputes that are inevitable in foreign trade operations.

In the future, for the Kaliningrad Region, reinforcing the role of arbitration may become possible once the representatives of regional businesses, foreign companies, legal practitioners, the Chamber of Advocates and the Chamber of Commerce and Industry of the Kaliningrad Region become actively involved in it.

7 Should permanent arbitral institutions (PAIs) expand their outreach to the regions, rather than function solely in Moscow? Would you say that there is something preventing that?

In my view, it is precisely through expanding the arbitral institutions' presence in the regions that a new, highly efficient institute of arbitration in Russia can indeed be built, as the reform initially intended. A hurdle to the quick emergence of arbitral institutions in the regions may be the complexity of the very procedure for obtaining the right to function as a permanent arbitral institution, as well as that for some candidates the statutory eligibility requirements are difficult to meet.

Moreover, it is of no small importance for the development of regional arbitration for the level of economic activity of each separate region to grow, as it also affects the needs of the representatives of the business community for alternative dispute resolution.

8 Can you name any other Russian regions potentially of interest for users of dispute resolution?

As the authority of arbitral institutions has increased, regional arbitration may currently hold serious potential for development in territorial entities with a high rate of economic activity, bordering on foreign countries and enjoying foreign economic ties with foreign business partners. Another significant factor for foreign companies in dealing with Russian organizations is the possibility of solving any arising difficulties by arbitration, having the opportunity to appoint an arbitrator and enjoy all the benefits of this dispute resolution method. Thus, for instance, I could see prospects of such development in the regions that belong to the Far Eastern Federal District.

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1 What does the notion of redomiciliation cover?

Redomiciliation is one of the ways to resolve the issue of corporate mobility (along with cross-border mergers and acquisitions and other mechanisms) that consists in relocating the company's place of registration from one jurisdiction to another and thus changing the company's personal statute while maintaining its uninterrupted legal existence.

2 What are, in your opinion, the most common reasons for redomiciliation into Russia?

The reasons for redomiciliation vary and depend on specific objectives that the business poses in each case. Such reasons may, among others, include the need to optimize the governance structure and/or cut the costs related to keeping a foreign presence, as well as the attractiveness of the regime of special administrative regions (SARs).

3 On what grounds can a company be redomiciled and what requirements will it have to meet under the Russian law?

The principal requirements to be met for a successful redomiciliation into Russia are: (i) the status of a commercial corporate entity (for example, private companies limited by shares); (ii) a decision to redomicile made under the rules of the jurisdiction where the company is originally registered; (iii) doing business in the territory of several states, including in the Russian territory; (iv) filing an application to execute an agreement to do business as a participant of a SAR; (v) an undertaking to invest in the Russian territory (for example, to contribute to the charter capitals of Russian companies) in the amount of at least RUB 50 million; and (vi) registration in a state that is a member or an observer at the Financial Action Task Force (FATF) and/or Moneyval (for instance, Cyprus).

In 2020, Russia has drafted a series of bills suggesting, among other things, permitting redomiciliation into Russia for foreign companies that are not active in Russia and have no investments into Russian assets; defining the procedure for "transit" redomiciliation *via* intermediary jurisdictions; as well as extending the list of countries that may be re-registered into Russia. At the time of this commentary, the relevant amendments are yet to be enacted.

4 What, do you think, is the reason behind the requirement to redomicile companies into special administrative regions (SARs)?

I believe that this requirement is dictated by the need to protect the participants of civil dealings in view of the special status of international companies (as one of the reasons).

5 What flaws and distinctive characteristics do you see in the Russian laws on redomiciliation as compared to other jurisdictions? How, in your opinion, could such flaws be eliminated?

The practice of redomiciliation into Russia is undergoing its earliest stage, and it appears impossible to give any evaluation to the Russian laws at this moment.

6 What do you think of the prospects of redomiciliation into Russia?

So far, over 30 companies (including several public ones) have successfully redomiciled into Russia, and more and more companies are considering it.

7 What should companies especially look out for during redomiciliation?

Redomiciliation is a multi-stage and multi-faceted process that requires thorough planning, including as regards the rules of the foreign jurisdiction from which the company is being reregistered into Russia; liaising with the company's creditors (for instance, due diligence of documents for any signs of events of default or adverse material changes); disclosure of documents in various jurisdictions if the company's financial instruments are listed; deciding on the law to govern the relations of the company's participants after registration in Russia; as well as a number of other questions.

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