Russian Arbitration Center

at the Russian Institute of Modern Arbitration

# ARBITRATION DIGEST AUGUST 2022

# CASE LAW DEVELOPMENTS

## Arbitration based on a 19th Century Agreement with UNIDROIT Principles as the Applicable Law

An altogether extraordinary dispute has been heard by a sole arbitrator in *ad hoc* proceedings. It arose between Malaysia and the heirs to the Sultanate of Sulu – an island nation that had occupied part of the territory of what is now the Philippines and the island of Borneo from the 15th to early 20th century. The arbitrator has held that Malaysia is to pay to the eight purported heirs almost USD 15 billion for a breach of an agreement dated 1878. Under the agreement terms, the Sultan of Sulu had granted the right to use natural resources in exchange for annual rental payments. Notably, the payments kept coming until 2013.

The claimants initiated the proceedings relying on a dispute resolution clause found in the 1878 agreement between the Sultanate of Sulu and British Borneo Company (that, and it was common ground between the parties, was owned by Malaysia). The agreement read that should there be any dispute or grievance between the parties, their heirs and successors, the matter was to be brought for consideration or judgment of "Their Majesties' Consul-General in Brunei". Having largely refused to take any part in the arbitral proceedings, Malaysia in its communications with the claimants made it clear that it did not treat that wording as amounting to an arbitration clause.

As the body charged with resolving the dispute under the clause in question was not existent, the claimants applied to the British Foreign Secretary with a request to determine who could perform that function instead. The UK, however, declined the request. The claimants then went to a court in Spain, arguing that Spanish courts were the organs directly relevant to the case, since at the time when the agreement was signed, it was governed by Spanish law by virtue of Spain's sovereignty over the Philippines. The Spanish courts agreed that they were competent to appoint an arbitrator who would then himself decide whether he was competent to hear the dispute or not. Later, admittedly, the Spanish courts changed their conclusion, which did not prevent the arbitrator from continuing the arbitration on the merits, having shifted the seat from Spain to France. Further, Malaysia secured an anti-arbitration injunction from a Malaysian court, which similarly did not impede the arbitrator from proceeding with the case. That said, according to the arbitrator, Malaysia's non-participation in the arbitration did not mean that the claimants' claims could be satisfied without being thoroughly considered. On the contrary, he noted that he aimed to strike a balance in the proceedings as the respondent's interests and right to defense – as a non-appearing party – were to be protected, while the claimants' interests were not to be undermined by the respondent's non-appearance.

In the arbitrator's opinion, although the dispute resolution agreement did not contain an express indication that disputes were to be referred to arbitration, that intention of the parties could be derived from their understanding that disputes had to be resolved by a neutral party. In addition, he stated that consuls-general acted outside the judicial system, which confirmed the intention of the parties to refer their disputes to a neutral party. The arbitrator decided that it was irrelevant that no such organ was in existence at present. According to him, the Spanish *lex arbitri* was "*inspired by the principle of conservation of the arbitration agreement," hence "reasonable interpretation of [the arbitration agreement's] terms […] may remedy a pathological aspect by severing what makes it unenforceable, while still retaining enough of the agreement to put the arbitration into operation.*" The arbitrator therefore concluded that the arbitration clause was valid and continued to bind Malaysia.

The arbitrator added that in accordance with the Spanish *lex arbitri* he was not obliged to follow the private international law rules of the respondent state and could choose a system of rules that was not "domestic" law by nature, such as, for instance, *lex mercatoria*. "*The choice of lex mercatoria* [...] *may help to put the contractual relationship articulated in the Deed on a more even footing and thus maintain that equilibrium*

*between the Parties,*" the arbitrator opined. Accordingly, the arbitrator concluded that the UNIDROIT principles could appropriately apply in the dispute.

The eventual award was in favor of the heirs of the Sultan of Sulu, while Malaysia was also ordered to compensate the arbitration costs.

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## All in Good Time: When to Raise the Counsel's Switching Jobs?

A Spanish company failed to set aside a USD 40 million ICC award with respect to the Peruvian oil refinery SSK by arguing that two members of its counsel joined the opposing side's law firm while the arbitration was still pending.

A US Court of Appeals in its judgment of 22 July 2022 established that TRT, a Peruvian subsidiary of the Spanish construction group Técnicas Reunidas, waived its right to appeal the award based on public policy, since it raised the objections regarding the lawyers' joining the opponent's counsel for the first time as late as at the enforcement stage. The Court of Appeals also noted that both parties had known about the transfer of the counsels and could have raised their objection during the arbitration, in view of the tribunal's right to disqualify the conflicted attorneys.

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## Rosatom Arbitrations: The Controversy Spirals on

The CEO of the Finnish company Fennovoima Joachim Specht has revealed that the company has initiated a series of arbitrations against the subsidiaries of State Corporation Rosatom in view of termination of the project to construct a nuclear power plant in Finland. Fennovoima's total claims amount to around EUR 2 billion, where EUR 800 million account for the prepayment that Fennovoima is claiming from Raos Project – Rosatom's subsidiary in Finland.

Fennovoima management insist that the project's termination was caused solely and exclusively by the Russian party's being unable to perform its contractual obligations. In particular, according to Joachim Specht, back in early 2022, Rosatom warned its Finnish partner about potential delays that could move the project implementation several years into the future.

The Russian party, in turn, argues that the contract was terminated without proper grounds to do so and for political reasons, while delays in technically complex projects of that kind were to be expected and some were even caused by Fennovoima itself. Due to the termination of the contract to construct the nuclear power plant, Rosatom, too, has announced its intention to initiate an arbitration against Fennovoima.

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## Swedish Arbitrator Sides with Danish Beer

A SIAC tribunal chaired by Jan Paulsson has ruled in favor of Carlsberg in a USD 1.5 billion dispute related to Carlsberg's businesses in Nepal and India. The Danish brewery received the right to buy its partner out of a joint venture.

Carlsberg held 67% in a joint venture, but had previously reported "serious disagreements" with CSAPLH, among other things, over the repayment of a USD 40 million loan and the conduct of Khetan Group (that belongs to an influential Nepalese family), allegedly impeding Carlsberg's control over operations in Nepal.

The tribunal found "irremediable material breaches" of the agreement in the conduct of CSAPLH and gave the Danish company the right to buy out the shares held by CSAPLH in their joint venture. Carlsberg has already exercised that right. Interestingly, the information on the outcome of that case became known from Carlsberg's financial statements.

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## A Flight to SCC

The Minister of Justice of the Republic of Moldova has announced the state's victory in an arbitration under a dispute concerning damages for unilateral termination of a concession agreement for the management of the Chisinau International Airport. According to the Minister, since the concession holder has failed to fulfil its obligations to invest into the project, the tribunal dismissed the claimant's claims.

The claimant, however, completely disagrees with the Minister's account of the situation. It points out that the award concerned the issue of jurisdiction rather than the tribunal's findings on the merits of the dispute, including any facts of investment into the project. As the claimant puts it, the tribunal decided that the investments made did not fall under the Moldova-Cyprus BIT, but it intends to challenge that award before a court in Sweden.

The dispute over the Chisinau International Airport had been ongoing since 2020, when the state terminated a 49-year concession, made in 2013 with Avia Invest, owned by the claimant (the Cyprus company Komaksavia Airport Invest Ltd). As stated by the Government of Moldova, the concession holder's outstanding debt under its obligations as at the termination of the agreement amounted to EUR 66 million; yet, the state did not file any counterclaims in the arbitration. Another interesting fact of notice is that the former Prime Minister who signed the concession is currently a suspect in a criminal case connected to that project.

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## No Proof – No Granting Damages Claims

The Singapore Court of Appeal has partially set aside a EUR 62 million ICC award with respect to a Malaysian steel plant after finding that the tribunal had recovered financial losses without appropriate proof.

The dispute concerned Danieli's obligation to provide engineering equipment and services for designing and constructing a steel plant in Malaysia for the value of EUR 92.7 million.

Performance of the obligations involved delays in the construction of the plant that, on top of that, failed to reach its performance target.

After Southern terminated the agreement, Danieli and Southern initiated ICC arbitrations in 2016 that were later consolidated.

In the 2019 award, the majority of arbitrators concluded that Danieli should be ordered to repay both the contract price of EUR 92.7 million, minus around EUR 74 million due to the loans it had extended to Southern previously and the decrease in the plant's value, and the damages due to misrepresentation that was what caused Southern to enter the agreement, in the amount of EUR 23 million (the tribunal satisfying only 25% of damages claim).

The Singapore court annulled the award to the extent it ordered a compensation of damages for misrepresentation, noting that in assessing evidence under the main claim, the tribunal expressly pointed at the gaps in Southern's evidence regarding the damages amount. The court held that the parties expected the tribunal to award the damages that Southern was able to prove, while the tribunal proceeded to issue an unfounded decision that the parties could not have foreseen, awarding 25% of the unproven claims.

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## A Vape Dispute Gone Too Far

An American seller of vaping devices seized the US District Court for the Western District of Washington with an application to enforce an ICDR award that held its former counterparty liable for a breach of several provisions of a distribution agreement.

The agreement was made with a Hong Kong company that undertook to supply vaping devices and accessories for five years for further resale. As established by the arbitrator, the Hong Kong company refused to honor some of the purchase orders made last year, which compelled the US company to resort to the "self-help" clause and start buying replacement products directly from the Chinese plant that produced them.

Furthermore, the arbitrator found that the seller had breached the exclusivity clause in the agreement by announcing an "exclusive partnership and joint venture" with the Chinese vaping devices manufacturer Shenzhen Yuto. The buyer says that the breach of the agreement still continues.

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## Out of Court and into the Arbitration: How Tesla Resolves Issues with Ex-Employees

In a dispute between engineer Alexander Yatskov and his ex-employer Tesla, the US District Court for the Northern District of California has granted the company's motion to refer the dispute to arbitration as per the arbitration clause set forth in the employment agreement.

Tesla accuses its former engineer of deleting from corporate devices the confidential information on the company's experimental supercomputer and storing it on his personal computer, as well as of providing a "dummy" computer to Tesla during its investigation to prevent the recovery of such data.

The defendant objected to the dispute being heard in arbitration, arguing that by suing him in court, Tesla had "dragged" his name "through mud" and that it now wanted to "hide this dispute in private arbitration" to deprive him of the opportunity to clear his name publicly. The Court, however, ruled that the company's submission constituted a request for urgent injunctive relief, while the arbitration clause between the parties allowed filing the relevant request with a court.

Interestingly, apart from claims for a number of injunctions regarding the confidential information, the company's submission also contained claims that can be characterized as a legal action. For example, the company claimed damages and a fine for the defendant's conduct. Additionally, Tesla demanded a jury trial, which is also unusual for a request for urgent injunctive relief.

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## Once upon a Time in California: The Brahmin, the Untouchables and an Arbitration beyond Reach

Cisco Systems Inc. has lost an appeal before a California court in an attempt to take to arbitration a case on caste bias in its Silicon Valley offices, where managers of Indian descent are accused of humiliating an employee from India.

In October 2020, the Civil Rights Department of California, acting under the California Fair Employment and Housing Act (FEHA) sued Cisco on the ground that the defendants had discriminated against the engineer who called himself John Doe, based on his origin – the man was a Dalit, or an untouchable. Cisco asked to take the case to arbitration and to extend the arbitration clause between the company and Doe to cover the Department, representing the engineer. The court of first instance dismissed the defendant's request and the Court of Appeals upheld the dismissal.

Cisco proceeded on the basis that the Department was bound by the arbitration agreement because it was Doe's attorney and was not acting independently. The Court of Appeal, however, pointed out that the Department was a public vehicle for the protection of civil rights and acted independently in filing FEHA claims, hence it could not be bound by an agreement it had not signed. In that ruling, the Court noted that if the Department had been a mere attorney, the employee would himself decide whether to file the claim; but, in accordance with the laws, the Department was entitled to file claims at its discretion to ensure compliance with the FEHA, which demonstrated that the Department acted independently. The Court also

cited the position of the US Supreme Court in *EEOC v. Waffle House, Inc.* to the effect that a federal agency placed in charge of ensuring compliance with employment discrimination laws, was not bound by the arbitration agreement between the employee and the employer.

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## Crypto Exchange's Battle for Arbitration

The US Supreme Court has dismissed a request filed by the crypto exchange platform Coinbase Global Inc. to put court proceedings in two cases on hold while Coinbase fought to have them referred to arbitration.

In one of the cases, the claimant, Abraham Bielski, argued that he had lost over USD 31,000 after his bitcoin wallet had been hacked. According to Bielski, his attempts to contact the company proved unsuccessful, Coinbase failing to fulfill its duties to protect its clients from fraud under the Electronic Fund Transfer Act. When Bielski submitted to a Federal Court, Coinbase raised the need to refer the case to arbitration, but the US District Court for the Northern District of California ruled that the arbitration clause in the Coinbase user agreement was unenforceable under the California contracts law.

Coinbase challenged the Bielski ruling and a similar ruling in another case before the Ninth Circuit Court of Appeals, moving to stay the first instance proceedings in both cases pending the appeals. When the Court of Appeals denied a stay, the crypto exchange applied to the Supreme Court asking for a writ of certiorari with respect to both cases and a stay of proceedings before the courts of first instance until the cases were reviewed by the Supreme Court.

Notably, in six circuits the proceedings in other cases were stayed pending the appeals, while in three, including the Ninth Circuit, they go on.

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# INVESTMENT ARBITRATION NEWS

## ICSID Tribunal Refuses to Conceal Names of State Officials the Investor Believes to Be Implicated in the Alleged Violation of Its Rights

An arbitral tribunal has refused to conceal information about state officials who, according to the claimant, were implicated in the violation of its rights as an investor. The arbitrators have concluded that granting this request would violate the principle of procedural transparency.

This ICSID dispute arose between Nicaragua and a US investor claiming to own an avocado farm in Nicaragua, now seized by a government-backed armed formation. The investor believes that the support by the Nicaraguan authorities of the seizure of farms was motivated by the state's intention to reward the armed formation for suppressing local protests against the pension reform. The investor contends that the actions of the armed group are attributable to the state as the state itself exercises effective control over this area, as well as acknowledges and adopts the conduct on the farms as its own.

The ICSID has recently published the tribunal's Procedural Order No. 3, which discloses that Nicaragua asked to change the names of its state officials in the documents filed with the tribunal. The tribunal was not convinced by the state's arguments to the effect that the Nicaraguan domestic laws prohibit publication of any information that may have adverse effect on every person's right to honor and reputation. The arbitral tribunal has concluded that the Nicaraguan laws shall apply only to information held by the Nicaraguan authorities and, hence, the documents submitted in the arbitration could not be affected by those laws. "*If allegations relating to the conduct of individuals, after having been made public, are upheld in public proceedings, they cannot be considered as prejudicial to the honor or reputation of the individuals concerned*," the tribunal has indicated. The arbitrators have thus dismissed the request to redact procedural documents filed and published in the arbitration.

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## PCA Tribunal Alters a Public Document to Exclude Information That May Threaten National Interests of the State

An arbitral tribunal in a PCA dispute between South Korea and a US investor, in contrast, has resolved that information about a criminal case in South Korea may be removed from the published transcript of the oral hearing.

In the case, South Korea asked the arbitrators to remove from the oral hearing transcript the information on the criminal case initiated in South Korea, including the names of the persons involved, as well as the evidence discussed and cited in the transcript. The investor objected against amending the transcript in such a manner.

The arbitral tribunal issued Procedural Order No. 11, whereby it agreed with South Korea that the transcript shall be amended. The investor brought this dispute based on the Korea-United States Free Trade Agreement (KORUS) that defines "Protected Information" as information protected from disclosure

according to the laws of the State Parties. The arbitral tribunal has agreed with South Korea's argument that information included in the oral hearing transcript did fall under the definition and, as a consequence, shall not be disclosed. As the arbitrators resolved, a state enjoys a certain margin of discretion when deciding whether disclosure may or may not threaten its national interests.

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## If Not Investment Arbitration, then Criminal One?

In a recent award, a UNCITRAL tribunal held, by the majority of votes, that a Russian citizen Maria Lazareva shall not be treated as an investor under the Kuwait-Russia BIT, as she did not exercise sufficient control over the Kuwaiti company KGL Investment (KGLI) as its former managing director.

Ms. Lazareva was arrested in 2017 on charges of embezzlement of funds during her consultancy work for the Kuwait Ports Authority. She was then charged with embezzling funds from an investment company known as The Port Fund. Some Kuwaiti courts convicted her of these crimes while others, exonerated. Eventually, Ms. Lazareva found asylum in the Russian Embassy in Kuwait and has remained there since 2019.

The businesswoman filed a claim in 2018, alleging that her treatment by the Kuwaiti authorities violated the Kuwait-Russia BIT. She claimed that her criminal prosecution resulted in substantial losses for the investment company. She also claimed that she had to be treated as an investor under the BIT, considering that, as the company's former managing director, she exercised *de jure* and *de facto* control over KGLI.

The tribunal, nonetheless, has resolved that, even though Ms. Lazareva indeed owned a small portion of shares in KGLI that qualified as investments, she had not based her claims on that, since the Kuwaiti authorities did not take any action against those shares. Furthermore, Ms. Lazareva did not have any control over the company in question.

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# ADR EVENTS AND NEWS

## 2022 Mozolin Moot Court: Pre-Moots and RIMA Knowledge Days

In the run-up to the VI National Moot Court on Arbitration of Corporate Disputes, the organisers have decided to help students refresh their knowledge of corporate law, private international law and arbitration and will hold the RIMA Knowledge Days.

Participants and arbitrators of the Moot will be offered a series of lectures on contentious issues raised in this year's case.

The following speakers will participate in the event: Yulia Mullina (Russian Arbitration Center), Leonid Kropotov (DeNuo), and Valerian Mamageishvili (Better Chance).

The lectures will be delivered online. To register, please follow this link.

A recording of the event will be also available to all registered users on the Moot Court platform.

Please also be reminded that the registration for the pre-moots is already on! This year, two pre-moots will be held offline (in Moscow and Yekaterinburg) and two pre-moots will be held online.

To participate, teams should send an application through the web-system of the Moot, as well as upload their skeleton arguments. Arbitrators will not examine these papers: they are needed only to confirm the team's intention to participate in the pre-moots.

We remind you that each team may participate in only one offline and one online pre-moot round, and, most importantly, the team winning a pre-moot will be awarded five extra points to be added to its combined final score for the written part and online rounds.

You can find more details about the pre-moots here.

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## Webinar "Trends and Developments in Arbitration Practice: An Arbitral Institution's and a Counsel's Perspective"

16 сентября 2022 года Маргарита Дробышевская (РАЦ, кейс-администратор) и Анна Авдулова (Иванян и партнёры, юрист) проведут вебинар, организованный IMS Law College, Noida (Индия), в ходе которого расскажут о последних тенденциях в международном арбитраже с точки зрения арбитражного учреждения и представителя стороны в арбитражном разбирательстве. Регистрация доступна по ссылке.

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

This August, the RIMA Summer Academy took place, bringing together 20 participants who gained valuable knowledge of the methods of alternative dispute resolution from leading arbitration specialists, namely Evgeny Raschevsky, Egor Chilikov, Kirill Trukhanov, Maxim Kulkov, Marina Akchurina, Maria Lyubimova, Natalia Alyonkina, Olga Tsvetkova, Stepan Sultanov, Tatiana Tereshchenko, and Yury Babichev. During the course, the participants had a chance to put the knowledge acquired to practice based on cases prepared by the speakers, discuss the subtleties of negotiations and learn about the special features of enforcing arbitral awards.

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## Global Arbitration Review Announces a Series of Conferences on Arbitration

This autumn, GAR Live will be held in Dubai and New York. And in early winter, GAR Live: Women in Arbitration 2022 will be held, offering a platform for all outstanding women in international arbitration.

## Aviation Arbitration: a New Arbitration Center in The Hague

A new arbitration center has opened in the Netherlands, with specialisation in resolving aviation disputes. As some practitioners say, aviation arbitration is the “final, nearly untouched frontier” of arbitration.

The center has been named The Hague Court of Arbitration for Aviation (the HCAA), and the Netherlands Arbitration Institute will administer all HCAA cases. Disputes will be heard in accordance with the specially designed Arbitration Rules, with one of the most important features being the focus on expert-oriented proceedings achieved through the wide use of the directory of arbitrators and mediators experienced in aviation.

The HCAA is expected to be actively involved in contract disputes concerned with operation, sale, lease and financing of commercial and private jets. The HCAA, however, is not affiliated with any representatives of the aviation sector and constitutes a private non-governmental initiative.

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## New Faces of Russian Women in Arbitration

Russian Women in Arbitration (RWA), an association set up to promote gender diversity in arbitration in Russia and abroad, has announced the formation of the Steering Committee and the names of its new members. The Committee now includes Anna Avdulova, Alexandra Aslanyan, Natalia Andreeva, and Margarita Drobyshevskaya. Together with the RWA co-founders Veronika Burachevskaya and Elena Burova, the new Steering Committee will continue contributing to RWA's mission and goals to support women and make the legal profession more diverse.

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