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MODERN ARBITRATION LIVE

NEWS JOURNAL

HIGHLIGHTS OF ALTERNATIVE DISPUTE RESOLUTION

The first 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 first half of 2020. Modern Arbitration: LIVE News Journal includes an overview 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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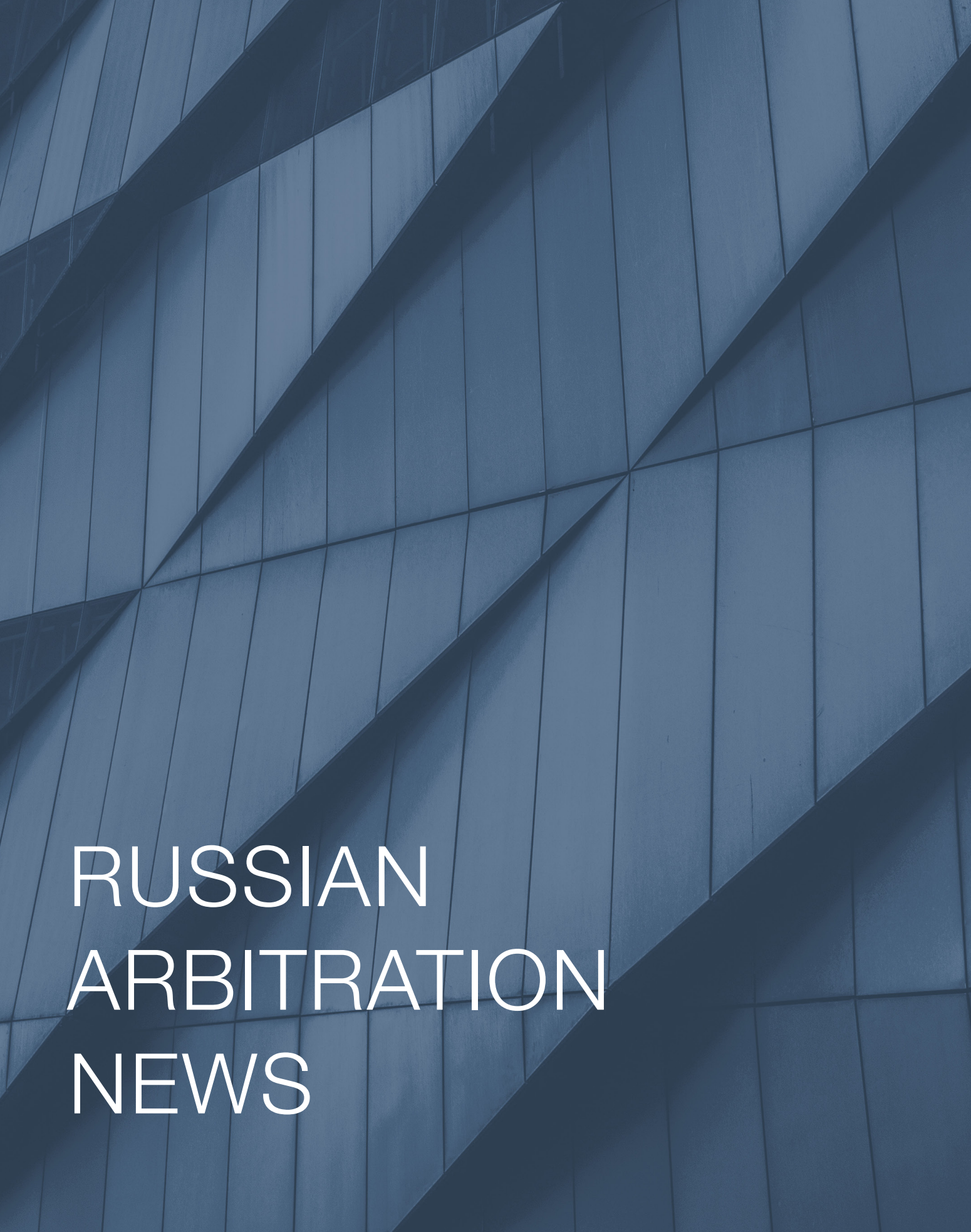

RUSSIAN ARBITRATION NEWS

The State Duma adopts a draft law on arbitrators' liability for corruption in the first reading more

By ratifying the Council of Europe Criminal Law Convention on Corruption of 27 January 1999, the Russian Federation undertook to bring its national legislation in line with its provisions.

Thus, on 26 March 2020, draft amendments to the Russian Criminal Code and Criminal Procedure Code were submitted to the State Duma, proposing criminal responsibility for bribing arbitrators and the unlawful receipt of bribes by arbitrators. As follows from the explanatory note to the draft, "Additional Protocol to the Convention and the GRECO recommendations[1] …prescribe unequivocal criminalization of bribery of national and foreign arbitrators."

Notably, the draft law's suggested punishment for bribing an arbitrator is lower than the Criminal Code's Article 291 sanction for bribing an official. Thus, bribing an arbitrator may be punished by a fine of up to RUB 400,000, restriction of liberty or imprisonment for up to two years or corrective labour for the same period. For arbitrators, the unlawful receipt of money and other valuables also entails a punishment: a fine of up to RUB 700,000 or imprisonment of up to three years.

The Supreme Court's Judicial Chamber on Economic Disputes decided on the arbitrability of a dispute arising from a major transaction made without the necessary approval more

In 2012, RZD's subsidiary RailTransAuto signed a contract with the Finnish company Škoda Transtech Oy for EUR 71.8 million, which accounted for 62.3% of the balance sheet value of its assets. The dispute that later arose between the parties was examined by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (the ICAC at the RF CCI) that granted Škoda's claim to recover EUR 3.7 million. RailTransAuto requested the Moscow Arbitrazh (Commercial) Court to set the award aside due to the non-arbitrability of the dispute, use of budget funds, and execution of a major transaction without the necessary approval. After RailTransAuto's claims were granted by two levels of courts, Škoda applied to the Supreme Court.

[1] The Group of States Against Corruption (GRECO) is an international organisation created by the Council of Europe in 1999. Its key objective is to help member states combat corruption. The GRECO sets forth anti-bribery standards (requirements) for states and controls compliance with such standards in practice. Russia has been a GRECO member from 1 February 2007.

The Supreme Court disagreed with the conclusions of the courts of first and appellate instances to the effect that the ICAC award was contrary to public policy: it opined that contracts complied with the Law "On Procurement of Goods, Works, and Services by Certain Types of Legal Entities" did not automatically make disputes non-arbitrable; moreover, RailTransAuto provided no proof of embezzling budget funds. The Supreme Court also dismissed the argument that the award was unlawful as the dispute arose from a major transaction that failed to obtain approval of the shareholders, required by the Law on Limited Liability Companies and Law on Joint Stock Companies. It noted that the claimant had not made this argument during the arbitration and failed to produce any evidence confirming that the contract had been challenged as a major transaction. Thus, on 19 February 2020, the Supreme Court's Judicial Chamber on Economic Disputes referred the case on setting aside of the ICAC award for a new trial to the Moscow Arbitrazh (Commercial) Court.

Nevertheless, on 28 August 2020, after retrying the case, the Moscow Arbitrazh (Commercial) Court still annulled the ICAC award, since "the arbitral tribunal violated the principles of adversarial proceedings and proper assessment of evidence in examining the respondent's arguments on the existence of force majeure circumstances in the performance of the contract at issue, as well as incorrectly interpreted the civil-law institutes of synallagmatic (reciprocal) obligations and liability for failure to perform obligations."

In a new review of court practice, the Supreme Court confirmed the impermissibility of arbitration by foreign PAIs under the guise of *ad hoc* arbitration more

The company applied to the Arbitrazh (Commercial) Court of the Kemerovo Region for a writ of execution to enforce an award issued by an *ad hoc* arbitrator of the Helsinki International Commercial Arbitration (HICA).

The ruling of the Arbitrazh (Commercial) Commercial Court of the Kemerovo Region, upheld by the Resolution of the Arbitrazh (Commercial) Court for the West-Siberian District, granted the application.

The Supreme Court's Judicial Chamber on Economic Disputes reversed the decisions of lower courts and refused to issue a writ of execution, having found that the arbitral tribunal had tried to circumvent the law by attempting to administer an arbitration in the territory of the Russian Federation without obtaining the Permanent Arbitral Institution (PAI) status granted by the Ministry of Justice. Among the criteria evidencing the fact that HICA was in fact administering arbitration the Supreme Court named the following:

1. Decisions on procedural matters were rendered by the chairman of HICA;
2. Procedural documents were sent to the address recommended in the model clause of HICA;
3. The case files were stored at the HICA.

Furthermore, the Judicial Chamber established that the HICA is not a foreign arbitral institution and that the arbitration was administered in the Russian Federation (thus, the statement of claim was filed at an address in the Russian Federation, the arbitrator was appointed in Moscow, and the award contains a reference to the Federal Law "On Arbitration (Arbitral Proceedings) in the Russian Federation").

Entry into force of the Federal Law "On Protection and Promotion of Investments in the Russian Federation" more

The Law is aimed at creating "predictable and favourable conditions" for doing business and therefore accords a number of preferences to the organisations implementing investment projects.

The Federal Law in question introduces a special investment regime for the parties that entered into an agreement for the protection and promotion of investments (APPI). The APPI investment regime allows for receiving a number of benefits. In particular, the organisations implementing investment projects will be able to benefit from a stabilisation clause that prohibits applying statutory provisions that worsen the conditions for business, as well as from support measures for the compensation of the costs incurred with a view to create or modernise infrastructure facilities. An APPI may be executed by filing the relevant application with the competent authorities or by tendering a public project proposal.

The Standard form of APPI and the Rules governing the conclusion, amendment, termination of agreements is approved by the Russian Government.

APPI-based disputes may be resolved by arbitration administered by PAIs. To resort to such an arbitration, the parties to an APPI must include therein the relevant arbitration clause. At present, such disputes may be resolved at the Russian Arbitration Center, the International Commercial Arbitration Court, the Arbitration Centre at the Russian Union of Industrialists and Entrepreneurs, as well as the HKIAC and VIAC.

AMENDMENTS TO THE COMMERCIAL PROCEDURE CODE OF THE RUSSIAN FEDERATION AS A POTENTIAL IMPETUS FOR FURTHER DEVELOPMENT OF RUSSIAN ARBITRATION

Authors: Valeria Butyrina, Alina Shirinyants

On 19 June 2020, the Federal Law amending the Commercial Procedure Code of the Russian Federation entered into force, supplementing the Code with new Articles 248.1 and 248.2. Among other things, the amendments establish exclusive jurisdiction of the Russian arbitrazh (commercial) courts over disputes involving sanctioned persons. As follows from the explanatory note to the draft Federal Law, these new rules are aimed at establishing the guarantees for the rights and legitimate interests of certain categories of Russian individuals and legal entities, sanctioned by foreign states. The Law was intends to protect the rights of such persons to a full-fledged trial.

Thus, the Russian arbitrazh (commercial) courts exercise exclusive jurisdiction over:

- *disputes involving sanctioned persons (Russian individuals and legal entities, as well as foreign legal entities, if they face restrictions due to the sanctions introduced against Russian persons or entities);*
- *disputes concerning sanctions introduced with respect to Russian individuals and legal entities.*

Within the meaning of Article 248.1, the rules on exclusive jurisdiction of Russian courts will not apply where an international treaty provides otherwise, as well as where the parties made an agreement referring their disputes to a foreign court or international commercial arbitration outside of the Russian territory. At the same time, if an agreement on the choice of court or an arbitration agreement become inoperable when a sanctioned person has hurdles in access to justice, the dispute may be referred to a Russian arbitrazh (commercial) court. This is possible, provided that no dispute between the same parties, concerning the same subject matter and circumstances has been initiated in a foreign court or international commercial arbitration. When applying to a Russian arbitrazh (commercial) court, the interested party will need to show why arbitration or prorogation agreement cannot be performed. We believe that impediments precluding access to justice may include a rather wide range of circumstances, in particular, the impossibility of payment of fees and state duties for dispute resolution, complications in appointing arbitrators or electing counsel due to the sanctions introduced with respect to a person, or a prohibition of granting claims related to transactions providing for performance that was affected by sanctions, if filed by a sanctioned person or on his/her/its behalf.

Thus, in one of the recent cases the claimant filed an application, requesting to find invalid and inoperable the SCC arbitration clause. The claimant argued that due to the fact that he was included in the sanctions list he was not able to pay arbitration fees and appoint an attorney that would present his case. Although the courts of the first and appellate instance rejected the application, the cassation court found the reasoning convincing and referred the case to a new trial.[2]

Notably, the provisions of Article 248.1 of the Commercial Procedure Code do not explain what the legislator means by "international commercial arbitration outside of the Russian Federation." This term may include:

- *arbitration administered by a foreign arbitral institution (potentially even accredited for administering disputes in Russia);*
- *arbitration with a seat outside of the Russian Federation (in this case, the dispute may be administered by a Russian arbitral institution or resolved in an ad hoc arbitration).*

In view of the above, execution of arbitration agreements providing for the seat of arbitration located abroad or for administration of the dispute by a foreign arbitral institution may potentially result in the dispute ending up before a different forum than initially agreed. Referring disputes to Russian arbitration may be a possible way to remove that risk.

Another novelty is the introduction of antisuit injunctions, a new institute for the Russian law.

Article 248.2 of the Russian Commercial Procedure Code provides that the parties facing a foreign litigation or international commercial arbitration initiated (or intended) outside of the Russian Federation may apply to an arbitrazh (commercial) court of a constituent entity of the Russian Federation for an injunction on initiating or continuing such a litigation or arbitration. The application must set out the circumstances demonstrating the exclusive jurisdiction of Russian courts and must enclose documents confirming the intention to initiate or the initiation of such a litigation or arbitration. As discussed above, such circumstances may include the unenforceability of the agreement whereby the parties opted for referring their disputes to the jurisdiction of foreign courts or international commercial arbitration outside of the Russian Federation. Violation of such antisuit injunctions may lead to the arbitrazh (commercial) court awarding the amount to be recovered from the party failed to comply with injunction. Notably, the fact that the above disputes fall under the exclusive jurisdiction of Russian state courts does not preclude recognition and enforcement of a foreign judgment or arbitral award in Russia, if the sanctioned person did not object

[2] Resolution of Arbitrazh (Commercial) court for the Ural District of 06 July 2020 in case № A60-62910/2018.

the jurisdiction or did not apply for antisuit injunction. If the person facing foreign litigation or arbitration outside of the Russian Federation was objecting the jurisdiction of relevant forum, it may be difficult to enforce the resulting judgment or award in Russia.

Interestingly, even before the recent amendments to the Commercial Procedure Code, there had been precedents of disputes being taken from international arbitration into the Russian courts.

Thus, the Russian company Instar Logistics LLC included on the US sanctions list (the SDN List) demanded amending the terms of the agreement that provided for arbitration of disputes under the English law and in accordance with the ICC Arbitration Rules. The Moscow Commercial Court granted Instar Logistics LLC's claims, relying on the fundamental change of circumstances. The court excluded the application of the terms on the applicable law, procedure and forum for the resolution of disputes and supplemented the agreement with provisions on the referral of disputes to a Russian commercial court in the location to be determined in accordance with the Commercial Procedure Code.[3]

Given that the new rules do not apply to Russian arbitrations, to minimise the risks of their selected dispute resolution method being changed, as well as the potential issues related to enforcing the resulting judgments or awards, the persons in the "risk group" or already sanctioned may potentially refer disputes to Russian arbitral institutions instead.

This step will allow retaining the quality of dispute resolution, as well as ensure the confidentiality of arbitration, which can become a significant advantage for the parties that have fallen or may fall under sanctions.

[3] The Commercial Court for the Moscow District has upheld the position of the Moscow Commercial Court in its Resolution of 6 July 2020 in case No. A40-149566/2019.

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SPORTS ARBITRATION NEWS

Russian athletes in sports arbitration

On 23 April, the Court of Arbitration for Sport (CAS) held hearings on the appeals filed by the Russian bobsledders disqualified for anti-doping rule violations at the 2014 Winter Olympics Alexander Zubkov, Alexander Kasyanov, Ilvir Khuzin and Alexei Pushkarev, by videoconference. The IOC Disciplinary commission annulled their results at the 2014 Winter Olympics in Sochi, and the athletes themselves were banned from any participation in the Olympics. The CAS award is not rendered yet.

Moreover, in February 2020, the CAS partially upheld an appeal filed by the Russian race walker Alexander Ivanov against the Russian Anti-Doping Agency (RUSADA) with respect to a decision issued by the RUSADA Anti-Doping Committee in October 2018. The period of ineligibility was reduced from three to two years beginning from 2 May 2017, and all the competition results achieved from 9 July 2012 through 17 August 2014 were annulled with all the ensuing consequences.

Furthermore, the CAS is arbitrating a dispute between the World Anti-Doping Agency (WADA) and the RUSADA. The CAS procedure was initiated by WADA after RUSADA refused to accept the conclusions of the WADA Compliance Review Committee, adopted by the WADA Executive Committee on 9 December 2019.

Labour disputes of professional athletes became arbitrable more

31 July 2020 marked the enactment of the Federal Law amending the Federal Law "On Physical Culture and Sport in the Russian Federation" and the Civil Procedure Code, and the Federal Law amending the Labour Code of the Russian Federation.

These laws have excluded individual labour disputes of athletes and coaches in professional sports and high-performance sports from the list of non-arbitrable disputes found in Article 22.1 of the Russian Civil Procedure Code. From now on, such disputes may be referred (apart from labour dispute commissions and courts) to arbitration administered by the PAI. The rules for arbitration of such individual labour sports must be approved by the non-profit organisation at which the relevant PAI operates upon consultations with the trade union of workers in physical culture and sports.

Our experts will tell more about amendments.

EXPERT COMMENTARIES

Natalia Kisliakova, Senior Associate, KIAP, Attorneys at Law

1 What do the amendments concern and how materially do they alter the existing dispute resolution procedure?

Two legislative acts were adopted, namely:

- Federal Law No. 245-FZ dated 31 July 2020 "On Amending the Federal Law 'On Physical Culture and Sport in the Russian Federation' and Articles 3 and 22-1 of the Civil Procedure Code of the Russian Federation"; and
- Federal Law No. 246-FZ dated 31 July 2020 "On Amending the Labour Code of the Russian Federation with Regard to Referral of Individual Labour Disputes of Athletes, Coaches in Professional and High-Performance Sports to Arbitration."

The amendments concern the procedure for dealing with individual labour disputes in the domestic sports arbitration that has a PAI status, namely, before the National Centre for Sports Arbitration (the "NCSA"). The laws have also stipulated the requirements for arbitrators; removed the previously existing inconsistencies between different legal acts and elaborated some of the nuances of resolving sports disputes.

2 What, in your opinion, triggered these changes in the legislation?

For a long time, even the very issue of arbitrability of individual labour disputes was debatable. Then, in 2016, the amendments that entered into force in 2017 were introduced into the Law "On Physical Culture and Sport in the Russian Federation". However, the Russian Labour Code and Civil Procedure Code remained inconsistent with them.

This lack of consistency across the legal acts was repeatedly noted by my colleagues both from the Ministry of Sport and those interested in the problem (it was described in great detail in 2018 by M.A. Adrianova and A.I. Muranov in their article "The Problem of Arbitrability of Individual Labour Disputes in the Sphere of Professional Sports and High-Performance Sports: a Possible Inconsistency between the Federal Law "On Physical Culture and Sport in the Russian Federation," the Russian CPC and Labour Code").

This was even noted by the Supreme Court in late 2019, when it specified that a federal law may provide for exceptions from the list of disputes that are not subject to arbitration under the rules of Article 221(2) of the Russian Civil Procedure Code, Article 33(2) of the Russian Arbitrazh (Commercial) Procedure Code, citing individual labour disputes as an example (Resolution of the Plenum of the Supreme Court of the Russian Federation No. 53 of 10 December 2019, Moscow, para. 17).

Now this inconsistency has at last been removed at the level of the Civil Procedure and Labour Codes.

3 Which disputes may now be referred to arbitration?

The categories of disputes in professional sports and high achievement sports that may be heard in the course of arbitration are set forth in Art. 36.3 Law of the Federal Law "On Physical Culture and Sport in the Russian Federation," and include a rather extensive list.

Yet, as already noted, in effect, the arbitrability of individual labour disputes emerged much earlier, with the amendments to the Federal Law "On Physical Culture and Sport in the Russian Federation" three years ago. Now, the rules of the Civil Procedure Code have been finally made consistent and unified with those amendments.

A much more interesting and acute issue is the issue of the conflict of jurisdiction for world-class athletes: it is very likely that some categories of disputes will simultaneously fall under the clauses on dispute resolution before the NCSA and the Court of Arbitration for Sport in Lausanne (CAS), since the competence of the latter may follow from the regulations and other by-laws of international sports federations. Moreover, applications for participation in global sport events usually contain a clause that establishes precisely the jurisdiction of the CAS.

4 What are the specifics of executing arbitration agreements for the disputes arising in professional sports and individual disputes? Does the approach of the Russian legislator correspond to the global practice?

Arbitration agreements in sports may generally exist both in the form of a classic agreement and in the form of a reference to a provision in a charter or regulation of the relevant legal entity.

Art. 36.2(4) of the Federal Law "On Physical Culture and Sport in the Russian Federation" provides that:

A dispute arising in professional sports or high-performance sports may be referred to arbitration if there is an arbitration agreement made in writing in accordance with the requirements of the legislation on arbitration (arbitral proceedings). An arbitration agreement, except for arbitration agreements on the resolution of individual labour disputes, ***is also deemed executed if it is included in the norms approved by a Russian national sports federation or a professional sports league, other sports events organisations and setting forth the rights and obligations of the subjects of physical culture and sport in professional sports and high-performance sports; in the***

rules (regulations) of sports events with the participation of the said subjects; in the charter of a Russian national sports federation or a professional sports league; and there is a written consent of the said subjects, expressed in applications, entry forms, application forms and other documents evidencing their intention to proceed from the arbitration agreement.

This corresponds to the global practice, and the clauses on arbitration before the Court of Arbitration for Sport in Lausanne may exist in the same form but the issue of express intention in these conditions remains relevant and open to debate.

5 May there be complications in including an arbitration agreement in the rules approved by a Russian national sports federation or a professional sports league, other sports events organisations; in the rules (regulations) of sports events; in the charter of a Russian national sports federation or a professional sports league? Should the consent to arbitration in that case be express and specific, or would a general consent to the provisions of the document containing the arbitration agreement suffice?

This is a rather debatable question and it is controversial not only in Russia but in the whole world. Speaking about consent to arbitration, one must mention that many types of arbitration are compulsory. Sports arbitration is usually listed among such types of compulsory arbitration, hence execution of arbitration clauses by reference, where the form of consent remains questionable, is very common in sports arbitration.

It should be noted that in the global practice there are judgments and awards where a reference to an arbitration agreement contained in the charter documents of a sports organisation was deemed invalid. Thus, in its Decision of 6 November 2011 No. 4A_358/2009, the Swiss Federal (Supreme) Tribunal held that signing an entry form for participation in an Ice Hockey World Championships did not meet the requirements of Article 178 of the Swiss Federal Act on Private International Law.[4] Then, regarding Decision of the Swiss Federal (Supreme) Tribunal of 25 March 2004 No. 4P_253/2003 in a dispute concerning a coach's labour contract, the CAS acknowledged that it had no jurisdiction to hear that dispute, since the reference in the FIFA by-laws to an arbitration clause was insufficient. Only the subsequent amendment of the FIFA by-laws could affect the issue of competition.[5]

As regards the positive global legal practice concerning the validity of such arbitration agreements, in two landmark cases of the Swiss Federal (Supreme) Tribunal: the *Nagel* case (Decision No. 4C.44/1996 of 31 October 1994) and the *Roberts* case (Decision No. 4P. 230/2000 of 7 February 2001), the Tribunal held that a reference to the document containing the arbitration clause would quite suffice and there was no need to specifically mention that the document being referred to contained an arbitration agreement.[6] The Tribunal arrived at a similar conclusion in its Decision of 9 January 2009 No. 4A_460/2008, upholding CAS Award No. 2007/A/1370.[7] The Tribunal concluded that the CAS had the necessary jurisdiction, as the Brazilian Football Confederation was a FIFA member and was therefore bound by the FIFA charter and by-laws. The argument that the dispute was a domestic one was not accepted, as the athlete was a FIFA member and had to abide by the FIFA acts. In a similar Decision of 20 January 2010 No. 4A_548/2009,[8] the Tribunal upheld CAS Award No. 2009/A/1881,[9] ruling that although the labour agreement in

[4] Federal Tribunal (Switzerland), Decision of 6 November 2011, 4A_358/2009, §3.2.4., *at* https://www.wada-ama.org/sites/default/files/resources/files/4A_358_2009_Busch_v_WADA_EN.pdf (last accessed on 20 August 2016).

[5] Mavromati D., *Selected issues related to CAS jurisdiction in light of the jurisprudence of the Swiss Supreme Court*, CAS Bulletin 2011/1, pp. 38-39, at: http://www.tas-cas.org/fileadmin/user_upload/Bulletin_1_2011.pdf (last accessed on 5 September 2017).

[6] Cited in Kaufmann-Kohler G., Blaise S. International Arbitration in Switzerland: A Handbook for Practitioners, 2004, p. 102; Mavromati D., *Selected issues related to CAS jurisdiction in light of the jurisprudence of the Swiss Supreme Court*, CAS Bulletin 2011/1, pp. 36-37, at: http://www.tas-cas.org/fileadmin/user_upload/Bulletin_1_2011.pdf (last accessed on 5 September 2017).

[7] Cited in Ramoni C., *Doping: Applicable Regulations in CAS and Football Landmark Cases*, in Wild A. (ed.) T.M.C. Asser Press: The Hague (2012), pp. 145, 159.

[8] Federal Tribunal (Switzerland), Decision of 20 January 2010, 4A_548/2009, *at:* http://www.swissarbitrationdecisions.com/sites/default/files/20%20january%202010%204A%20548%202009.pdf (last accessed on 5 September 2017).

[9] *E. v. FIFA & Al-Ahly Sporting Club*, CAS 2009/A/1881, 2009 http://jurisprudence.tas-cas.org/Shared%20Documents/1881.pdf (last accessed on 5 September 2017).

question did not contain an arbitration clause, the relevant athlete also fell under the international FIFA rules that did contain one.

Therefore, arbitral jurisdiction very frequently follows from the charters and rules of federations, associations and other sports organisations, and that conforms to the global practice of sports arbitration.

At the same time, I can see two problems. The first one concerns the conflict of jurisdiction between the NCSA and the CAS, as world-class athletes will still be bound by the acts of international sports federations. The second one has to do with the lack of the original clause signed by the relevant party. Speaking of the Russian conditions, it is interesting to note that the lack of a written clause can entail certain risks, given the practice of the Russian courts and in particular Ruling of the Supreme Court of the Russian Federation No. 305-ES17-993 of 20 June 2018.[10] In that case, the Court ruled that the lack of originals or duly certified copies of reinsurance agreements signed by the parties, and, accordingly, of the arbitration agreements, violated the public policy in terms of one of its fundamental principles, namely, the right to fair trial. So, there exist prospects of refusal to recognise and enforce an award of a sports arbitration based on the lack of a full-fledged arbitration agreement. But, if one goes back to recent Russian judgments, one could bring a counter-example of case No. A53-3107/2020 – there, a reference in a bill of lading to a charter that, in turn, encompassed standard terms and conditions with an arbitration clause, was found to be sufficient as a valid arbitration agreement with respect to carriage.

6 Should there be a right to agree on a different forum for disputes?

Sports arbitration has always been known for its compulsory nature and lack of alternative (the primarily concerns international sports arbitration).

This lack of alternatives is characteristic of the NCSA, too, although rules for sports-related disputes exist at the ICAC at the Russian CCI as well, and the latter could theoretically compete with the NCSA.

The issue of the lack of alternatives is often raised by my colleagues: if one views arbitration as a means for resolving disputes based on an agreement between the parties, then compulsory arbitration contradicts the very nature of arbitration. This interpretation follows from the UNCITRAL Model Law on International Commercial Arbitration 1985 that provides for the "autonomy of the parties […] [that] allows the parties to select or tailor the rules according to their specific wishes and needs."[11]

The contractual nature of arbitration is not, however, axiomatic, and there are multiple examples from all around the world where a party would have no right to agree on a different forum: thus, compulsory arbitration is common in the US, in particular, in insurance law; compulsory arbitration with no alternatives for a long time existed based on the 1972 Moscow Convention.

Sports arbitration is often criticised for its lack of alternatives and its compulsory character, as many believe that athletes should have the right to choose and participate in the negotiations of the ways of resolving sports-related disputes. However, my colleagues all agree that the lack of alternatives in sports arbitration is due to the need for an expeditious way of resolving disputes in this unique area.

7 What is your opinion: will the amendments result in new arbitration agreements or in relevant changes into the existing agreements on dispute resolution?

The amendments do not change the existing system for the resolution of sports disputes quite so fundamentally, but to execute

[10] Ruling of the Supreme Court of the Russian Federation No. 305-ES17-993 // http://kad.arbitr.ru/PdfDocument/d9ad5ac7-f5a6-4565-99af-63a2993a4e4d/b91fc703-2d28-45c1-bc2e-1728a52f6f38/A40-60583-2016_20180620_Opredelenie.pdf (last accessed on 28 August 2018).

[11] UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, *at* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf (last accessed on 2 October 2016).

new arbitration agreements, one must unequivocally resolve the issue of the conflict of jurisdiction between the NCSA and the CAS: it is likely that the NCSA awards will not be final and it will be possible to appeal many of them to the CAS, while the NCSA will effectively assume some of the functions of the adjudication bodies of the sports federations.

8 Will the amendments lead to the adoption by the existing PAIs of Arbitration Rules for Sport?

The ICAC at the Russian CCI already has rules for the resolution of sports-related disputes. I do not think that other centres enjoying the PAI status (the RSPP, MAC, RAC, HKIAC, VIAC) will adopt new arbitration rules for sports-related disputes, since they are not specialised institutions.

The latest amendments are, most likely, primarily aimed at continuing the reform of the NCSA dispute resolution system, and concern, first and foremost, the national athletes. These amendments may also constitute an attempt to take some of the disputes out of the CAS jurisdiction and to transfer them the national level, as arbitration in Switzerland is not always accessible or feasible. Moreover, it may also be an attempt to take some of the disputes out of the adjudication bodies of the national sports federations and refer them to arbitral tribunals, as the latter will be more independent and impartial than the disciplinary adjudication bodies of the national sports federations.

9 What, do you think, are the prospects of development of sports arbitration in Russia?

Sports arbitration at the Arbitration Chamber for Sport that obtained a PAI status in April 2019 and was renamed into the NCSA is likely to remain an actively functioning arbitral tribunal for sport and will have jurisdiction over some of the disputes where it would be unreasonable to approach the CAS in view of the value of the claim, and the jurisdiction of state courts is excluded.

By analogy with the phenomenon where the disciplinary bodies of the international sports federations delegated some of their functions to the CAS that is now hearing disputes in a new ADD procedure, the same is going to happen in Russia at the national level: it appears that some of the functions will be delegated from the disciplinary adjudication bodies of the national sports federations to the NCSA.

As to labour disputes, here the NCSA will enjoy a doubtless monopoly. At present, however, it is not entirely clear what is to be done with clauses in the charters of international federations, since world-class athletes can also be bound by CAS clauses in terms of their individual labour disputes. Therefore, I believe that the NCSA will primarily focus on national athletes.

EXPERT COMMENTARIES

Mikhail Prokopets, Partner, SILA International Lawyers

1 Do you expect that Russian arbitration will become more appealing to Russian athletes in view of the new rules?

A lot depends on how the entire project will be implemented. Yes, the costs of arbitration will be much lower than in similar foreign arbitrations, but the qualifications of arbitrators and quality of dispute resolution will be the determinant factor.

2 What are the advantages of resolving disputes in Russian? What could the disadvantages be?

The advantages are obvious: enormous cost-cutting (duties, legal fees, interpreters, logistics, even such mundane costs as those related to courier services) and, as a result, the accessibility of arbitration; convenience and clarity of process for a regular Russian athlete.

The quality of dispute resolution could be the only possible disadvantage, and it fully depends on the approach to forming arbitrator lists. If the "selection" is disappointing, arbitration may turn out a joke, where disputes will be "fixed", not solved. In my view, that is the main thing to strive to avoid.

3 Is it justified to allow referring disputes on anti-doping rule violations, sports-related sanctions and individual labour disputes of athletes and coaches only to Russian PAIs (unless the rules of international sports organisations provide otherwise)? What, in your opinion, triggered this rule?

It is crucial to understand here that we are talking about Russian domestic disputes only. In the situations where all parties to a dispute are located in Russia, it would be justified to hear the dispute in this country.

The overwhelming majority of international sports federations, however, mandate resolving the dispute at a certain stage (first instance or appeal) in international arbitration (usually the CAS). I repeat that it is a requirement posed by an international federation to its members, the national associations, and it is to be observed for fear of sanctions. As a result, in practice, for many sports, nothing will change all that dramatically – the disputes will be heard by the national association's bodies and then challenged in international arbitration.

In this context, one cannot help but muse that this rule was aimed at juxtaposing Russian sports arbitration with international sports disputes adjudication bodies in the eyes of the public, which is apparently dictated by the still continuing conflict between the Russian sports and international sports, primarily in the light of doping scandals. In practice, however, the procedure itself will not change in the financially developed sports.

4 Should it be possible to appeal a decision of a Russian arbitral institution?

Being a lawyer, I am always "for" possibilities for appealing the decisions of any first instance adjudication body. That significantly improves the quality of dispute resolution and allows to correct an arbitrator's mistake; after all, all arbitrators make or can make mistakes, and that is normal.

Of course, such an appeal procedure should have a reasonable and clear scope, so that nobody could try and challenge the recognition and enforcement of a hypothetical CAS award in a court of general jurisdiction, because that would discredit the Russian sports and the surrounding business environment.

It is quite another matter that the possibility of appealing Russian awards appears to be very unlikely. Right now, Russian sport actively places itself in opposition to international institutions (primarily, the CAS), and that is the very reason for the emergence of Russian sports arbitration as such. Hence, appeals before the CAS will most likely be unavailable.

If one lets his imagination run wild, though, that issue could be dealt with by instituting another, body, which could serve as an appellate instance in the future for disputes from other countries as well, such as the CIS countries. That could be a very exciting project, but I see no prospects of its implementation even in the long term.

Moreover, if the Russian arbitration acts as an appellate instance for certain categories of disputes (for example, for challenges of decisions issued by Russian national sports federations), further review of cases on the merits (and let me stress that – on the merits!) will be simply illogical. In that view, Russian arbitration will be identical to the CAS, whose awards may be appealed only on procedural grounds and only to the Swiss Federal Tribunal.

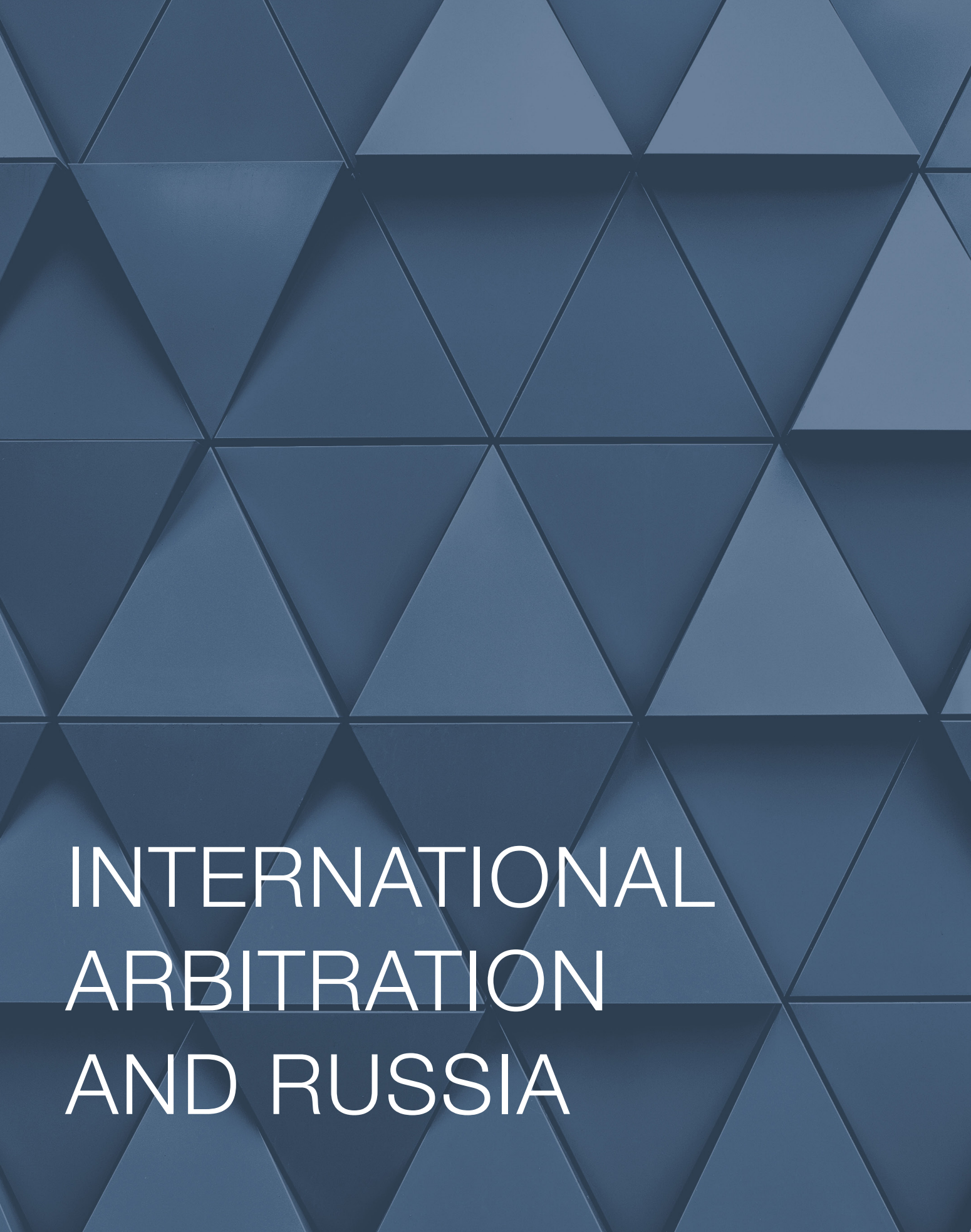
Appealing a sports arbitration award before a state court would make practically no sense – state judges usually lack adequate understanding of the specifics of professional sports (the issues of transfers, sporting schedules, participation in certain events, etc.), which frequently negatively affects the quality of dispute resolution. One must not forget that litigation before a state court often takes months, while many professional sports issues require rather rapid solution (such as club applications for a season, disqualification from competitions and so on).

Furthermore, the arbitral proceedings in principle imply that state courts should not intervene into the merits of the dispute resolved by an arbitral institution, but may only verify the award's consistency with minimum due process guarantees and public policy.

5 What provisions may be potentially introduced into the Russian laws to promote further development of sports arbitration in Russia?

Given that we have just seen the long-awaited amendments introduced into the Labour Code, Civil Procedure Code and the Federal Law "On Physical Culture and Sport in the Russian Federation" that allow athletes to arbitrate their individual labour disputes, I am not anticipating any new rules in this area anytime soon.

Once again, hypothetically, it would possibly simplify and "speed up" the procedure of resolution of individual labour disputes, if the awards of the arbitral institution that resolved then had been given the force of enforcement documents (as the general rule of the Labour Code does for the warrants issued by labour dispute commissions), but the procedure for the issuance of writs of execution for awards is envisaged in Chapter 47 of the Civil Procedure Code and is unlikely to be changed for just a single sphere, that is, professional sports.


INTERNATIONAL
ARBITRATION
AND RUSSIA

Ex-A1 president Khabarov wins USD 58 million from a co-owner of Delovye Linii more

On 21 January 2020, the London Court of International Arbitration (LCIA) ordered that Alexander Bogatikov, a co-owner of transportation and logistics company Delovye Linii, pay USD 58 million to a former co-owner of the company and Bank Trust CEO Mikhail Khabarov. On 6 March, Khabarov's representatives approached the St. Petersburg Commercial Court for enforcement.

It was also reported that in August, a Cyprus company Caledor Consulting Ltd, that Khabarov co-owns with the investment company A1 (sharing 75 % and 25 %, respectively), filed a claim with a Cyprus court to recognise the LCIA award in Cyprus. As a result, a District Court in Cyprus enjoined Alexander Bogatikov from disposing of his assets. The injunction covers the businessman's EUR 2 million Cyprus residences in Nicosia and Paphos.

Gazprom settles Ukrainian disputes with a new transit deal with Naftogaz and loses the SCC clause more

Russia's Gazprom has settled a set of multibillion-dollar disputes before the Stockholm Chamber of Commerce (SCC) with Ukraine's national oil and gas company Naftogaz *(Naftogaz v. Gazprom)*, paying it USD 2.918 billion and withdrawing an investment treaty claim, thus clearing the way for new arrangements for the transit of Russian gas to the European consumers via Ukraine over the next five years. It is reported that both parties decided not to include an SCC arbitration clause in their new gas transit arrangements: from now on, disputes will be arbitrated at the International Chamber of Commerce (ICC) with the seat in Zurich. The contracts, however, will be still governed by the substantive laws of Sweden.

Former YUKOS shareholders succeed in seizing 18 Russian alcohol brands and reinstating the USD 50 billion award more

The Hague Court of Appeal has reinstated three Energy Charter Treaty (ECT) awards for the total of USD 50 billion against Russia in the YUKOS case (*Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227), thereby reversing the Hague District Court's 2016 judgment that had set the awards aside. Apart from that, 18 Sojuzplodoimport brands of national standing were attached in the Benelux countries – these are the vodka brands *Moskovskaya* and *Moskovskaya Osobaya*, *Stolichnaya* and *Na Zdorovye*, as well as Sojuzplodoimport's very own logo.

It was also reported in August that Russia's attempt to persuade the Ontario Superior Court of Justice to examine new materials on the Russian law that were not used in the arbitration in the dispute with the former YUKOS Cyprus shareholder, Luxtona, have been unsuccessful: under Articles 16 and 34 of the UNCITRAL Model Law, the party challenging tribunal's jurisdiction may not submit new materials on matters of law without a prior authorisation and without explaining the value of such materials and why they had not been filed earlier.

New Gazprom arbitration more

On 10 January 2020, Gazprom Export LLC notified ENI S.p.A. of arbitration due to controversies on the interpretation of natural gas supply contracts.

At present, the parties are engaged in negotiations on the candidate for president of the arbitral tribunal to hear their dispute, and their chosen forum is kept undisclosed.

Public sources contain no information on the arbitral tribunal to administer the dispute. PJSC Gazprom's Quarterly Report only mentions the fact of initiation of arbitration, while a similar report by Eni contains no relevant information.

Winter Academy

The Russian Institute of Modern Arbitration

11-16 January 2021
Online

Winter Academy on International Arbitration

"BEYOND THE IMAGINABLE BORDERS: TRANSFORMATION OF ARBITRATION"

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During the special courses the most acute topics in the field of arbitration will be examined such as due process, confidentiality and its cyber risks, arbitration of climate change and renewable energy disputes, peculiarities of construction and oil & gas arbitration, cultural and procedural differences, cross-examination in international arbitration. Apart from theory, the participants will have an opportunity to get hands-on experience during workshops on advocacy, expert evidence & damages with the following application of acquired skills before the distinguished panel of arbitrators during the Moot Court.

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The Academy will be held in English.

Requirements: no less than 2 years of experience in arbitration, mediation or litigation
Participation Fee: 5 000 RUB (paid after being selected as a participant of the Academy)

Deadline for Applications: 30 October 2020. **Registration is available here.**

The Organizing Committee will select from 15 to 20 participants and announce the results no later than 1 December 2020.

Should you have any questions, please contact us via email event@centerarbitr.ru

BEGINNER'S LUCK: NEW DISPUTE MATTERS, STATE PARTIES TO PROCEEDINGS AND AGREEMENTS IN INVESTMENT ARBITRATION

Colombia faces an ICSID claim over a domain name more

A US tech company has lodged a USD 350 million ICSID claim against Colombia over rights to operate the ".CO" domain (*Neustar, Inc v. Colombia* (ICSID Case No. ARB/20/7)). The dispute concerns a 10-year concession agreement for the management of the .CO domain that Neustar's subsidiary, CO Internet, signed in 2009 with the Colombian Ministry of Information Technologies and Communications. Neustar argues that the concession agreement provides for another 10-year term if certain requirements are met and claims a compensation of losses related to the prospective concession rights for the period from 2020 through 2030.

5G spectrum expropriation in the satellite sector: a new source of disputes? more

A webinar held by public international law firm Volterra Fietta considered a potential new basis of investor-state arbitration claims: the reallocation of the communications spectrum from satellite operators to terrestrial telecoms operators desiring C-band frequencies for use in 5G. It has been discussed that "as of January 2020, 23 countries have allocated or auctioned C-band spectrum frequencies for use by mobile operators," and the "system being designed today to use C-band frequencies will still need these frequencies 14 or more years from now," therefore reallocation presents a serious threat. Thus, for instance, in *CC/Devas (Mauritius) Ltd v. India*, the Mauritius shareholders of an Indian company won the dispute on India's reallocation of frequencies for use for military purposes, since military defence only partially justified the expropriation of the spectrum.

Korean gaming company enjoys a winning streak more

South Korean videogame developer WeMade has received favourable awards in three arbitrations over an online role-playing game series (*WeMade v. Shanda Games, Lansha Information Technology and Actoz*). WeMade announced that an ICC tribunal held the Chinese company Shanda Games and its two branches – the South Korean Actoz and Shanghai company Lansha Information Technology – liable in a dispute on IP rights to the game Legend of MIR 2. The award followed victories in two other arbitrations in the last month: the first being a SIAC case against Lansha with respect to a licence agreement to the game sequel, The Legend of MIR 3; and the second award having been issued by the KCAB against Kingnet's subsidiaries due to Kingnet's alleged breach of a USD 240 million game licence agreement.

Public communication on the second negotiation round on the modernisation of the Energy Charter Treaty more

On 6 November 2019, the Energy Charter Conference established the Modernisation Group and instructed it to commence negotiations on the modernisation of the ECT. The first round of negotiations took place on 6-9 July 2020 by videoconference. The second round – also by videoconference – took place on 8-11 September 2020. As to why the ECT needs modernisation, the ECT Secretary-General Urban Rusnák stated as follows: first, the legal text, drafted in the early 1990s, is outdated; second, the rights and obligations of actors should be re-evaluated in all areas: transit, investments, energy efficiency, trade, as well as transparency; third, the ECT should reflect the ongoing global energy transition, to find a new balance between the rights of governments to regulate and the rights of investors to have their investments protected. It is also important to take care of protection of the environment: all ECT parties have undertaken obligations under the Paris Agreement within the UN Framework Convention on Climate Change that regulates measures to reduce atmospheric concentrations of carbon dioxide since 2020.

The Mexico-United States-Canada Tripartite Trade Agreement enters into force more

On 1 July 2020, the United States-Mexico-Canada Agreement (USMCA) entered into force, replacing the North American Free Trade Agreement (NAFTA), whose chapter on investments has expired. The USMCA is notable at least in view of Canada's non-participation in the investor-state dispute settlement (ISDS) mechanism. Under Chapter 14 of the USMCA, ISDS is possible only for Mexican investors in the US and for US investors in Mexico. Disputes between Canadian and Mexican investors in Mexico and Canada, respectively, will be settled under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), but there is no similar agreement between Canada and the US.

Canada wins its first BIT claim more

Canada has prevailed in its very first BIT arbitration, defeating an ICSID claim worth USD 1.8 billion brought by an Egyptian telecoms company (*Global Telecom Holding SAE v. Canada* (ICSID Case No. ARB/16/16)). This is the first known case against Canada that has been filed under a BIT after over 20 years of proceedings between the investors and that state under the NAFTA. The case concerned former Global Telecom investments into Wind Mobile, the fourth largest mobile operator in Canada. GTH acquired a share in Wind Mobile in 2008, but sold it in 2014 after a protracted dispute on regulations with the Canadian government regarding increasing its share and violation of guarantees under the BIT.

Norway faces its first investment treaty claim more

Norway is to deal with its first known investment treaty claim brought at the ICSID by a Latvian businessman, whose vessel was seized while trawling for snow crabs (*Peteris Pildegovics and SIA North Star v. Norway*). North Star had been trawling for snow crabs in Norway's waters since 2014. However, in 2016, one of the company's vessels was fined by the Norwegian Coast Guard, since the permit presented by the vessel's Russian captain Rafael Uzakov, was invalid. North Star and Uzakov were fined and later held liable under criminal law for their refusal to pay. After the court of first instance rendered its judgment against them, in 2017, North Star filed its first notice of arbitration under the Latvia-Norway BIT.

EXPERT COMMENTARIES

Dmitry Davydenko, PhD, Assistant Professor at the Private International and Civil Law Department, MGIMO University, CIS Arbitration Forum Director

This is the first known claim against Norway under a bilateral investment treaty (BIT) made between Latvia and Norway in 1992. The claim was filed by a Latvian businessman, whose vessel was seized while trawling for snow crabs, and his company.

1 Does the ICSID tribunal have jurisdiction over this claim?

One of the preliminary issues that the ICSID tribunal will need to deal with, unless the parties settle the dispute before, is whether the claimants qualify as investors under the BIT. That is, whether they should be considered as having invested in Norway and, if yes, whether the dispute concerns such investments. This is not very obvious considering the publicly available documents. The definition of “investment” in Article I of the BIT encompasses any property or other assets invested in

the territory of Norway. It appears, however, that trawling for snow crabs in Norway's territorial sea to sell them abroad, in itself is not an investment. If the tribunal does not find that the claimants had made "investments" in Norway (or if the dispute is unrelated to such investments), it will have no jurisdiction over the claim.

2 The Supreme Court of Norway, among other things, has resolved a dispute on whether the snow crab is a sedentary species, relying on the provisions of the UNCLOS. Would it be permissible for the ICSID tribunal that will examine this dispute to assess the arguments on the applicability of interpretation of international law of the sea treaties that both parties invoke?

I believe that the competence of an ICSID tribunal includes the application of international law rules insofar as it is necessary for it to fulfil its mandate, namely, to examine a claim on a BIT breach and resolve the relevant dispute. This follows, in particular, from the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States that established the ICSID. Its Article 42 provides that the tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties, or, in the absence of such agreement, it shall apply the law of the Contracting State party to the dispute and such rules of international law as may be applicable.

3 Could the investor approach the International Tribunal for the Law of the Sea based on these facts? Will it be able to do so after the award in this case is issued?

The ITLOS (Hamburg, Germany) was established by the UNCLOS that entered into force in 1994. It is competent to interpret that Convention and resolve a wide range of disputes. At the same time, the claimants cannot independently approach that body, since it generally hears cases only between state parties to the UNCLOS. There are exceptions from that rule, such as, for instance, an agreement between the parties to another treaty to refer certain disputes to the ITLOS, but the dispute in question does not fall under them.

AN OLD CASE IS THE BEST

Forty years later: the Hague tribunal orders return of Iranian assets more

The Iran-US Claims Tribunal has ruled in a long-running dispute over Iranian physical assets that were frozen during the 1979 hostage crisis. The US was ordered to pay over USD 29 million in damages to Iran and return several antique musical instruments including a Stradivarius. The arbitration that lasted for as long as the tribunal's mandate allowed it, comprised several steps. The first step ended in an award in 1992. The latest award was issued in the second step and after 49 days of hearings held over the period from 2013 through 2015.

SPAIN IS FIGHTING FOR ITS PLACE IN THE SUN IN RENEWABLE ENERGY CASES

Author: Ekaterina Bubnova

After the reform in the area of renewable energy sources, Spain has faced more than fifty Energy Charter Treaty (ECT) claims.

Back in 2010, when Spain experienced a boom in solar energy, the Spanish authorities decided to encourage the development of alternative energy and enacted a law on the support of companies owning solar power plants. Apart from deriving income from their sales of solar energy at market prices, the companies also received "premium" incentives from the state, making almost 25% of their net annual income.

Then, the number of investors, both Spanish and foreign, investing into the construction of "solar parks" became too numerous: as early as in 2013, the Spanish government announced that the state's budget no longer had money to fund solar plant owners. Spain's Deputy Minister of Energy Alberto Nadal stated that the alternative energy development reform failed and that the experiment left only debt behind.

The Spanish government had to resort to unpopular measures to avoid further deficit in the state budget, namely, it decided retroactively to reduce the energy companies' rate of return by 7.5 % annually until 2026. Experts predicted an onslaught of claims against Spain after its drastic change of attitude towards investors in solar energy.

From 2013, more than fifty investors have brought claims against Spain under investment treaties. The latest completed case is RWE Innogy GmbH and RWE Innogy Aersa SAU v. Kingdom of Spain (ICSID Case No. ARB/14/34).

The ICSID partially upheld the claims by the German energy company RWE; as well as in *Watkins Holdings S.à r.l. and others v. Kingdom of Spain* (ICSID Case No. ARB/15/44), where a majority of the ICSID tribunal obliged Spain to pay EUR 77 million for breach of guarantees under a BIT by its legislative reforms.

Yet, the enormous amount awarded to the investors in their Spanish disputes is not the only thing that makes these cases unique: it seems

that Spain is deliberately pursuing a strategy of challenging arbitrators.

In particular, Spain has challenged Kaj Hober in *FREIF Eurowind v. Spain* (SCC Case No. 2017/060), administered by the Arbitration Institute of the Stockholm Chamber of Commerce. The challenge rested on the arbitrator's dissent opinion in another case with similar facts. Thus, in *Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Spain* (ICSID Case No. ARB/15/1), Kaj opined that the conduct of the Spanish government to be contrary to fair and equitable treatment. The SCC declared the arbitrator to be partial.

Another award against Spain in *Eiser Infrastructure Limited and Energia Solar Luxembourg Sarl v. Kingdom of Spain* (ICSID Case No. ARB/13/36) was set aside for doubts as to the impartiality and independence of an arbitrator since the latter failed to disclose ties with one of the claimant's expert witnesses.

It should be noted that Spain has challenged Gary Born, Guido Tawil, Peter Rees, Eduardo Zuleta and many other arbitrators in different cases, but the challenges were unsuccessful. It would seem that Spain's tactic only works on a case-by-case basis, although it may enrich the scarce practice on arbitrator challenges in international arbitration and create new and interesting precedents.

ARBITRATION STAYS ON GUARD FOR NATURE AND WORLD HERITAGE

Mauritius defeats a treaty claim over a UNESCO site more

An ICSID tribunal has rejected a EUR 70 million claim brought against Mauritius by UK real estate investors, after they were prevented from building a tourist resort in the Le Morne region, later named a UNESCO World Heritage Site commemorating resistance against slavery (*Thomas Gosling and others v. Republic of Mauritius* (ICSID Case No. ARB/16/32)). Starting from 2005, the investors planned to build two luxury tourist resorts in Mauritius, but two years later, the Mauritius government had a U-turn in its policy, supposedly because Le Morne was included on the UNESCO World Heritage list.

Insurers cannot escape payouts for water pollution suits more

A Manhattan federal judge has upheld a UNCITRAL tribunal award requiring the German insurance company HDI Global SE to make a payout of almost USD 44 million to the oil company Phillips 66 Company to cover expenses related to settling lawsuits over pollution by gasoline leakage in the 1990s (*HDI Global SE v. Philips 66*). The gasoline leaks contained a hazardous additive – methyl-tret-butyl-ether, that polluted water making it undrinkable after it seeped into the ground waters.

RESOLUTION OF EU DISPUTES

23 EU Member States sign an agreement for the termination of intra-EU BITs more

On 5 May 2020, 23 EU Member States signed the agreement for the termination of intra-EU bilateral investment treaties (Agreement). The preamble of the Agreement refers to certain EU legal principles and court practice, including the *Slovak Republic v. Achmea B.V* judgment of 6 March 2018 (Case C-284/16) (*Achmea*). The Agreement signatories have affirmed their commitment to ensure "protection of cross-border investments [within the EU]" and state that intra-EU BITs "are contrary to the EU Treaties and thus inapplicable. As a result of this incompatibility […], as of the date on which the last of the parties to a [BIT] became a Member State of the [EU], [the BITs] cannot serve as legal basis for Arbitration Proceedings". All EU Member States, except for Austria, Finland, Sweden and Ireland, have signed the Agreement that entered into force on 29 August 2020.

The European Council approves a multi-party interim appeal arbitration arrangement to solve WTO disputes more

The WTO Appellate Body (AB) has been effectively paralysed since 11 December 2019 – it has been unable to hear appeals due to the impossibility of appointing new AB members. On 27 March 2020, the ministers of WTO member countries – Australia, Brazil, Canada, China, Chile, Chinese Taipei, Colombia, Costa Rica, the European Union, Guatemala, Hong Kong, Mexico, New Zealand, Norway, Singapore, Switzerland, and Uruguay, announced their decision to put into effect the MPIA (Multi-Party Interim Appeal Arbitration Arrangement). Given that the EU is one of the champions by number of WTO disputes, its participation in that mechanism was especially important. The new arrangement is temporary and based on Article 25 of the WTO Dispute Settlement Understanding. The MPIA states will be able to solve trade disputes and have the right to an independent and impartial appeal review of panel reports, as originally provided in the WTO system.

No investor-state dispute settlement mechanism in draft UK-EU agreement more

On 19 May 2020, the UK released the draft working text of its free trade agreement with the EU, which does not appear to contain any mechanism for investor-state dispute settlement apart from general provisions on dispute settlement and mediation.

ARBITRATION IN THE COVID-19 ERA

Mexico faces potential claims over the pandemic response more

Several investors are considering bringing investment treaty claims against Mexico after the state placed restrictions on renewable energy production relying on a fall in demand caused by the coronavirus pandemic. The investors doubt that it is Mexico's real motive, as the state has reinforced its control over energy industry by enacting two resolutions on 29 April and 20 May 2020.

The arbitral tribunal refuses to suspend Bolivia's claim over the pandemic more

A Permanent Court of Arbitration (PCA) tribunal has refused to suspend Bolivia's motion to extend the deadline for filing its objections to an investment treaty claim due to force majeure after the state argued that the coronavirus pandemic had made work on its statement of defence "virtually impossible" (*The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini v. The Plurinational State of Bolivia* (PCA Case No. 2018-39)). The US-Bolivia BIT claim concerns concessions for the mining of natural resources held by a US national Julio Miguel Orlandini-Agreda, who passed away last year, and a Bolivian company where he had held a controlling shareholding, in the Antequera municipality in West Bolivia.

This is not the first case of a state addressing an arbitral tribunal with a similar request. Thus, in *TECO Guatemala Holdings, LLC v. Republic of Guatemala* (ICSID case № ARB/10/23) Guatemala argued before the D.C. Circuit Court that enforcement of the award should be suspended, as a party cannot be deprived of resources it needed to fight COVID-19. As in Bolivia's case, the tribunal refused to grant Guatemala's plea and continued with the proceedings.

Arbitration reform efforts continue despite the pandemic more

At the first-ever Zoom ITA-ASIL (Institute for Transnational Arbitration and American Society of International law) conference held on 24 June 2020, Professor Chiara Giorgetti from the University of Richmond School of Law, and Corinne Montineri, Senior Legal Officer at UNCITRAL's Office of Legal Affairs and current secretary of Working Group III, provided an update on the work performed by UNCITRAL Working Groups II and III.

Working Group II on "Arbitration and Conciliation / Dispute Settlement" managed to organise a meeting in New York for its 71st session in February 2020. The next Working Group II meeting took place on 21-25 September 2020 in Vienna. The 39th session of Working Group III, on the contrary, originally scheduled for 30 March 2020 in New York, was indeed postponed due to COVID-19. Nonetheless, until its next meeting the Group continued to collaborate informally, holding frequent webinars and reviewing public comments to various working papers posted on its website.

Moreover, in early July, during its 53rd session, the UNCITRAL Secretariat held a series of panel discussions concerning the pandemic's impact on international economic relations. The RAC Executive Administrator Yulia Mullina presented at the panel discussion on the long-term effects of the pandemic on arbitration from the standpoint of an arbitral institution.

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DISPUTE RESOLUTION IN THE DIGITAL ERA

ARBITRAL INSTITUTIONS RESPOND TO COVID-19: REVIEW OF RECOMMENDATIONS ON VIRTUAL HEARINGS

Author: Ekaterina Bubnova

The new COVID-19 pandemic, without doubt, has had a great impact on the work of arbitral institutions across the globe. It has become difficult if not impossible to hold oral hearings in the usual format. Many arbitral institutions have tried to adapt to the challenging conditions and have begun actively using the latest technologies, holding their oral hearings online. Such online hearings obviously have their specifics that the parties' counsels are advised to keep in mind.

Perhaps the most important component that affects the success of an online hearing is preliminary preparation.

Such preparation needs to take account of a multitude of different factors, such as, for instance, the physical location of the representatives of the parties and the arbitrator(s): as they may find themselves in different time zones, the time selected for the hearings should be convenient for all participants of the procedure; the participants of the hearing should receive detailed instructions on how to join; it is feasible to have a test call; and make sure that all participants have the equipment and stable Internet connection required, etc.

The choice of online platform, too, is an important aspect of a successful online hearing. Ideally, the platform should offer a wide range of functions, such as, for instance, the possibility to share the screen or otherwise circulate electronic documents, mute the sound, and send messages into the chat. The platform should also be reliable and secure in terms of observing the confidentiality of arbitration. Arbitral institutions offer virtual hearings via such well-known platforms as Zoom, Skype, Cisco Webex, Microsoft Teams, Bluejeans, yet in this case, it is impossible to guarantee full security (for details on cyber security and the protection of personal data in interna-

tional arbitration, see the ICCA Protocol on Cybersecurity in International Arbitration). Notably, the leading arbitral institutions have opted for different platforms for their online hearings. Thus, the Arbitration Institute of the Stockholm Chamber of Commerce is using a separate platform for online hearings by SIHC (Stockholm International Hearing Centre) that offers standard functions and guarantees full security.

The Russian Arbitration Center offers the possibility of conducting hearings using TrueConf – a high-quality videoconferencing system developed by one of the leaders in the market of corporate communications. Moreover, the parties may agree to use other software to conduct their hearings by videoconference (for instance, Zoom, Skype, etc.)

A lot depends on the participants of the hearings – the parties' counsels and arbitrator(s) – themselves. The AAA advises preparing in advance: testing the equipment before the hearing, having spare hardware (laptop, headset) should the primary hardware fail, finding a quiet location and making sure that the background visible in the video is neutral, does not draw unnecessary attention and is not backlit. The representatives are also advised to have dual monitors, one with all the necessary files for the case, and the virtual hearing running on the other. Do not underestimate the importance of digital etiquette: do not interrupt a representative or an arbitrator speaking; mute the microphone if necessary to avoid background noise and echo; raise your hand to request to speak.

The HKIAC recommends always having a "plan B" in case of serious trouble that jeopardizes the normal conduct of a hearing. In that case, the arbitrator may decide to end the virtual hearing and appoint a new date, or stop the conference call. The VIAC advises having a technical assistant to support the remote hearings and help the participants trouble-shoot any technical issues throughout the online hearing.

Arbitral institutions have quickly adapted to the new conditions and made sure that the parties would have available to them efficient and convenient dispute-resolution via online hearing. The tendency of holding hearings online will probably survive the pandemic, as it considerably cuts the travel and accommodation expenses for the representatives of the parties and arbitrators, and saves the most precious resource – time.

ARBITRAL INSTITUTIONS STATISTICS: AN OVERVIEW

Author: Ekaterina Bubnova

The world's leading arbitral institutions have issued reports on their performance in 2019. These include statistics on the key figures, such as the number cases heard, the average value of claims, the number of appointments of emergency arbitrators, cases resolved in the expedited procedure, etc.

Overall, the number of cases resolved by arbitration continues to grow: thus, at the ICC, it increased from 842 in 2018 to 869 in 2019; at the SIAC, from 402 to 479; at the LCIA, from 317 to 395; at the HKIAC, from 265 to 308; and at the SCC, from 152 to 175. In 2019, the ICC has also registered its anniversary 25,000th case.

At the RAC, the number of claims filed in 2019 was 262.

The geographic coverage of disputes is also expanding: some arbitral institutions (for instance, the VIAC and the SCC) have been largely hearing domestic disputes, while the HKIAC and the SIAC have dealt primarily with the resolution of international disputes (80.9% and 87% of the total number of cases heard, respectively). The origin of arbitrators is diverse, too: thus, in 2019, the LCIA cases were examined by arbitrators from 40 different countries, while the SIAC cases were taken on by arbitrators from 32 countries. The 2019 record, however, was set by the ICC – its cases involved elected or appointed arbitrators from 89 different jurisdictions.

Arbitral institutions also report how many challenges were filed with respect to their arbitrators, and how many were granted. Thus, in 2019, the ICC received 52 challenges, granting only 6 (11.5% of the total number of challenges filed); the SCC considered 9 such challenges and granted 1; the SIAC, 2; the HKIAC, 3 challenges, where not a single one ended up granted. Generally, the number of challenges filed against arbitrators remains low, which suggests that the

arbitrators, whether elected by the parties or appointed by the arbitral institutions, are real professionals in their sphere and value their impeccable reputations.

The annual reports of the arbitral institutions feature other interesting statistics as well. For example, the ICC and SCC have reported the average duration of arbitral proceedings: at the SCC, 50 % of awards took 6-12 months from the date of constitution of the arbitral tribunal, 27 % of awards were issued even quicker – within less than 6 months, while the average duration of arbitration before the ICC equalled 26 months (against 28 months in 2018).

Special attention in the reports of arbitral institutions is dedicated to gender diversity. Many arbitral institutions publish full statistics on the number of appointments of female and male arbitrators.

These figures can be found both in form of the number of appointments and percentage, in order to avoid any misinterpretation or distortion of information. Overall, the trend continues and women get appointed more rarely than men: at the VIAC, 16.4 % of all appointed arbitrators were women; at the HKIAC, 20.5 %; at the ICC, 21 %; at the SCC, 23 %; ant 36.5 % at the SIAC. There are, however, record-holders in this area: thus, for instance, in 2019, the LCIA could boast 48 % of female arbitrators, which earned it the Equal Representation in Arbitration Pledge award.

In 2017, the Russian Arbitration Center joined the Equal Representation in Arbitration Pledge movement that supports women practitioners in international arbitration and calls for maintaining the gender balance. In this regard, the RAC includes information on the number of appointed women arbitrators into its annual statistics. Thus, among the arbitrators appointed for dispute resolution in 2019, 42 % were women, which is 14 % higher than in 2018.

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IT TAKES TWO WILLS TO TANGO: INVALIDATION OF ARBITRATION AGREEMENTS WHERE ONE OF THE PARTIES FINDS ITSELF IN A WEAKER POSITION

Author: Arina Akulina

On 26 June 2020, the Supreme Court of Canada issued a judgment in the *Uber Technologies Inc. v Heller* case,[12] where the claimant challenged a standard form contract between Uber and its drivers. Under the contract, the disputes were to be resolved in a private arbitration in accordance with the rules of the International Chamber of Commerce (ICC) and the laws of the Netherlands. Mr. Heller, an Uber driver, filed a class action against Uber, submitting that Uber violated the 2000 Ontario Employment Standards Act (ESA), since the company did not consider its drivers as employees and failed to accord them the benefits and guarantees owed to the employees under the ESA. Mr. Heller argued that the arbitration clause with Uber was invalid, as it was by its nature unconscionable, and claimed over 400 million Canadian dollars as compensation. As a result, the Court deemed the arbitration clause invalid.

[12] *Uber Technologies Inc., Uber Canada, Inc., Uber B.V. and Rasier Operations B.V. v. David Heller*, 2020 SCC 16. The judgment is published on the website of the Supreme Court of Canada at: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/18406/index.do

The Supreme Court of Canada agreed with Mr. Heller and sided with the drivers in declaring Uber's conduct unconscionable, and the arbitration agreement, invalid. That agreement, the Court opined, resulted in expenses for Canadian drivers that were disproportionate to the size of their potential arbitration awards, in view of the need to conduct the proceedings in the Netherlands under the law of that state.

Back in January 2019, the Court of Appeal for Ontario heard the case involving Uber, where it also ruled that Uber drivers were in principle unable to change the terms of the arbitration agreement offered by the aggregator. In the opinion of that Court, Uber knowingly and deliberately used an arbitration agreement to reduce the number of claims filed by drivers, exploiting their vulnerable position.

In view of the Uber judgment, many companies will now have to revise their agreements with employees and inde-

pendent contractors to make sure that the arbitration clauses therein are just with respect to the weaker counterparties.

Notably, the position of the Canadian court in this case diverges from the American one. Thus, in September 2018, a US Court of Appeal deemed an Uber arbitration agreement enforceable and valid, dismissing a class action filed by the drivers and referring them to arbitration with individual claims. After that decision, the drivers did not lose heart: on the contrary, they waged a real war against Uber, with more than 12,000 claims submitted to arbitration to date. Given how many drivers the carrier employs, the cost of arbitration may be quite considerable for Uber and it might still regret opposing the initial class action.

Similarly, in 2015, the US Supreme Court examined the *DirecTV v. Imburgia* case[13] – a class action filed against DirecTV by consumers in California.

The case started in 2008, when a California consumer filed a class action on her own behalf and on behalf of other consumers against DirecTV, claiming that she had been unlawfully charged a fee for early termination of the agreement with DirecTV. The DirecTV counsel argued that the claimants had consented to arbitrate disputes under the clause contained in the initial service agreement.

In spite of that, the Los Angeles District Court and the California Court of Appeal both held that forcing consumers to enter into arbitration clauses was unconscionable, and such clauses could be enforced: the consumers were effectively being forced to consent to arbitrate disputes, otherwise they would not be able to obtain the desired service.

DirecTV appealed to the US Supreme Court. The US Supreme Court disagreed with the lower courts and upheld DirecTV's case, therefore following a similar decision of 2011 in *AT&T Mobility LLC v. Concepcion*.[14] The Court's judgments stated that the Federal Arbitration Act[15] called for compliance with the arbitration agreements contained in contracts with the relevant companies, notwithstanding the more favourable protections available to consumers in such states as California.[16] It should be noted here that since 2019, the American legislator has been attempting to change the existing approach.[17]

In Russia, the approach to the validity of arbitration clauses with consumers is controversial. Thus, the Supreme Arbitration (Commercial) Court of the Russian Federation pointed at the impossibility of arbitrating disputes involving consumers (that, in particular, was emphasised in Resolution of the Presidium of the Supreme Arbitration (Commercial) Court of the Russian Federation No. 3364/13 of 17 September 2013 г. in Case No. A65-15588/2012). At the same time, the Supreme Court of the Russian Federation expressed an opinion to the effect that such disputes may be referred to arbitration under certain conditions (Ruling No. 19-V11-24 of 10 January 2012).

In turn, the draft Ruling of the Plenary Session of the Supreme Court of the Russian Federation "On the Performance of Functions of Support and Control in regard of Arbitral Proceedings, International Commercial Arbitration by the Courts of the Russian Federation" originally provided that "if the arbitration agreement is governed by the Russian law, the consumer may invoke its invalidity where it contains provisions

[13] *DIRECTV, Inc. v. Imburgia* - 136 S. Ct. 463 (2015).

[14] *AT&T Mobility LLC, Petitioner v. Vincent Concepcion, et ux.,*563 U.S. 333, 131 S. Ct. 1740 (2011).

[15] Federal Arbitration Act (FAA), 9 U.S.C.

[16] Savage D. G. Supreme Court says binding arbitration clauses in consumer contracts trump California law //Los Angeles Times, December. – 2015. – T. 14. URL: https://www.latimes.com/business/la-na-supreme-court-california-arbitration-20151214-story.html

[17] After a series of US Supreme Court judgments in favour of employers in arbitration disputes, in February 2019, the Democrats in both chambers of the Congress put forward the Forced Arbitration Injustice Repeal Act or FAIR Act. The bill will amend the Federal Arbitration Act, invalidating any contract requiring compulsory arbitration of disputes, save for certain exceptions. The bill was introduced after the events involving several major IT companies, including Google, that resulted in such companies removing compulsory arbitration from their contracts with employees. For more details on the situation at Google, see Lecher C., Google organizers join lawmakers in forced arbitration fight, The Verge, February, 2019, at: https://www.theverge.com/2019/2/28/18244752/google-organizers-fair-act-bill-forced-arbitration

that limit the consumer's access to court due to the distribution of arbitration-related costs between the parties that materially increases the consumer's financial expenses;[18] however, that provision was abandoned in the final version of the Resolution.[19]

At present, there is no express prohibition of arbitration of disputes arising from relations with private consumers, and a contract with such a consumer may include an arbitration clause; however, it is best to forego this possibility in view of the following.

In line with the position of the Constitutional Court of the Russian Federation in its Ruling No. 2479-O dated 24 November 2016, assessment of the validity of an arbitration clause in contracts with consumers should take account of the general provision of Art. 16(1) of Law of the Russian Federation No. 2300-1 of 7 February 1992 "On the Protection of Consumer Rights." This means that the clause should be checked for provisions that could *potentially limit "the consumer's access to justice* due to the provision on the distribution between the parties of arbitration-related costs, materially increasing *the consumer's financial expenses*, as well as due to the potential violation of the principles of legality, independence and impartiality in constituting the specific arbitral tribunal, to which the case is to be referred," or make the agreement unenforceable or without effect.[20] It follows that the counterparty should, at the stage of execution of the contract, assess the financial standing of the consumer based on some undefined criteria, as well as project how that standing might change over time.

Furthermore, under Art. 13(4) of the Federal Law "On Consumer Credit (Loan)," the borrower and lender may enter into an agreement to arbitrate their disputes under the consumer credit (loan) agreement, but they can do that only after the emergence of grounds for filing a claim. This provision can be explained by analogy with the DirecTV case discussed above: the consumer might be forced to enter into a contract with an arbitration clause, since otherwise the credit organisation might refuse to render the service the consumer requires at all or render it on other terms than those initially offered to the consumer. Among the possible cases of infringement of consumer rights in terms of financial services in such circumstances, one can draw the example of assignment of claims arising under a consumer contract, situating territorial jurisdiction at the location of the head office of the bank, etc.

Such infringements are contrary to the UN Guidelines for Consumer Protection;[21] moreover, the invalidity of an arbitration clause in a loan agreement between a microlender and a private individual prior to the emergence of the cause of action has been confirmed by the Presidium of the Supreme Court of the Russian Federation in para. 4 of its "Review of Cases Related to the Functions of Assistance and Control in Relation to Arbitration and International Commercial Arbitration" of 26 December 2018.

Therefore, despite the dispositive freedoms and autonomy of the parties to contracts, one can observe a tendency towards protecting the weaker party in the assessment of validity of arbitration clauses. In common law jurisdictions, this protection takes the form of the unconscionability doctrine. The Russian approach, although it lacks an express statutory limitation of the freedom of the parties in choosing the method and place of dispute resolution, also follows this tendency and in some cases limits the possibility of arbitrating disputes, if the arbitration clause would potentially put one of the parties in an "onerous" position and is by nature manifestly unfair.

[18] Draft Ruling of the Plenary Session of the Supreme Court of the Russian Federation "On the Performance of Functions of Support and Control in regard of Arbitral Proceedings, International Commercial Arbitration by the Courts of the Russian Federation."

[19] Ruling of the Plenary Session of the Supreme Court of the Russian Federation No. 53 dated 10 December 2019 "On the Performance of Functions of Support and Control in regard of Arbitral Proceedings, International Commercial Arbitration by the Courts of the Russian Federation."

[20] Ruling of the Constitutional Court of the Russian Federation No. 2479-O dated 24 November 2016, reasoning, para. 2(4).

[21] UN Guidelines for Consumer Protection, adopted by UN General Assembly Resolution 39/248 of 16 April 1985 at its 106th Plenary Session.

US SUPREME COURT: THE NEW YORK CONVENTION DOES NOT PRECLUDE RECOGNISING A NON-SIGNATORY OF THE ARBITRATION AGREEMENT AS A PARTY THERETO

Author: Katsiaryna Piskunovich

This was a conclusion that the US Supreme Court made in its decision of 1 June 2020 in *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC.*, where the Supreme Court examined the provisions of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) from the standpoint of the possibility of applying the doctrine of equitable estoppel elaborated in the domestic law.

The dispute arose under the following circumstances: ThyssenKrupp Stainless USA executed three contracts with F.L. Industries for the construction of cold rolling mills at ThyssenKrupp's steel manufacturing plant in Alabama. Then F.L. Industries entered into a subcontractor agreement with GE Energy Power Conversion France SAS for the provision of nine motors to power the cold rolling mills. Shortly thereafter, the ownership of the plant was transferred to Outokumpu Stainless USA.

In 2015, Outokumpu Stainless and its insurers sued GE Energy in Alabama state court, claiming that the motors for powering the cold rolling mills manufactured and supplied by GE Energy failed, causing considerable losses for the plant. Under GE Energy's motion, the dispute was transferred to federal court, where the company then applied to refer the case to international commercial arbitration, relying on the arbitration clauses in the contracts between ThyssenKrupp and F.L. Industries.

The US District Court granted GE Energy's motion, concluding that GE Energy was a party to the arbitration agreements, since the subcontractors also fell under the definitions of "seller" and "parties" in the contracts.

The Eleventh Circuit Court, however, reversed the District Court's judgment holding that:

- the New York Convention requires that the arbitration clause must be actually signed by the parties, and, consequently, it only extends to its signatories;
- GE Energy could not be a party to the arbitration agreement, since it did not sign the aforementioned contracts;
- according to the Court, GE Energy's argument on the applicability of equitable estoppel was contrary to the New York Convention's signatory requirement.

GE Energy therefore appealed to the Supreme Court of the United States.

Decision of the US Supreme Court

The Supreme Court addressed the issue of applicability of the domestic legal doctrine of equitable estoppel, which allows a non-party to enforce an arbitration agreement if the other party claims performance of obligations under the contract in respect of which the arbitration agreement was concluded.

The Supreme Court pointed out that the text of the New York Convention implies the possibility of applying domestic law to fill in the gaps in the Convention. Thus, for instance, Article 2 of the Convention touches upon the issue of arbitrability of disputes, but does not contain a list of such disputes, hence leaving it to domestic law. Given that the Convention does not prohibit the application of domestic law provisions in assessing the enforceability of an arbitration agreement, the application of the domestic doctrine, the doctrine of equitable estoppel, is not at odds with the New York Convention.

The US Supreme Court then concluded that the New York Convention and the equitable estoppel doctrine did not contradict each other. The Supreme Court noted that the Convention text was silent on the issue of recognition of a non-signatory as a party to an arbitration agreement, yet, nothing in that text could be interpreted as prohibiting the application of the doctrine of equitable estoppel or the extension of arbitration clause to non-signatories.

As a result, the US Supreme Court reversed the judgment of the lower court and remanded the case for further proceedings in accordance with the Supreme Court's position.

The US Supreme Court decision in *GE Energy v. Outokumpu Stainless* is of significant interest from in terms of the New York Convention interpretation and the permissibility of extending arbitration agreements to the parties that did not, in fact, sign them.

This position of the Supreme Court may affect not only the international business relations with American companies, but also the formation of subsequent arbitration practice worldwide, where subcontractors, suppliers, distributors, etc., that never signed the arbitration agreement, will be able to invoke one of the many domestic doctrines to seek arbitration with a signatory, if the latter makes claims based on such contract.

MEDIATION AS A MODERN METHOD OF DISPUTE RESOLUTION

Author: Ekaterina Baliuk

Mediation has gained a significant respect of representatives of the business community who wish to preserve their relations instead of plunging into endless and costly disputes in court or arbitration.

For instance, by way of mediation a billion-dollar dispute between the Dominican-controlled energy company CDEEE and an Odebrecht-led construction consortium was recently settled. The dispute arose back in 2017 after the consortium requested additional time and funding to complete construction works of a major thermal power plant on the Dominican South Coast.

The parties initially prepared themselves for referring their dispute to an arbitration under the ICC Arbitration Rules. Later, however, they decided to resort to mediation, since the project was 90% completed and the parties wanted to see it through to the end as soon as possible. Under the settlement agreement resulting from the mediation, CDEEE will pay to the consortium USD 395.5 million, while the consortium shall complete construction within the agreed terms.

In that case, facilitated by the mediator, the parties engaged in long negotiations that focused on the "pros and cons of reaching a settlement agreement as compared to lengthy and costly arbitration."

This section of the Digest is dedicated to the reasons for choosing mediation, its pros and cons as against other alternative dispute resolution methods, as well as aimed to assess the evolution of mediation globally and in Russia.

Neutrality, speed, and amiability of conflict settlement as the principal reasons for choosing mediation

On 3 July 2020, the Singapore International Dispute Resolution Academy (SIDRA) published a detailed survey on the development of various dispute resolution mechanisms from the standpoint of user experience and the evolution of

technologies, aimed, among other things, to predict future trends.[22]

In particular, the SIDRA Survey sets out an analysis of preferences, experience and opinions of users, including those with no legal background, regarding the choice and use of various international dispute resolution mechanisms: arbitration, mediation, litigation and hybrid protocols (Med-Arb or Arb-Med). Special attention is paid to the digital transformation of these instruments, including as a result of COVID-19.

For the purposes of this section, we will discuss several conclusions concerning mediation:

1. *more than 80% of users note that impartiality, speed and confidentiality are the decisive factors in favour of choosing mediation (or at least essential ones);*
2. *enforcement of settlement agreements is not ranked highly among the reasons for choosing mediation;*
3. *among professional standards, the users highlight the importance of compliance by the mediator with ethical norms and his/her dispute resolution experience.*

It is no accident that the users often cite these conclusions among the pros and cons of mediation as an instrument for dispute resolution. Before we proceed to the relevant analysis, let us take a step back and consider scope and features of mediation.

The place of mediation among methods of alternative dispute resolution

Mediation is a flexible and confidential settlement procedure, where the conflict existing between the parties is resolved in light of their interests amicably and in a mutually acceptable way, without reference to the mediator's discretion.

Flexibility lies in simplicity. The parties themselves define their procedures and the resulting settlement agreement. They are not limited by any specific scope of the dispute and may discuss legal and non-legal issues to arrive at the best and most amicable solution, sometimes in a matter of days. Therefore, mediation does not require the resources necessary for other legal mechanisms.

A mediator is not an arbitrator. The mediator does not intervene in the process and does not adopt an agreement somehow similar to an arbitral award, but rather supports the parties in their independent movement towards the settlement agreement. An arbitrator, on the other hand, manages the process of confrontation between the parties, where only one often emerges as a winner.

Therefore, the efficiency of mediation is entirely in the hands of the parties, which mitigates the risks inherent in other types of dispute resolution, such as, for instance, losing a multi-million claim.

At the same time, mediation is not appropriate for cases where one or both parties wish their conflict to receive media coverage, or if the conflict has reached a stage where a settlement is no longer possible. Experts often name the lack of binding force behind the settlement agreement among the key drawbacks of mediation.

As follows from the table, the mediation procedure goes through the key steps inherent to arbitration as well but with the following special features.

First, the parties enjoy more freedom in determining the procedural terms, the stages for exchange of documents and the number of meetings, and are not limited by the mediator's opinion or position. An important distinctive feature of mediation is that it allows unilateral contacts between a party and the mediator to reveal interests and intentions of the parties, which may subsequently affect the efficiency of bilateral

[22] For more details on the Survey, see Kluwer Mediation Blog *at* http://mediationblog.kluwerarbitration.com/2020/08/16/what-users-say-about-technology-in-mediation-2020-sidra-survey-part-3/?doing_wp_cron=1597911978.9795839786529541015625

The mediation procedure comprises the following key steps:

1	2	3	4	5	6
the dispute is referred to mediation	**appointment of a mediator and payment of fees**	**the participants discuss the procedure and other procedural issues**	**exchanges of positions (incl. in writing), meetings and conference calls**	**a settlement agreement is reached**	**execution of the settlement agreement**
e.g., based on a mediation clause in a contract; or a separate agreement between the parties; or a proposal to resolve the dispute by mediation[23]	as agreed by the parties or under the rules of the institution administering mediation		as necessary	if any – the parties may be unable to reach an agreement and decide to proceed with their dispute in court or arbitration	it may be executed voluntarily or enforced (where relevant legal mechanisms are available)

negotiations. The information received from one of the parties may be disclosed to the other party only subject to the consent of such party.

Second, there exists a number of hybrid protocols. **Med-Arb** (mediation-arbitration) implies that mediation precedes resorting to arbitration. In such case arbitration takes place if the parties failed to reach a settlement agreement or it was not executed.

The reverse protocol – **Arb-Med** (arbitration-mediation) – suggests that the parties retain the opportunity of turning to mediation at any stage of the arbitration until adoption of the arbitral award. Other variations of these procedures exist, too, such as **Arb-Med-Arb** and **Med-Arb-Med**.

At the same time, even more unusual scenarios for the interaction between the parties involving mediation are possible. Thus, the parties may have an obligation to "discuss and consider an opportunity" to refer the dispute to mediation. Or they may have their dispute considered simultaneously in mediation and arbitration.[24]

It is also important to keep in mind, that a settlement agreement is generally non-binding and is to be executed by the parties on a voluntary basis. However, as efficient enforcement mechanisms (both domestically and abroad) may be lacking, this may carry additional financial risks for the parties.

This problem had for a long time been at the forefront of the agenda of the international professional community. On 20 December 2018, a breakthrough in the development of mediation was made – the UN Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention) was opened for signature.

[23] Based on the example provided by the ICC – see ICC Mediation Rules, Article 3.

[24] Based on the ICC's example https://iccwbo.org/content/uploads sites/3/2014/12/Suggested-ICC-Mediation-clause-in-ENGLISH-1.pdf

International Development of Mediation

1. The Singapore Convention on Mediation: the much-anticipated entry into force on 12 September 2020

The significance of the Convention for the evolution of mediation as a method for settling trade disputes may be compared only to the adoption of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The purpose of the Singapore Convention is to create an opportunity for the recognition and enforcement of international settlement agreements[25] in the state parties thereto.

By now, the Convention has been signed by 53 states, including such major players as the US and China. Although these states are yet to ratify the Singapore Convention, under Article 18 of the Vienna Convention on the Law of Treaties, they already bear the obligation not to defeat the object and purpose of the Singapore Convention prior to its entry into force.

Pursuant to Article 14 of the Convention, the Convention shall enter into force six months after deposit of the third instrument of consent from a state to be bound by it.[26] On 12 March 2020, Qatar ratified the Convention, joining Singapore and Fiji,[27] as a result of which the Convention enters into force on 12 September 2020.

Currently, the consent to be bound by the Singapore Convention has also been expressed by Saudi Arabia and Belarus, subject to the reservation that the Convention shall not apply to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party.

Prior to the Convention, a settlement agreement could become enforceable through court (by being approved as a settlement agreement in a judgment) or arbitration (through adoption of an award on agreed terms).

If two parties were of the same jurisdiction and the execution of the settlement agreement was carried out in that same country, no difficulties arose. But the execution of international settlement agreements entailed multiple proceedings and, as a result, required considerable time and financial expenses. Consequently, execution was delayed for the party in whose favour the agreement was made. The Singapore Convention cures this deficiency by introducing a simplified procedure of direct enforcement of international settlement agreements in the states parties to the Convention.

In addition to international instruments, positive developments in the work of international arbitral institutions further contribute to popularity of mediation.

2. Under the new programme of the Saudi Center for Commercial Arbitration (SCCA), settlement agreements will be made enforceable in accordance with the Singapore Convention

The programme provides for the conversion of settlement agreements obtained through remote mediations into enforceable titles (bonds). The Center was highly appraised among the representatives of the professional community, becoming the world's first arbitral institution to operate within the framework of the Singapore Convention.

[25] The scope of the Convention excludes settlement agreements concluded by a consumer for personal, family or household purposes, or relating to family, inheritance or employment law, as well as the settlement agreements that are enforceable as judgments or as arbitral awards in order to avoid possible overlap with existing and future conventions.

[26] The available mechanisms of expressing consent to be bound by the Convention are ratification, acceptance, approval or accession.

[27] The status of the Convention is available *at* https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en#EndDec

The programme is aimed at reducing the negative impact on the businesses that suffered from the pandemic and responding quickly to such situation.

The programme is based on the Center's "existing and time-tested mediation rules" and may be used both by domestic and international parties. They will also be given access to a modern videoconferencing platform.

3. **The American Arbitration Association (AAA) launches a new project for administering mediation**

The project is part of the new programme of the New York State Department of Financial Services. It is aimed at helping individuals and small business owners who have suffered from the rallies and demonstrations in the US, in their disputes with insurance companies (licenced in the State of New York).

It is suggested that in many cases a settlement may be accomplished with one mediation session of two hours. The fees for applying and for the administration of mediation, as well as the mediator's fee (for the total of USD 750) will be covered by the insurance companies.

Furthermore, due to COVID-19 restrictions, mediations will be conducted on videoconferencing platforms.

Evolution of Mediation in Russia: Legislation and Rules of Arbitral Institutions

In Russia, mediation is governed by Federal Law No. 193-FZ of 27 July 2010 "On the Alternative Dispute Resolution with the Participation of an Intermediary (Mediation Procedure)." In 2019, a number of important new rules have been introduced into the legislation, among other things, enabling the resort not only to regular mediators, but also to court mediators (resigned judges). If the parties have their settlement agreement certified by a notary public, it will automatically become enforceable and will serve as an instrument of execution.

Furthermore, if the parties settle in the course of legal proceedings, or if the claimant withdraws its claims, or the defendant acknowledges such claims, the claimant may get a refund of 30-70% of the state duty paid, depending on the stage when the parties arrived at a settlement.

There are no other legislative acts governing the mediation procedure. So far, Russia has not signed the Singapore Convention and is consequently not bound by its provisions. Hence, currently, there is no opportunity of direct enforcement of foreign settlement agreements in Russia.

Russian arbitral institutions have also made a considerable contribution to the development of the mediation procedure. Thus, the Panel of Mediators in conciliation procedures with the **Chamber of Commerce and Industry of the Russian Federation (the Russian CCI)**, has gained distinction by administering mediation under its own Rules.

These Rules are one of a few defining the mediation procedure in Russia. The parties are provided with several options to refer their disputes to the Panel, including by using a mediation clause: *"until their resolution in accordance with the procedure established by the law or this contract (agreement), any and all disputes arising from this contract (agreement) or in connection with it, shall be referred by the parties for settlement to the Panel of Mediators in conciliation procedures with the Chamber of Commerce and Industry of the Russian Federation."*

Before proceeding with settling the conflict, the parties must enter into an agreement to conduct a mediation. Pursuant to the Panel's Rules, it must contain information on the subject matter of the dispute, the mediator, the amount and procedure of payment and distribution of fees and costs, as well as an indication that the dispute shall be settled by the Panel in line with the procedure and the terms set forth in the Rules.

The Panel's Rules expressly provide that mediation is conducted for a fee in accordance with a special regulation. Unless stated otherwise, the parties may independently determine the specific amount of fees and costs payable or the procedure for paying the same (or the fees and costs can be covered by the parties in equal shares).

One must pay special attention to the fact that the agreement resulting from the mediation will be approved by a court as a settlement agreement and gains binding force under applicable law. Such agreement must therefore clearly define the terms of settlement and the obligations of each of the parties to voluntarily execute the agreement within the terms specified therein.

The Panel is not the sole Russian institution that administers mediation. **The Russian Union of Industrialists and Entrepreneurs (RSPP)** has a United Mediation Service.

The Service administers mediation procedures under its own Rules adopted in 2019. Its Rules have been drafted along the lines of the legislative developments and reflect the best practices of mediation procedures and professional standards.

The Russian Arbitration Center (RAC) does not administer mediations. Nevertheless, the Arbitration Rules allow for resolving the dispute following a hybrid Arb-Med protocol (*i.e.*, first by arbitration, then by mediation).

Under the said procedure, the parties may enter into an agreement to mediate after the arbitration has commenced, at any stage until the arbitral award is issued. At the same time, the parties themselves will need to agree on the applicable mediation rules for choosing and appointing the mediator and determine the procedure. The RAC may only render organisational and technical support of the mediation (*e.g.*, make available rooms for meetings for a separate charge). Moreover, the parties may peruse the special RAC database of mediators that may help them choose the mutually acceptable candidate for settling their dispute.

By contrast with the Panel's Rules, at the RAC, if the parties have arrived at an agreement, it is not approved as a settlement agreement and is not effective as such. Such an agreement may be approved by the arbitral tribunal only as an award on agreed terms at the request of the parties.

The RAC has also prepared the recommended text of an agreement to mediate disputes with the subsequent referral of such disputes to arbitration. Compared with the Panel's clause, the RAC agreement, in particular, has the following distinctive features:

1. the parties must independently determine the body administering mediation and the applicable rules of procedure;
2. the parties automatically consent to their settlement agreement being approved as an arbitral award on agreed terms, and for this purpose, the same person will act as both mediator and arbitrator;
3. the parties automatically agree that the application for a writ of execution will fall within the competence of the commercial court of the constituent entity of the Russian Federation (or a district court), in whose territory the award on agreed terms was adopted.

Even though the RAC has no specialised rules, there still exist requirements as to when the mediation should be commenced and completed. In particular, if the mediation does not commence within 45 days from the date when one of the parties approached the administering body, the parties will not be bound to resort to mediation. In that case, the dispute must be resolved by arbitration administered by the RAC under the Arbitration Rules.

This provision also applies if the mediation did commence within 45 days from the date when one of the parties approached the administering body, but the dispute was not settled within 90 days from that date.

CHOICE AND TYPES OF LAW IN INTERNATIONAL COMMERCIAL ARBITRATION: VARIOUS APPROACHES TO THE DETERMINATION OF THE APPLICABLE LAW

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One of the key principles of international commercial arbitration is party autonomy, which, among other things, manifests itself in the arbitral proceedings in the parties' freedom to choose the law they want to be applied to the resolution of their dispute. The choice of law may affect both the very procedure of dispute resolution and the overall outcome of the case.

Parties, however, do not always make that choice themselves, whether in their arbitration agreement or later when the dispute has already arisen, and in that case, the applicable law is chosen by the arbitrators instead. This issue is sometimes not so easy to handle, because, given the nature of international commercial arbitration, resolution of the dispute may concern the application of the law not just of one but also of several states. Moreover, in some cases other rules may be applicable that are not in fact related to the legislation of a particular state.

Depending on the regulated aspect of arbitration, the following types of applicable law can be distinguished:

1. *The law applicable to the merits of the dispute (lex causae);*
2. *The law applicable to the arbitral proceedings (lex arbitri);*
3. *The law applicable to the arbitration agreement.*[28]

[28] Some also distinguish the law applicable to the enforcement of the arbitral awards, but it is not discussed here due to the fact that, unlike the abovementioned types of law, the law of the place of enforcement of the award is to be applied by state courts rather than by the arbitrators. In this case, the applicable law will depend on the state to which the prevailing party applies for the recognition and enforcement of the award.

1. The law applicable to the merits of the dispute *(lex causae)*

This law comprises the substantive legal rules that will be applied to determine the subject matter of the legal relations at issue and to resolve the dispute on the merits. The parties may agree to apply either the law of the country with which the facts relevant to the dispute are connected, or any other law, even if it has nothing to do with the dispute or the parties thereto.

Furthermore, the parties may expressly name *lex mercatoria* as the law applicable to the merits of their dispute (*e.g.*, the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law, the Model Rules of European Private Law, etc.) or even rule out the application of law of any state by establishing that the award should be rendered *ex aequo et bono* or as an *amiable compositeur*.

In the absence of agreement between the parties, the arbitral tribunal may itself determine the law applicable to the merits of the dispute taking into account the circumstances of the case and the rules governing the arbitral proceedings. Approaches to regulating this choice at the legislative level may vary. The international commercial arbitration laws of some countries, such as France, the Netherlands and Switzerland, contain provisions allowing a tribunal itself to determine the substantive laws that would be appropriate for resolving the dispute. Other countries may require an arbitrator to first use the conflict of laws rules that he/she deems applicable. For instance, Art. 28(2) of the Russian Law on International Commercial Arbitration states, "In the absence of any indication by the parties, the arbitral tribunal shall apply the law determined in accordance with the conflict of laws rules that it deems applicable." There is a growing perception now that the arbitrators should proceed directly to the application of a general rule aimed to determine the applicable substantive legal rules, instead of having to first find the appropriate conflict of laws rules of a particular state.

Some of the most common ways of determining the applicable law, which are also used in conjunction, are the principles of party autonomy, closest connection and characteristic performance.

Thus, following the principle of party autonomy, an arbitrator determines the law that the parties intended to govern their contract or to which the parties intended to submit themselves. The choice may be either explicit or implicit. An implicit choice may be suggested by such factors as the choice of jurisdiction where an arbitration is initiated, arbitration clauses, references to the rules of a specific country, the form of documents or the wording used in the text of the agreement, all of which may indirectly indicate the parties' consent to resolve their dispute in accordance with a specific law.

In furtherance of this principle, the UK courts have elaborated an approach, according to which the proper law of the contract is to be determined based on the intention of the parties, but where there is none, the law that will be chosen is the law that the parties, as just and reasonable parties to legal relations, should have or would have chosen themselves if they had considered this matter when entering into the contract. Finding such law is also facilitated by the factors that indicate the closest and most real connection to the facts of the case.

Therefore, the second principle of the closest connection supplements the first one. In determining the law that has the closest connection with the relations of the parties, the following can be taken into account: the place of contract formation, the place of performance of obligations under the contract, the place of incorporation of legal entities, the place where obligations under the contract were to be secured, as well as any links to another contract containing the choice of applicable law. The common nationality of the parties, their regular place of residence and, to a lesser extent, the language of the contract, the place where it was signed or the currency of settlements thereunder may be relevant as well.

It should be noted that the issue of the facts to be taken into account in such a case is debatable due to the flexibility of the principle itself. To make it more predictable, the principle of the closest connection may be applied together with other principles for the choice of applicable law, for instance, together with the principle of characteristic performance. According to that principle, one must consider the principal place of business, its statutory seat or the seat of central administration of the party performing the obligation that defines the nature of the agreement.

2. The law applicable to the arbitral proceedings *(lex arbitri)*

The law of the arbitral proceedings (lex arbitri) determines the procedural aspects of arbitration and includes the rules regulating:

- *the internal aspects of the arbitral proceedings (the composition and appointment of the tribunal, due process, the requirements to the form of the award, etc.);*
- *the external aspects of the arbitral proceedings that are related to the state courts' assistance and control over their arbitration (ordering interim measures, obtaining evidence from third parties, challenging arbitrators, reversing court judgments, etc.).*

Arbitration is subject to the imperative rules of the *lex arbitri* as well as the dispositive rules, insofar as the latter are not changed by the arbitration agreement of the parties. Such a change of the procedure prescribed by the *lex arbitri* may take form of the parties' choice of the applicable rules of arbitral institutions or ad hoc rules that become part and parcel of the arbitration agreement and supplement or modify the procedure of the arbitration to the extent not prohibited by the laws.

In general, the law applicable to the arbitral proceedings is that of the seat of arbitration, that is, the law of the country determined as the legal location of the arbitral proceedings.

The seat of arbitration as a legally relevant notion is not tied to the venue of the hearings, that is, the physical location of the participants of the arbitration when taking their procedural actions. The choice and changes in the venue of the hearings shall not have any impact on the specific law of the arbitration, while the choice of the seat of arbitration is the main criterion for determining the *lex arbitri*.

Thus, for instance, the Russian Law on International Commercial Arbitration applies to international commercial arbitrations if their seat is located on the territory of the Russian Federation; moreover, some provisions of the Law related to the assistance and control of the courts of the Russian Federation in relation to international commercial arbitration shall also apply where the seat of arbitration is situated abroad.

3. The law applicable to the arbitration agreement

According to the principle of separability of arbitration agreement, the arbitration agreement is considered separately from the agreement in which it is contained or to which it refers. Therefore, the law applicable to the arbitration agreement might not coincide with the law applicable to the merits of the dispute or the arbitral procedure.

The law applicable to the arbitration agreement is used in analysing the issues of formation, validity, enforceability and interpretation of the arbitration agreement.

Parties may choose the law applicable to the arbitration agreement. Absent such a choice, the applicable law will be determined by the arbitrators.

In practice, one can come across various approaches to the criteria applied in such a case to determining the applicable law. Thus, according to the clarifications given in para. 27 of Resolution of the Plenum of the Supreme Court of the Russian Federation No. 53 dated 10 December 2019 "On the Performance by the Courts of the Russian Federation of the Functions of Assistance and Control with Respect to Do-

mestic and International Commercial Arbitrations," where the parties have not chosen the law applicable to their arbitration agreement, such law shall be determined based on where the arbitral award is to be rendered or has been rendered under the arbitration agreement.

This criterion is used, since the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) provides for one of the grounds for refusal to recognise and enforce an arbitral award being the invalidity of the arbitration agreement under the law to which the parties have subjected it, or, failing any indication thereon, under the law of the country where the award was made.

Thus, reliance on the place of issuance of the award as the criterion to determine the law of the arbitration agreement is aimed at mitigating the subsequent risks of non-recognition and non-enforcement of the final award in the case.

There are also other approaches to determining the law applicable to the arbitration agreement. Thus, for instance, in English law, in the *Sulamérica v Enesa Engenharia*[29] case, a three-step mechanism was developed to determine the substantive laws applicable to the arbitration agreement. According to that approach, the law of the arbitration agreement should be determined by examining:

1. any explicit choice of applicable law;
2. any implied choice of applicable law;
3. which legal system has the closest and most real connection to the agreement.

Each of these steps is considered separately and in its turn, since any choice that the parties made shall be taken into account due to the principle of party autonomy. In that case, the court also underscored that the first and second steps may merge into one, and the implied law of the arbitration agreement is often the same as that of the main agreement. Nonetheless, there may be factors pointing at another law, and because of that, in some cases, the law of the arbitration agreement will not coincide with the law applicable to the merits of the dispute.

In the recent case of *Kabab-Ji SAL v Kout Food Group*, the English Court of Appeal refused to recognise and enforce the arbitral award on the grounds that the award was made against a person who was not a party to the arbitration agreement. While examining the case, the Court found that the law applicable to the arbitration agreement was the law regulating the relations of the parties under the main contract, which in that case was English law and not French law that was previously determined by the arbitrators based on the parties' choice of Paris as the seat of arbitration in their agreement. The English Court arrived at that conclusion, since in their agreement the parties did not determine the law applicable to the arbitration agreement, but instead indicated the following:

- the agreement was to be governed and interpreted in accordance with English law;
- the provisions of the agreement were to be construed as a whole;
- the tribunal was to apply the provisions contained in the agreement.

After analysing these provisions, the Court in *Kabab-Ji SAL v Kout Food Group* concluded that the parties had explicitly chosen the law applicable to the arbitration agreement; moreover, it held that the autonomy does not preclude construing the arbitration agreement as one with the main agreement, if the parties provided for such interpretation.

Nonetheless, despite the English Court's refusal to recognise and enforce the award, the Paris Court of Appeal came to a diametrically opposite decision in the *Kabab-Ji SAL v Kout Food Group* case. The Paris Court of Appeal held that French law was the law of the arbitration agreement, because French law was the law of the seat of arbitration according to the general principles of law, including the principle of separability of the arbitration agreement, and the validity of the award in such a case depends on the law in effect at the seat of arbitration.

[29] *Sulamérica CIA. Nacional de Seguros S.A. and others v Enesa Engenharia S.A. and others*, [2012] EWCA Civ. 368

The Paris Court of Appeal believed that the parties' reference to the English law as the law governing the merits of the dispute was not per se sufficient to establish their common intention to subject their arbitration agreement to the English law rather than the law of the seat of arbitration, when such a place was expressly determined by the parties. The Court also reasoned that, in that case, the agreement contained a reference to the general rules of law and obliged the arbitrators to observe those principles, hence application of English law would contradict the strict wording of the agreement.

The Paris Court of Appeal refused to annul the *Kabab-Ji SAL v Kout Food Group* award, and that shows how fundamentally different the approaches to determining the law applicable to the arbitration agreement may be and what legal consequences that choice can bring forth.

To sum up, it can be noted that in view of the unique nature of international commercial arbitration the choice of applicable law consists in defining the law in relation to three aspects: 1) the merits (substance) of the dispute, 2) the arbitral proceedings, 3) the arbitration agreement.

Absent an agreement between the parties, when considering this issue, the arbitral tribunal will take account of various factors, including the imperative rules at the seat of arbitration, as well as the existing approaches and doctrines on the method of defining the applicable law.

Whereas some approaches are more or less widespread (*e.g.*, the closest connection principle), the particular way of their application may differ (*e.g.*, in England the analysis focuses first on the principle of party autonomy); furthermore, the approaches themselves may be completely opposite, as, for instance, illustrated by the practice of English and French courts in *Kabab-Ji SAL v Kout Food Group*. Nevertheless, despite these differences, it appears that the choice of law applicable to each of the aspects of arbitration should remain reasonable and predictable for the parties, as well as be made with due regard of the criteria for further enforceability of the arbitral award.

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