Russian Arbitration Center

at the Russian Institute of Modern Arbitration

ARBITRATION DIGEST NOVEMBER 2022

CASE LAW DEVELOPMENTS

As the Delivery Service Reaped, So Did Uber Sow

Canadian courts are continuing their crusade against onerous arbitration clauses made by online giants with their employees. This time, following *Uber v Heller*, 2020 SCC 16, SkipTheDishes, a major delivery service, has tried to force its couriers to enter into an arbitration clause banning the filing of collective action with Canadian courts and providing for individual arbitration in any dispute, including disputes arising from earlier agreements with the employee in question. More than that, accepting an arbitration agreement that entered into force within a week by clicking "I accept" was a necessary precondition for the courier to keep working, something the service expressly warned the employees of.

Such terms, however, did not find sympathy with a female employee, a courier and a single mother with secondary-level education. Which is why, in clicking "I accept", she also emailed to the company her objections stating the following: "I do not agree with the new terms, but will indicate 'Agree' so I can continue to get shifts because I want to work. I am doing this under protest." The company never emailed back.

When the employee went on to demand that she is recognized as an employee by seizing the Manitoba Court of King's Bench, as provided by the original agreement between the parties, and initiated a class action against SkipTheDishes, the delivery service asked the Court to dismiss the action due to the arbitration clause (*Pokornik v. SkipTheDishes Restaurant Services Inc.*, 2022 MBKB 178).

The Court, however, held that the arbitration agreement between the plaintiff and the delivery service was never made because:

- the arbitration clause was not retroactive;
- the plaintiff did not accept the agreement as indicated in her email, while the company's silence in response constituted consent to her disagreement.

And even assuming that the clause had been made, the Court noted that it would have been invalid as an unconscionable clause and for lack of consideration due to the considerable inequality in the bargaining power, difference in the level of education of the parties and the use of continuation of the employee's employment as consideration in making that agreement. Moreover, such a clause undermined the principle of efficient adjudication of class actions, limiting access to justice.

Read

No Money Not a Reason to Ignore Arbitration

The French Cassation Court has upheld a finding of a lower court to the effect that a party's refusal to resort to arbitration where the contract contained an arbitration clause, for the reason that arbitration was more expensive than approaching a state court, did not constitute a valid reason to ignore the arbitration clause.

The parties had two contracts. One of the parties approached a state court in France to protect its rights. The court found that it was not competent to hear the dispute by virtue of an arbitration clause between the parties. The party claimed that it had been unable to initiate an arbitration because the costs would have amounted to EUR 100,000, not including the costs of engaging counsel, which could cause its bankruptcy.

The court ruled that the party was to present evidence that the arbitration would have failed due to the party's lack of necessary financial resources.

Interestingly, in its decision, the Paris Court of Appeal opined that "subjects of the arbitration world must avoid any risk of denial of justice in facing a claimant with limited financial means", thereby suggesting that the subjects of arbitration (that is, arbitral tribunals and institutions) should adapt their costs to cases involving such claimants.

Read

Failure to Pay the Arbitration Fee = Waiver of the Right to Arbitrate

Ms. Rosa M. Quincoza Espinoza sued her former employer, Centinela Skilled Nursing & Wellness Centre West, LLC, for discrimination in the employment relations. The employer, in turn, moved to stay the litigation since the dispute was to be arbitrated based on an arbitration clause between the parties that the employee had signed.

After the employer initiated an arbitration, the administering authority sent to the parties an invoice for the administrative fee and the costs of telephonic conference. However, the employer never made the payment. After that, Ms. Rosa M. Quincoza Espinoza filed with a court of first instance, claiming that the employer had materially breached the terms of the arbitration agreement and waived its right to resolve the dispute by way of arbitration, having failed to honor the invoice within 30 days from the due date. The trial court dismissed the motion on the ground that the defendant was in "substantial compliance" with the arbitration procedure and that the plaintiff did not suffer any "material prejudice". The court of appeal, however, ruled that s. 1281.97 of the California Code of Civil Procedure did not contain any exceptions for substantial non-compliance with the arbitration procedure and obliged the trial court to vacate its order denying the plaintiff's motion, order the lifting of the stay of litigation in court, and determine whether the plaintiff's motion should be granted in line with the provisions of the California Code of Civil Procedure.

Read

English Court Explains When a Party Is Deemed to Have Waived Arbitration in Favor of Litigation

In 2014, the Nigerian company Aiteo took out a USD 512 million loan from the US company Shell, as well as almost USD 1.5 billion more from other parties to purchase a share in Nigerian oil deposits. The agreement with Shell contained an asymmetrical arbitration clause whereby Shell was entitled to unilaterally refer disputes to ICC arbitration in London or to a state court.

In 2019, differences arose between the parties over Aiteo's failure to repay the debt. That forced the Nigerian company to approach a national court to declare that there was no debt. Eventually, the Federal High Court of Nigeria issued an *ex parte* injunction for creditors' exercising their right to judicial remedies and claiming repayment of the debt. Subsequently, Shell and other creditors tried to have it quashed.

In 2020, Shell and other creditors initiated two ICC arbitrations. In March 2022, a tribunal declared that it had jurisdiction to hear the dispute in a partial award, dismissing Aiteo's argument that Shell had waived its right to arbitrate having participated in the litigation before the Nigerian court.

An English court upheld the award on jurisdiction, stating in its judgment that to exercise its right to arbitrate a dispute, the party was to make an "unequivocal statement". Moreover, such a statement could be made either in form of a request for arbitration or in any other form; the content of the request was key. The judge also noted that Shell's participation in the Nigerian litigation was confined to appealing against the injunction. Thereby Shell affirmed its intention to arbitrate.

Read

KCAB to Hear a Dispute on Rights to Nuclear Reactor Technologies

In 1997, a Korean company Korea Electric Power Corporation (KEPCO) and a US company Westinghouse contracted for a 10-year license for the Korean party to use a water nuclear reactor technology. Later, in 2010, the parties also entered into a 10-year agreement on business partnership for implementing joint projects outside Korea. After both agreements expired, former business partners became competitors.

The US company Westinghouse then lodged a claim before a national court shortly after learning that KEPCO intended to sell nuclear reactors to Poland, as well as potentially to the Czech Republic and Saudi Arabia. To support its claims, Westinghouse invoked national laws, namely the US Atomic Energy Act. The company intends to enjoin the Korean party from handing technical information on nuclear reactors over to its counterparties.

In turn, KEPCO initiated an arbitration at the Korean arbitration center KCAB under the license contract, claiming that their new reactors had gone far ahead as compared to older generation technologies used in the partnership with Westinghouse.

Read

Details Revealed on an Award in a Dispute between the Finnish Gasum and Russian Gazprom Export

The Russian company Gazprom Export has announced the decision of the panel of arbitrators in an *ad hoc* arbitral dispute between gas companies.

The arbitrators found that Gazprom Export was entitled to suspend deliveries and deemed the March decree of the Russian President (changing the payment currency) a force majeure circumstance. According to the Russian company, the arbitral panel dismissed most of Gasum's arguments such as an argument that the claim for payment for supplies in Russian rubles was contrary to the EU laws and that minimum daily and annual volumes of supply under the contract violated the EU competition laws.

The Finnish company has not commented on the award. At present, on the arbitrators' insistence, the parties are continuing their negotiations.

Read

Gazprom Faces a Major Claim for Undersupplied Gas

The German company Uniper has announced that it filed a claim with the SCC Arbitration Institute against Gazprom Export LLC for the total of EUR 11.6 billion. The claimant demands that the Russian counterparty compensate the damages it incurred due to failure of the Russian party to perform its obligations to supply specific volumes of gas. As Uniper representatives claim, the company has had to buy gas at overstated prices to cover for the undersupplied volumes and that the amount of damages will keep growing until 2024. That said, Uniper has officially dismissed Gazprom's statement on force majeure related to undersupplied gas.

Previously, Uniper had been a major buyer of Russian gas, but this summer supplies started gradually decreasing to eventually fully halt. Because of these circumstances, the company incurred EUR 40 billion worth of damages and the German government has had to nationalize it to save it from bankruptcy. The financial aid allocated by the German government to save Uniper has been the largest amount of such aid in the country's history.

Read

Curiosity Killed a Judicial Commissioner's Decision

The dispute in *Cockett Marine Oil (Asia) Pte Ltd v MISC Berhad* arose after Cockett Marine – a Singapore supplier of bunker fuel for marine vessels — and MISC Berhad – a bunker supplier and shipowner – entered into an agreement on the supply of bunker fuel. Unfortunately, the vessel and barge owned by Cockett Marine got arrested by the Malaysian authorities, following which MISC Berhad rescinded the contract unilaterally. Yet the key role went to the process of execution of the contract and the arbitration agreement.

The story began when MISC Berhad announced a tender for the supply of bunkers, creating a special email newsletter for potential counterparties. The documents circulated, among others, included a provision vesting Malaysian courts with exclusive jurisdiction to resolve any arising disputes.

When, however, Cockett Marine responded regarding the tender and entered into an email exchange with MISC Berhad, it included a hyperlink to its website that contained standard terms and conditions, including an arbitration clause.

Accordingly, when the relations between the parties soured, MISC Berhad approached the High Court of Malaysia in Kuala Lumpur, while Cockett Marine initiated an arbitration in London, moving to stay the High Court proceedings until the completion of the arbitration. Learning about this, MISC Berhad lodged an

application for an anti-arbitration injunction against Cockett Marine. The Learned Judicial Commissioner seized of the matter found that Cockett Marine had failed to demonstrate the existence of a valid arbitration agreement binding the parties and issued an anti-arbitration injunction against it.

Disagreeing with that conclusion on the *prima facie* existence of an arbitration agreement, Cockett Marine brought an appeal against the Judicial Commissioner's decision, and the court of appeal accepted the company's objections. According to the court, the Commissioner had not given due attention to the fact that the latest Cockett Marine email, that is, its confirmation of the supply, was a contractual document between the parties to the supply contract. Furthermore, the court's jurisdiction was confined to determining the prima facie existence of an arbitration agreement and after the *prima facie* assessment, the legal proceedings in the case were to be stayed and referred to arbitration for a full-fledged determination of the existence of a legally binding arbitration agreement. Accordingly, the Court granted Cockett Marine's appeal and stayed the proceedings at the High Court of Malaysia in Kuala Lumpur, as well as lifted the injunction on arbitration.

Read

Arbitration Simplified

The Ontario Court of Appeal has confirmed that hearing a case in a simplified procedure was a manifestation of an arbitrator's discretion, whose limits are established by the parties in their arbitration agreement (*Optiva Inc. v. Tbaytel, 2022 ONCA 646*).

The dispute arose from a USD 8.5 million contract for the acquisition of software and related services. The parties in their arbitration agreement defined the arbitrator's powers, stating that the arbitrator had "competence to examine any and all motions in the course of the arbitral proceedings and decide on the same", including, among other things, "the right… [to issue] orders, instructions and generally review any interim and procedural matters related to issues raised in the arbitration."

During the preliminary discussion of the procedure for the case, Tbaytel announced that it intended to file a motion for a simplified procedure, which it later did. However, after the motion was filed, Optiva objected, claiming that it had not consented to the case being heard in a simplified procedure and that the tribunal had no competence to consider said motion.

Nevertheless, the arbitrator, after looking at the wording of the arbitration agreement between the parties, as well as having reviewed the Ontario Arbitration Act provision allowing an arbitrator to himself "determine the procedure to be followed in the arbitration", granted Tbaytel's motion for a simplified procedure, awarding to Tbaytel in its partial award a compensation of USD 4,390,000 for Optiva's breach of the contract.

Optiva sought to have the award set aside on appeal, arguing that the arbitration agreement did not mention the possibility of a simplified procedure, that the company itself had forfeited its right to an oral hearing for testifying *in viva voce* and for a cross-examination of witnesses, and that the simplified procedure had resulted in injustice towards Optiva.

The court, however, dismissed Optiva's objections, stating that the wording on the arbitrator's right to "examine any and all motions in the course of the arbitral proceedings" vested the latter with a right to resort to simplified proceedings; as to the argument on *in viva voce* evidence, it lacked merit since the law of the

seat of arbitration did not grant to the parties a right to present evidence *in viva voce* or in any special manner; finally, Optiva failed to supply any proof of unjust treatment in the arbitration.

Read

High Court of an Enclave State Lesotho Demonstrates an Anti-Arbitration Stance

In 2018, Lesotho, a South African state, made a contract with the German company FSG for the supply of equipment for the development of solar energy. As the contract price was considerable, it was financed via a loan raised from a German bank. The Ministry of Finance of Lesotho was unhappy with the financing terms and the state eventually refused to make initial payments to the German company under the contract.

FSG was forced to go to arbitration. The sole arbitrator arrived at a conclusion that he had jurisdiction despite Lesotho's refusal to arbitrate, and awarded EUR 50 million worth of damages to the German company.

To set the award aside, the state approached the High Court of Lesotho. The national court concluded that the contract made was contrary to procurement rules, the provisions of national laws, and even the constitution. Additionally, according to the court, a payment of EUR 50 million could cause significant harm to the state's economy and affect vulnerable citizens. The High Court judges rebutted the finding of validity of the arbitration clause based on the principle of divisibility, stating that the principles of divisibility could not apply if the underlying contract was void *ab initio* or if the party that made it had no powers to do so.

Read

Cameroon Violates an Order of an ICC Emergency Arbitrator

An Australian mining company Sundance Resources (SR) sent a notice of an "expropriation dispute" against Cameroon. The move was caused by Cameroon's issuance of a permit for mining the Mbalam iron ore deposit to a competitor.

SR and its subsidiary submitted to an ICC arbitration against Cameroon last June after the state declared it was going to work with a Chinese consortium on a part of the project within its boundaries. SR believes that the presidential decree underlying the permit issued to the Chinese competitor directly breached an order of the ICC emergency arbitrator. Furthermore, the emergency arbitrator had enjoined Cameroon from granting the rights to develop the mine to its state mining company Sonamines or any party other than SR's subsidiary while the arbitration was pending.

Cameroon has 15 days to settle its dispute with SR; otherwise, the expropriation dispute will be referred to a tribunal.

To recall, this is not SR's only major dispute in Central Africa. As we reported earlier, SR also had a dispute against Congo over the issuance of a permit to mine the Nabeba deposit (March 2021 Arbitration Digest).

Read

Russian Party Successfully Annuls an SCC Award in Sweden

Chelyabinsk Metallurgical Plant (ChMK) succeeded in partially annulling an SCC award in a USD 200 million dispute with a Chinese engineering contractor before the Swedish courts.

In 2008, ChMR entered into a contract with Minmetals for designing and setting up a plant for the production of railway tracks at one of its facilities. After ChMK terminated the contract in 2014, the Chinese company went to arbitration, claiming over USD 45 million as outstanding amounts under the contract, as well as a compensation for allegedly stolen and damaged equipment.

In the award, delivered in 2017, the arbitral tribunal upheld the claimant's claims and obliged ChMK to pay USD 32 million (or USD 17 million after a setoff) to its former contractor. Yet, one of the arbitrators concluded that the award could not be based on a position not pleaded during the arbitration.

ChMK approached the Court of Svea in 2018 with a request to set the award aside in full or in part, since the tribunal had awarded a compensation for the costs incurred by Minmetals, while the Chinese company never asked for them.

By its 4 November Judgment, the Svea Court of Appeal partially annulled the arbitral award, stating that the tribunal exceeded its mandate when it compensated the costs incurred to Minmetals, even though the latter demanded only to be paid for the works performed.

Read

Impartiality of an Arbitral Institution v. Impartiality of an Arbitrator: Are They Different?

The Supreme Court has brought to a close the case on the arbitration clause of OOOR SoyuzMash Rossii [All-Russian Industry Association of Employers "Union of Machine Builders of Russia].

The clause at issue was included by a SC Rostech company into a contract with an external counterparty. It provided that "any and all disputes, differences or claims arising from this agreement or in connection with it, including related to its performance, violation, amendment, termination or invalidity, shall be resolved by arbitration administered by the Arbitral Institution with OOOR SoyuzMash Rossii in accordance with its applicable rules." The next paragraph, moreover, read that "if the parties fail to reach a mutually acceptable solution in a complaints procedure, the dispute is to be resolved by a commercial court in accordance with the effective laws of the Russian Federation."

The counterparty decided to lodge a claim with a state court, reasoning that the clause, in its opinion, was an alternative one, and furthermore the Arbitral Institution with Non-for-Profit Organization OOOR SoyuzMash Rossii was not impartial, since the respondent was a member of that non-for-profit organization.

The courts of first and appellate instances dismissed the claim due to the existence of an arbitration clause. The courts also rejected the claimant's argument on the partiality of the arbitral institution, indicating that the case files contained no evidence of an objective lack of impartiality of the arbitral tribunal.

The cassation court, however, quashed those judgments, focusing instead on an analysis of the impartiality of the arbitral institution. According to the judges, the arbitration clause was invalid since it suggested referring disputes to an arbitral institution affiliated with the respondent, something which was a violation of the principle of impartiality.

During oral hearings at the Supreme Court, the issue of whether the impartiality principle had been met was also discussed in detail. Thus, the respondent's counsel insisted that the principle of impartiality was for arbitrators rather than for the arbitral institution administering the dispute to comply with. In its final ruling in the case, the Supreme Court abstained from specific conclusions on whether the impartiality requirement covered the arbitral institution, merely stating that the cassation court's doubts as to the impartiality of the arbitral tribunal were speculative. On that basis it reversed the cassation court's decision and upheld the judgments of the courts of first and appellate instances.

Read

Arbitral Tribunal Allows a Columbian to Be an Ecuadorian

A CAS panel allowed the Ecuador team to participate in the FIFA World Cup in Qatar even though the country provided false information about one of its players – the right guard of the team who was born in Ecuador in 1998 according to his passport. It turned out later, however, that the information in the passport was not true and the player was born in Columbia in 1995.

On that ground, the football associations of Chile and Peru demanded that the Ecuador team be disqualified from among the World Cup participants, with a technical loss in all matches involving that player.

The arbitral tribunal admitted that the passport indeed contained false information, hence the Ecuador football federation must be fined and stripped of three points in the qualifying tournaments of the next World Cup. However, the arbitrators refused to disqualify the team from the current World Cup, holding that if Ecuador officially recognizes the man as its national, he is one, despite false information in the passport.

Read

An Arbitrator's Error in Applying Substantive Legal Rules Not an Absolute Ground for Refusal to Enforce an Award

The arbitral award at issue was rendered due to a claim made by sports cars sellers against a servicing company. The claimants believed that the fees charged by the servicing company for maintaining the sports cars sold were overstated even though the maintenance tariffs had been agreed upon between the parties.

The arbitrator sided with the claimants and himself elaborated a compensatory mechanism he deemed just. The first instance court enforced the award. The respondent went on to challenge that decision on appeal, the court finding that enforcement was to be denied. The court of appellate instance found that the arbitrator had manifestly breached the law as he had changed the payment procedure agreed upon by the parties in their contract.

The Supreme Court did not agree with that finding. It ruled that an arbitrator making an error in interpreting the law did not demonstrate thereby his manifest disregard for the law; consequently, the award could not be repealed on that basis. After the case was remanded for retrial, the court of appeal adopted the reasoning of the Supreme Court of Georgia and endorsed the judgment of the court of first instance.

Read

No Success Fee and Equally Unsuccessful Attempts of Ex-Dentons Partner to Avoid Arbitration

The California appeals court sent back to a New York arbitration a claim by an ex-Dentons partner on wrongful termination. Dentons had earlier initiated an arbitration against John Zhang who, as the firm claims, abused his official position to appropriate a portion of a success fee of USD 35 million. Mr. Zhang invoked labor laws to insist that the case be heard by a California court, while the firm demanded an arbitration in New York in line with the agreement between the parties.

Early this year, the California Supreme Court stayed the New York arbitration and referred the case to the California appeals court to decide on the proper forum, but the appeals court returned the case to the New York arbitrator to decide on jurisdiction and on whether the ex-partner was the firm's employee.

As argued by Mr. Zhang's lawyers, the California Labor Code mandates that California employee disputes be adjudicated in court, but the California Code of Civil Procedure provides for a stay of legal proceedings if a court of another state is seized with a petition to compel arbitration.

Read

Arbitration v. Bankruptcy. The Score Is 0 : 1

On 10 November 2022, the Supreme Court of Canada released its decision in *Peace River Hydro Partners v. Petrowest Corp. (Petrowest)*. The case went through several instances.

Peace River Hydro Partners (Peace River), a construction company formed to build a hydroelectric dam in the British Columbia, subcontracted a company with affiliates in the Alberta province of Canada – Petrowest Corporation (Petrowest Corp). Contracts between Peace River and Petrowest Corp contained agreements of the parties to arbitrate any disputes. When Petrowest Corp experienced financial difficulties, the court (the Alberta Court of Queen's Bench) delivered an order pursuant to s. 243(1) of the Bankruptcy and Insolvency Act (BIA), appointing a receiver to manage the assets and property of Petrowest Corp. and its affiliates. The receiver then brought a civil claim against Peace River seeking to recover funds owed to Petrowest Corp and its affiliates for the subcontracted works. In turn, Peace River applied under s. 15[1] of British Columbia's Arbitration Act to stay the proceedings in the case on the ground that the parties had made arbitration agreements. Both the British Columbia Superior Court and the Court of Appeal found that the stay application was to be dismissed.

The Supreme Court arrived at the same conclusion, as well as deemed the arbitration agreements unenforceable to facilitate the bankruptcy. The Court also suggested a certain algorithm of analysis of decision-making on staying the arbitral proceedings in case a bankruptcy procedure is initiated. Among the conditions to be taken into account in deciding to stay the proceedings it noted, in particular, the effect of the arbitration on the integrity of the bankruptcy case, the relative losses for the parties that can be caused by arbitrating the dispute, the need to have the dispute resolved urgently, etc.

Read

Don't Want to Perform an Agreement? Well Then, Bear the Costs Too

An Italian company (claimant) and a Turkish company (defendant) had an agreement for construction and installation works that the claimant was to perform at a site for the transportation of liquid petrochemical products in Romania. The claimant's contractual obligations consisted in carrying out preparatory studies before the implementation of the project, as well as acting as an advisor and engineer in the performance of construction and technical works in case the defendant decided to proceed with implementing the project. During the preparatory studies conducted by the claimant, the defendant informed the claimant of changes in the project and asked it to complete some types of work and put off others. The project was suspended.

The Italian company approached ICC to arbitrate the dispute, arguing that the defendant breached the contract by failing to pay for the services rendered. After the claimant initiated an arbitration, the defendant brought an action with a court in Turkey, relying on the lack of merit in the claimant's claims. The defendant moreover asserted that the arbitration agreement was invalid and the case was to be heard by a state court.

In the arbitration, the arbitrator issued an injunction, requiring the respondent to abstain from filing a lawsuit with a state court and taking any further steps. The respondent, however, did not abide by the antisuit injunction and continued pleading that the arbitration agreement was invalid and that the arbitration itself was to be suspended because the claims simultaneously pending before the arbitration and a Turkish court were identical.

As a result, the tribunal partially granted the claims filed. Furthermore, in view of no cooperation on the part of the respondent for obtaining an expert report on the work performed under the contract by the claimant and in view of the respondent's continuation of the litigation before the Istanbul court despite the antisuit

injunction, the arbitrator held that the respondent was to compensate the losses to the claimant and cover 75% of arbitration costs.

Read

Swiss Court Confirms the Standard Applicable to Annulment of Awards in Situations of Potential Partiality of an Arbitrator

The Federal Supreme Court of Switzerland has affirmed that there are serious impediments to annulment of arbitral awards on the basis of manifest partiality of an arbitrator. The ground for annulment must not have been known or discoverable with due care while the arbitration was ongoing. The party seeking annulment must demonstrate that any such grounds could not have been discovered at an earlier stage.

In the case in question, the claimant alleged that an arbitrator, an English barrister, and the opposing party were closely linked. The Court noted that the arbitrator had notified the respondent in the course of the arbitral proceedings that he wished to represent the claimant in an unrelated case. That is why the claimant cannot now complain that it had not known of a potential conflict of interest during the arbitration.

Read

INVESTMENT ARBITRATION NEWS

Paris Sequel to an Oriental Tale on a Russian National Denied Investor Status

The claimant in *Maria Lazareva v. Kuwait* approached the Paris Court of Appeal with an application to set aside an arbitral award dismissing her claims under the Kuwait-Russia BIT.

In our August 2022 Digest we covered how in 2018 Maria Lazareva initiated an UNCITRAL arbitration against Kuwait, claiming that Kuwait had unlawfully arrested her in order to attach her assets at KGLI, a private investment company. According to Lazareva, her arrest inflicted major losses for the company in violation of the Kuwait-Russia BIT. As the UN Working Group on Arbitrary Detention established in its November 2010 opinion, Maria Lazareva's opinion was unlawful.

The UNCITRAL tribunal found that Ms. Lazareva did not qualify as an investor under the BIT as she did not exercise sufficient control over KGLI, hence it had no jurisdiction over the dispute. Now Ms. Lazareva seeks to have the award set aside in Paris on the ground that the tribunal erred in finding that it had no jurisdiction.

Read

ICSID, Too, Falls Outside of US Code § 1782

A US court held that ICSID arbitrations did not fall under § 1782 of the US Code. The US Supreme Court had previously concluded that federal courts could not assist in the discovery of evidence for arbitral proceedings, since only a governmental or intergovernmental adjudication body fell under § 1782 of the US Code. Now another court found that such assistance could not be rendered for ICSID arbitrations as well.

Read

Arbitration Clause Prevents Treaty Ratification

The Supreme Court of Ireland has ruled that the country was unable to ratify the trade agreement between the EU and Canada (CETA) since that would be contrary to the Constitution. The Court's opposition was caused by an arbitration clause found in the CETA, that provides that the arbitration agreement is binding and the parties must recognize and perform the same without delay. According to the majority of the Court, that clause deprived the Supreme Court of Ireland of the opportunity to ensure that arbitration awards are consistent with the country's Constitution and the EU legislation.

Nevertheless, the Court also pointed out that the CETA's ratification would be possible if the Parliament amends the 2010 Irish Arbitration Act. According to the Supreme Court, amendments must entitle it to exercise control over arbitration awards issued under the CETA.

Read

ARBITRATION NEWS AND ADR EVENTS

Cancel Culture Spreads to the Energy Charter Treaty

Members of the European Parliament have adopted a resolution calling on the Council and European Commission to organize and support a coordinated approach to the withdrawal by the EU and its member states from the Energy Charter Treaty (ECT).

Initially, it was expected that the ECT member states would vote on a modernized ECT at the Energy Charter Conference on 22 November 2022, but after the decisions made by a number of EU member states (Germany, Slovenia, France, the Netherlands, Spain, Poland, and Luxembourg) to withdraw from the ECT and the Council's resulting inability to reach a common position on voting on the modernized ECT, voting was postponed until April 2023.

The key reasons for the resolution were preserving the protection of investments into fossil fuels in the modernized ECT for an indefinite term, the lack of clarify on the 20-year-old clause on the ECT's termination in case of withdrawal therefrom, as well as the ECT's inconsistency with the Paris Agreement.

Of interest is a remark by the Energy Charter Secretariat that apart from ECT Art. 47 on withdrawal from the ECT, termination of ECT with respect to a member state is governed by Art. 62(1) of the Vienna Convention on the Law of Treaties, whereby withdrawal from a treaty is possible only in case of a "fundamental change of circumstances", material for a party's decision to enter into the treaty, and only where such fundamental changes materially change the obligations of the parties under the treaty.

Read

British Lawyers Allowed to Receive Money from Russia

The UK Office of Financial Sanctions Implementation (OFSI) has simplified the process for accepting payments from clients on the Russian and Belarus sanctions lists.

A six-months General Licence allows law firms to accept up to GBP 1 million from designated clients provided that they report the payments to OFSI within seven days from receiving them. Further, law firms will have to provide detailed billing of the legal work performed, indicating their hourly rates.

Additionally, a number of limitations applies to incoming payments: there is a cap on hourly rates (no more than GBP 896 per hour) and a cap on payments that law firms will be able to receive for the legal work performed before the client was designated (no more than GBP 500,000).

Where law firms had to first approach OFSI to be authorized to receive payments from their designated clients before, to then wait for up to several months for the regulator's license, now the procedure has been decidedly facilitated.

Read

Siriusly on Why Arbitration Is the Brightest Star for Disputes Related to Space Objects

Experts involved in panel discussions part of the World Arbitration Update came to the conclusion that could be summarized thus: arbitration could be a great idea for space disputes.

According to their suggestions, by 2030 the profits in the space industry will reach USD 1 trillion. A decrease of the costs of launching space projects will inevitably lead to an increase of the number of players in that market. Given that even now it is populated by more than 1,000 startups, whose prospects of success are hard to assess in the long term, that new subjects are going to appear in the space industry and that by far not all projects will "take off" and satisfy investors, shareholders and buyers, one can confidently say that disputes in this field will be proliferating exponentially. Which is why now could be the time to start thinking about the mechanisms and tools to be included in the dispute resolution clauses whenever companies engaged in the space industry are making any agreements:

- Transnational arbitration is disconnected from a specific state, its policies or public interests;
- Arbitrators, unlike state judges, are not appointed by the government of that state and do not depend on it, which increases the level of trust for arbitration as a DR mechanism;
- Arbitration is easily adapted to any language, which allows cutting costs on interpreters;
- Confidentiality is the cornerstone of arbitration as well as for the industry effectively built on protecting patents and high tech;
- Direct access to the locus of incidents in space is somewhat limited, hence a huge role in resolving disputes on technical matters is most likely to be played by expert witnesses who will help control the scope of documents disclosed in the case.

We have already seen such an approach to DR in other industries – examples are to be found in the development of aviation, maritime navigation; now valuable lessons could be extracted from these industries in order to arrange for something similar, for instance, for matters of mining in space and on the Moon.

Read

Workshop "How to Win a Moot Court or a Moot Court Through an Arbitrator's Eyes"

In November, Margarita Drobyshevskaya (Case Administrator, RAC) and Daria Mayorova (Associate, Dispute Resolution – BGP Litigation) held a masterclass as part of Master's School sharing what moot courts are and how to prepare for them. The masterclass was supported by BGP Litigation, the Russian Institute of Modern Arbitration, and Young IMA.

Read

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