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современного
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ARBITRATION DIGEST AUGUST–SEPTEMBER 2020



CASE LAW DEVELOPMENTS

A Class Action against a Crypto Trading Platform Referred to Arbitration

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

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

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

Proceedings are suspended until the completion of the arbitration.

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Hormone disputes: Caster Semenya lost battle over testosterone

To compete, Caster Semenya, a South African female athlete, an Olympic and World champion, was obliged to lower her testosterone level under the rules of the International Association of Athletics Federations (IAAF), after gender tests revealed that it was innately very high.

First, the Court of Arbitration for Sport (CAS) dismissed the runner’s appeal on 1 May 2019, holding that such discrimination “is a necessary, reasonable and proportionate means of achieving the IAAF’s aim of preserving the integrity of female athletics.” Now, on 25 August 2020, the Federal Supreme Court of Switzerland dismissed the athlete’s motion to annul the CAS award and confirmed that Caster must take a testosterone suppression treatment to participate in athletics events among women.

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The UK May Face Arbitrations over the Brexit Law

The European Commission has warned the UK that it may face arbitration if it adopts legislation overriding the agreement governing the country’s exit from the EU..Commission believes that the new draft law on the domestic market would contravene with the provisions of the Northern Ireland Protocol to the Withdrawal

Agreement. In that case, the Commission stated, it intends to use the Withdrawal Agreement's mechanism and file a claim with the Permanent Court of Arbitration (PCA), although matters of EU law may be referred to the Court of Justice of the EU.

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WTO Panel Concludes That the US Tariffs on Chinese Goods Are Unlawfully Overstated

In 2018, after the US raised tariffs on Chinese goods by 25%, China introduced similar measures for the US goods and applied to the WTO to resolve the tension. The US, in turn, continued to introduce further tariffs.

In December 2019, a dispute panel was formed to consider the matter. **The panel concluded** that the US failed to demonstrate "how its restrictions contributed to protecting its public morals and did not extend beyond what was necessary". Thus, the panel recommended to bring the US policies in conformity with the GATT 1994.

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Enforcement of Yukos Awards to Be Suspended

The Supreme Court of the Netherlands held that enforcement of the arbitral award of over USD 50 billion to the former shareholders of YUKOS may be suspended until the completion of cassation proceedings.

The YUKOS shareholders based their objections to suspension of enforcement on the argument that cassation proceedings may take as long as 5 years.

Russia disagreed, arguing that there are contradictions in the estimation of the potential duration of such proceedings. Furthermore, the Supreme Court of the Netherlands will in any case have to "**rule out any unjustified objections**" until December 2021. Here, if some of the objections are accepted and the proceedings take longer, meaning that the Russian Federation's arguments have objective value. Thus, it may well be that after the case goes through cassation, the former YUKOS shareholders will be left with no grounds for seeking enforcement.

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Dispute on the Distribution of Bonuses Involving Former Law Firm Partners Referred to Arbitration

A New York court **obliged** the former partners of Nixon Peabody who left to DLA Piper to arbitrate their disputes on the distribution of claw back bonuses.

Five ex-partners of the law firm claimed that Nixon Peabody arbitrarily stopped the mediation process that concerned the distribution of USD 100,000 bonuses. The partners asked the court to order mediation before the dispute went to arbitration.

The court found that there was a valid arbitration clause in the partnership agreement between the parties. Therefore, any disputes related to mediation were to be resolved by an arbitrator, rather than a court.

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How Much Does It Cost to Broadcast Australian Cricket?

Media company Seven West Media is planning to file a claim with the Australian Chamber for International and Commercial Arbitration concerning the reduction of the fee for broadcasting Australian cricket. Seven West Media is unsatisfied with having to pay USD 75 mln annually to Cricket Australia, while the quality of the matches does not meet its expectations. In particular, the company claims that there are too few men's cricket matches. The media company furthermore argues that the pandemic has weakened teams, given that some celebrity players could not participate due to, among other things, quarantine restrictions.

In view of these complaints, Seven West Media applied to a group of experts for adjusting the cost of broadcasts, but Cricket Australia dismissed its request for an expert examination.

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Keystone Foods Acquisition Dispute Referred to Arbitration

Two major American retailers are litigating a dispute over the acquisition by Tyson Foods of the assets of Keystone Foods.

Keystone Foods's former owner claims that instead of the planned USD 2.5 bln, it only received USD 2.16 bln. In turn, Tyson Foods accuses the counterparty of manipulations in accounting statements that resulted in the artificial overstatement of the assets' price and the loss of IP rights that Tyson Foods intended to acquire as a part of the deal.

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INVESTMENT ARBITRATION NEWS

| New ICSID Claims

First Treaty Claim against Denmark

A Lithuanian businessman, owner of the construction company Ds Byggeri, Donatas Aleksandravicius lodged a claim against Denmark after an unsuccessful attempt of negotiations with the Danish government in February. The investor claims compensation of the damage caused by trade union and worker protests at a construction site in Copenhagen, and also intends to submit a claim to the European Court of Human Rights.

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First ICSID Claim against Switzerland

The first ICSID claim against Switzerland for USD 300 mln was filed by a Seychelles-incorporated entity Human Rights Defenders, representing Italian investors Natale Palazzo, Rudolfo Scodeller and Antonio Basile in connection with Switzerland's measures taken in the 1990s that resulted in a retroactive prohibition of sales of property within 5 years after its acquisition and a spike in mortgage interest rates (Human Rights Defenders Inc, as assignee of Natale Palazzo, Rodolfo Scodeller and Antonio Basile v. Swiss Confederation (ICSID Case No. ARB/20/29)). Interestingly, the investor relies on the dispute resolution provisions in the Hungary-Switzerland Bilateral Investment Treaty (BIT) pursuant to a most-favoured nation clause in 1868 Switzerland-Italy Consular Convention.

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| Telecom Case under the First Claim against Sudan Discontinued

The first ICSID claim against Sudan filed by a Jordanian-Lebanese telecoms investor, Dagher, was discontinued by agreement of the parties, however, no official settlement has yet been reached (*Michael Dagher v Republic of Sudan* (ICSID Case No. ARB/14/2)). In 2014, under Sudan's BITs with Jordan and Lebanon, Dagher lodged a claim due to the Sudanese government's failure to allocate the contracted 2.5 GHz frequencies, necessary to operate the internal wireless Internet network that eventually could not be launched.

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First ICSID Extension of a Stay of Enforcement without a State's Financial Guarantee

For the first time in history, an ad hoc ICSID annulment committee has extended a stay of enforcement of an award without requesting a financial guarantee from the state. The EUR 41 mln award in SolEs Badajoz GmbH v. Kingdom of Spain (ICSID Case No. ARB/15/38) was one of the many cases related to Spain's renewable energy reforms. In this case, however, the committee believes that there is a real risk of the state being unable to compensate the amounts paid, should the award be annulled later, since these sums would be ultimately distributed between the investors of the parent funds of SolEs Badajoz.

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ICSID Tribunal Allows Sierra Leone's Criminal Case Simultaneously with Arbitration

In a case against Sierra Leone, Gerald International, a London trader of raw materials, filed a claim against the state's prohibition of exports of iron ore and other infringements of the company's rights under the UK-Sierra Leone BIT (*Gerald International Limited v. Republic of Sierra Leone* (ICSID Case No. ARB/19/31)). According to the investor, Sierra Leone had unlawfully forced it to revise a licence agreement, threatened to suspend the concession and extorted additional duties and taxes. Moreover, after investor served a notice of the potential ICSID claim, the state initiated investigations against the management of SL Mining, arresting 5 top officers of the company on suspicions of incitement of public disorder.

The investor applied to the ICSID with a request for provisional measures, including demanding immediate release of the arrested employees; however, before the tribunal could render its decision on provisional measures, Sierra Leone closed the case against all SL Mining employees without bringing charges. In the end, on 28 August, the ICSID tribunal dismissed the claimant's request, citing the impossibility of interference into the state's domestic affairs absent proof of "bad faith" initiation of criminal prosecution. The ICSID stated that to protect its interests, the company should exercise domestic remedies in Sierra Leone.

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Third Party's Funds Deemed an Investment

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

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In Mid Air: Blocked Aerospace Deal Prompts Threat against Ukraine

Chinese investors are reportedly considering international arbitration against Ukraine as the state continues to block their takeover of Motor Sich.

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

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

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Ponzi Scheme Victims File US Treaty Claims

The investors who suffered from Allen Stanford's Ponzi scheme¹ are moving ahead with claims against the US for over USD 511 mln under several investment treaties, claiming that the government violated investment protection standards due to its failure to put an end to the fraud earlier. They blame the Dallas Division of the US Securities and Exchange Commission (SEC) that failed to stop the Ponzi scheme, despite having been aware of it for seven years.

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

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¹ Allen Stanford's Ponzi scheme is a financial scheme exposed in 2008 and created by the Texas banker and financier, owner and CEO of Stanford Financial Group Allen Stanford. He operated a so-called "Ponzi scheme," where interest on investments was paid as new clients came in. The scheme caused more than 30 thousand investors across the globe to suffer damages totaling over USD 7 bln.

ARBITRATION NEWS

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

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

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

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New Possibilities for Arbitration: The Pros and Cons of “Asynchronous” Hearings

Maxi Scherer (WilmerHale & Queen Mary University of London) presented a new concept of “asynchronous” hearings during the [Virtual Panel on COVID-19 Impact on International Dispute Resolution of the UNCITRAL’s 53rd Session](#). “Asynchronous” hearings are pre-recorded video submissions by the parties’ counsels. According to the author, an “asynchronous” hearing has both indisputable advantages (the possibility of listening to the positions of the parties an unlimited number of times, convenience of recording their videos at any place and at any time for the parties) and disadvantages, such as the impossibility of posing questions live, the lack of face-to-face communication, and, consequently, “live” reactions.

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The ICCA to Research the Right to a Physical Hearing

The International Council for Commercial Arbitration (ICCA) has launched a research project that will look into whether there is a right to a physical hearing in international arbitration. The project will first focus on whether such a right exists in principle in state parties to the New York Convention. Although the initiative was spurred by the spiking number of virtual hearings during the COVID-19 pandemic, the ICCA states that it also took into account the long-standing debates on what constitutes a “hearing”.

A report on this issue will be published as part of the ICCA reports by the end of 2020. It will also include a series of essays on the key issues arising in view of virtual hearings, their consequences for access to justice, as well as practical and technical issues.

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| New Initiative to Support Young Arbitrators

The Rising Arbitrators Initiative, which seeks to support arbitration practitioners under 45 years, who have received their first appointment as arbitrator or who have at least seven years of international arbitration experience, launched on 1 October 2020.

The Initiative aims at supporting young arbitrators by holding events on the topical issues of the substantive and procedural laws, as well as informal talks for sharing unique experience and advice.

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| Public Debates on Arbitrating Labour Disputes in the US

Many people including public figures have expressed their discontent with the possibility for the police officers to challenge their dismissal in specialised labour arbitration due to such arbitrations usually ending in the officers' favour no matter how serious are the allegations that caused the dismissal.

Equally **questionable is the practice** of arbitrating discrimination and sexual harassment claims. Here, the issue arose due to the fact that Section 7515 of the Civil Practice Law and Rules prohibits employers from forcing employees to arbitrate such claims, However, the US District Court for the Southern District of New York held that the prohibition was in fact repealed by the Federal Arbitration Act that introduced a strong pro-arbitration policy.

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| The ICCA Releases a New Yearbook Commercial Arbitration

ICCA's new 2020 Yearbook Commercial Arbitration contains the total of 21 judgments on the application of the New York Convention across the globe – in Austria, Germany, Italy, Kenya, Luxembourg, Malaysia, Russia, the Seychelles, Switzerland, Tanzania, the UK, the US, and Uzbekistan, as well as 2 decisions

reflecting the arbitration practice and doctrine in France and Ghana. You can find the new Yearbook at [Kluwer Arbitration](#).

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The Council of Modern Arbitration (Young IMA) Has Published a Review of Arbitration Practice for Q2 2020

The review focuses on the judgments of Russian courts on issues related to arbitral proceedings, such as:

- the procedure for execution and effect of arbitration agreements;
- the procedure and grounds for excluding a person from an arbitral institution's list of recommended arbitrators;
- enforcement of arbitral awards;
- legal succession in arbitration;
- resolution of disputes involving sanctioned persons.

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ARBITRAL INSTITUTIONS NEWS

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

In February 2018, the HKIAC launched WIA, an initiative committed to the promotion and success of female practitioners in international arbitration and related areas in China. The aim of WIA is to provide a forum to consider and discuss current topics, grow networks and business relationships, and develop the next generation of leading female practitioners. Since its launch, WIA activities have been organised in Shanghai, Beijing and Hong Kong. Discussions took the form of roundtables, debates and social events addressing arbitration-related topics, as well as professional and personal development.

New WIA committees will be responsible for shaping the policies and activities of WIA in order to promote gender diversity in arbitration in China; the WIA Committee members will therefore be based in different parts of China.

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The Swiss Arbitration Association to Unite Forces with the Swiss Chambers' Arbitration Institution

In a joint press release, the Swiss Arbitration Association (ASA) and the Swiss Chambers' Arbitration Institution (SCAI) have announced that they will be joining forces to administer cases brought under the Swiss Rules of International Arbitration and the Swiss Rules of Mediation to "make dispute resolution...more international" and "benefit globally active users worldwide." The new cooperation will take effect in January 2021.

The SCAI Arbitration Court and Secretariat will continue to function, and all the existing dispute resolution clauses will remain intact and fully operative.

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Mauritius International Arbitration Centre Relaunches as an Independent Centre

After terminating its joint venture with the LCIA in 2018, the Mauritius International Arbitration Centre (MIAC) has relaunched as an independent centre.

The MIAC is supported by an international advisory board chaired by Emmanuel Gaillard, the Paris Head of the International Arbitration Practice at Shearman & Sterling; it has its own secretariat, a team of practitioners and an arbitrator database. The MIAC has rooms for holding hearings in the recently built business quarter on the waterfront of Port-Louis that will be used together with the PCA, as well as a library of treatises on international dispute resolution.

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EVENTS IN ALTERNATIVE DISPUTE RESOLUTION

| Business Meeting “Private Law and Arbitration” and Public Talk

On 24-25 September 2020, the Russian Institute of Modern Arbitration held an offline event “Private Law and Arbitration” in Kaliningrad in the format of a business meeting.

Loys Attorneys at Law acted as the General Partner of the event, along with other partners – the law firms [Monastyrsky, Zyuba, Stepanov & Partners](#) and [Solntsev & Partners](#).

The first day of the event included two sessions on the general issues of private law and arbitration. The second day of the business meeting comprised two more sessions on the current trends in arbitration.

On 26 September 2020, with the support of the Law School of the Immanuel Kant Baltic Federal University, a [public talk](#) was held on private law and arbitration with Roman Bevzenko and Andrey Panov, moderated by Maria Lyubimova.

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| Virtual Global Trade Conference by Baker McKenzie

In a Virtual Global Trade Conference on 10 August 2020, the Baker McKenzie lawyers from all over the world discussed the major developments affecting international trade in sessions recorded in July 2020.

The conference featured discussions of the following topical issues: foreign direct investment trends, evolution of US, EU and Japan’s foreign investment regimes, the prospects for USMCA and a US-UK Free Trade Agreement, export control developments, economic sanctions (including those against Russia), China import issues, the status of Hong Kong and other matters.

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| Online Conference on the Impact of New Russian Rules on Exclusive Jurisdiction of Russian Courts to Hear Disputes Involving Sanctioned Persons

On 9 September 2020, the international law firm Dentons held an online conference on the impact of the new Russian CPC rules on the exclusive jurisdiction of Russian courts to hear disputes involving sanctioned persons, on international arbitration.

The conference was moderated by Dentons partner Konstantin Kroll. Konstantin spoke on the practical aspects of the impact of the US and EU sanctions on international arbitration, as well as the changes in the Russian CPC. He noted that Russian commercial courts will now have exclusive jurisdiction over disputes involving sanctioned persons, even where a party to the dispute has entered into an arbitration agreement or included an arbitration clause in its contract, or executed a prorogation agreement to hear the dispute in a foreign court or arbitration.

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| SibLegalWeek 2020

On 5-9 October 2020, the Siberian Legal Week (SibLegalWeek) took place online and offline in Novosibirsk. The free online streams of the sessions are available at the [official Youtube chanel](#).

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UPCOMING EVENTS

| IV FDI ST PETERSBURG PRE-MOOT and Online Conference

On 30-31 October 2020, FDI St Petersburg Pre-Moot will be held *via* Zoom – the last opportunity for the teams to polish their presentation skills and arguments ahead of the FDI Globals.

The rounds will be traditionally accompanied by an [online conference](#), with the world's leading specialists discussing the theory and practice on the most topical and hotly debated issues related to whether the international investment law meets the demands of the principle of sustainable development and complex corporate structures.

Working language of the conference and rounds – English.

Register as an arbitrator [here](#).

Register for the conference [here](#).

More on FDI ST PETERSBURG PRE-MOOT

[Read](#)

| Winter Academy “Transformation of Arbitration: Beyond the Limits of the Imaginable” Goes Online

The e-Academy will include general courses along with case studies on the issues of validity of arbitration agreements and choice of applicable law.

Special courses will also cover the more relevant arbitration-related topics, such as due process, confidentiality and cyber-risks, arbitration of climate change and renewable power related disputes, specifics of arbitration in construction and oil and gas fields, cultural and procedural differences, and cross-examination in international arbitration.

The lecturers feature world-class arbitration practitioners from Russia, the US, the UK, Switzerland and other countries.

In 2021, the Academy will be held online.

Apply [here](#).

More details on the terms of participation, the Academy programme and speakers

[Read](#)

XII International Arbitration Conference “Russia as a Jurisdiction for Dispute Resolution”

On 5 November 2020, the Russian National Committee of the International Chamber of Commerce – the World Business Organisation (ICC Russia) will hold the XII International Arbitration Conference “Russia as a Jurisdiction for Dispute Resolution.”

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