



**Российский
арбитражный
центр**

при Российском
институте
современного
арбитража

ARBITRATION DIGEST DECEMBER 2020



CASE LAW DEVELOPMENTS

| A Cure for All Claims

The UK Government has granted indemnity from potential claims to the pharmaceutical company Pfizer in case of any complications resulting from the use of the COVID-19 vaccine. Indemnity was also granted to the medical institutions with the UK National Health Service (NHS) providing the vaccine.

Although the Pfizer/BioNTech vaccine is an unauthorized drug, it has been included in the list of drugs authorized for use in such emergencies as a pandemic.

Ben Osborn, Pfizer's UK managing director, has refused to explain why the company needed such an indemnity.

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

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

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

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

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

In its recent judgment, the Court of Appeal of Asturias agreed with the court of first instance that Juan Ignacio had been guilty of "serious negligence" and ordered him to pay a compensation in amount of EUR 339,635 to both parties. In doing so, the Court expressly relied on the IBA Guidelines on Conflicts of Interest in International Arbitration, ruling that Juan Ignacio's conduct was a "Red List" situation.

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The CAS Rules on Doping

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

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

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A US District Court in California Holds That Fans Unhappy about Pandemic-Related Event Cancellations Must Arbitrate Their Claims Even If They Had Not Read the Ticket Terms and Conditions Containing an Arbitration Clause

American fan who was refused a refund due to the indefinitely postponed Rage Against The Machine concert filed a suit against Ticketmaster.

The fan's anger was triggered by the website's changes in the refund policy due to the pandemic's spreading in the US and extension of the new rules to cover previously executed ticket purchase agreements.

Ticketmaster filed a motion to compel arbitration, arguing that in buying tickets on the website, the fan had agreed to its terms of use that contained an arbitration clause.

Ticketmaster had already prevailed in the past in a dispute with baseball fans, holding that a click-through arbitration agreement was valid.

A similar conclusion was made by the Court here: it reasoned that a user cannot avoid performing the arbitration agreement by merely claiming that he had not read the website's terms of use that he had access to.

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The Svea Court of Appeal Rejects Gazprom's Appeal against the SCC Interim Award

The subject matter of this dispute was the pricing under the Yamal contract between the Russian gas company and the Polish PGNiG. In its award, the SCC recognized the PGNiG's right to arbitrate a claim to

reduce the gas price under the contract. Later, the arbitral tribunal in Stockholm granted the Polish company's claims; as a result, Gazprom refunded an overpaid amount of USD 1.5 billion.

Given that the award upheld by the Svea Court of Appeal does not concern the merits of the dispute, Gazprom **reported** in its Telegram channel that the status quo in the dispute has been maintained.

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The Commercial Court in London Orders the LCIA to Fix Its Error

On 21 January 2020, the London Court of International Arbitration (LCIA) **obliged** the co-owner of the transportation and logistics company Delovye Linii Alexander Bogatikov to pay USD 58 million to the former co-owner of that company and the CEO of Bank Trust Mikhail Khabarov. On 6 March, Khabarov's counsel filed an application to recognize and enforce that award to the Commercial Court of Saint Petersburg. The Court refused to enforce it, since the LCIA had awarded Khabarov USD 58 million, but erred in its calculations, adding the alleged "tax liabilities" to the company's value instead of deducing them.

Bogatikov then applied to the Commercial Court in London seeking an order that the LCIA revise its award to that extent. The Court concluded that the error made by the arbitral tribunal was material and noted that the tribunal made "the sort of simple mistake any of us can make," but "with the most unfortunate consequences." The request to have the entire quantum analysis reviewed, however, was dismissed by the Court. Thus, the LCIA will have to revise its award as regards the error only.

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Equatorial Guinea Loses the Dispute with France over the Paris Mansion

On 11 December 2020, the majority of the International Court of Justice voted to confirm that the 42 Avenue Foch mansion in Paris was not covered by diplomatic immunities. The mansion, worth EUR 107 million, was seized by the French authorities in 2011 in their investigation of a corruption case initiated against the son of the President of Equatorial Guinea. The police confiscated various valuable objects in the premises of the mansion, including a fleet of luxury cars owned by Teodoro Nguema Obiang Mangue, the then Equatorial Guinea's Minister of Agriculture.

Equatorial Guinea protested against France's actions, believing the building to be part of its diplomatic mission in France and hence not subject to seizure, and applied to the ICJ in 2016.

The Court concluded that the 1961 Vienna Convention on Diplomatic Relations does not allow a state to unilaterally impose its choice of premises for a mission if the host state objects to that choice. In the

opinion of the Court, France objected against the use of the mansion, and that objection was neither arbitrary nor discriminatory.

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| Fish Files in WTO

The representatives of the member states of the World Trade Organization have once again failed to agree to ban the subsidies that result in over-fishing of commercial fish stocks, but they intend to continue negotiations in 2021.

According to the UN food agency, almost 90% of marine fish stocks are nearly depleted. Back in 2015, the world leaders in the UN committed to a target of striking a WTO deal by 2020 that would put an end to multi-billion subsidies that contribute to over-fishing by such culprits as China, the EU, the US, South Korea, and Japan.

Reuters reports that although the negotiators had been discussing the text of the agreement for several months in secrecy, they have failed to even agree on the definition of the term “fish”, or the section on exceptions for developing countries suggested by India.

Additionally, since China has in the past resisted attempts to limit the exploitation of the high seas with its industrial fishing fleet, the success of the negotiations is believed to depend, to a certain extent, on Beijing.

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| Australia Challenges the Barley Tariff

Australia launches the WTO dispute settlement procedure against China’s 80% tariff on barley imposed in May 2020. This is Australia’s first response to China’s sanctions on dairy products, meat, wine, and other products (accounting for the total of 40% of Australia’s exports). According to preliminary estimates, the political conflict has already cost Australia AUD 80 billion. Australia intends to resolve a dispute by an independent WTO arbitrator, or, “if both parties are willing to come to the table,” settle it outside of the WTO mechanisms.

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INVESTMENT ARBITRATION NEWS

| Ukraine Fails to Get the Pipe of Peace Going

The tobacco company Philip Morris is preparing to file an ICSID claim against Ukraine in view of the antimonopoly fine imposed on the company for an alleged collusion aimed at monopolizing Ukraine's cigarette market.

Last year, Ukraine's Antimonopoly Committee issued a EUR 44.4 million fine against the company and other cigarette producers – Imperial Tobacco (EUR 16.9 million), Japan Tobacco International (EUR 33.9 million), and British American Tobacco (EUR 19.5 million), as well as the distributor TEDIS Ukraine (EUR 125.2 million) – for creating artificial barriers for other market participants and setting such conditions for the shipment of cigarettes to remote localities that only TEDIS could meet them. As a result, the latter controls over 99% of the market.

Moreover, in February, the [CEO of the British company Imperial Tobacco announced that the company intended to file a claim](#) concerning that dispute.

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| Driving Money Through the Air

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

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

The Ukrainian enterprise Motor Sich develops, produces, repairs and maintains gas turbines for airplanes and helicopters, as well as industrial gas turbine installations. [To recall](#), in 2017, the Chinese investor Beijing Skyrizon Aviation executed a deal for the acquisition of a controlling shareholding in the enterprise to promote China's military potential. As early in July 2017, however, Ukraine's Security Service initiated a criminal case, attaching the company's shares in 2018.

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| Burnt by the Sun

The World Bank President David Malpass has dismissed a challenge against ICSID arbitrators under the claim filed by Landesbank Baden-Württemberg and three other banks against Spain (Landesbank Baden-Württemberg and others v. Kingdom of Spain, ICSID Case No. ARB/15/45). The claimants had loaned the

total of EUR 1.76 billion for funding renewable power plants and are now seeking compensation after Spain's reform of the subsidies regime in that sector.

The attempt to recuse the arbitrators was due to their refusal to hold an offline hearing during the COVID-19 pandemic, as well as failure of two arbitrators to disclose information on their participation in the Frankfurt Investment Arbitration Moot Court (FIAMC), organized by the claimants' counsel.

Malpass considered the situation of each arbitrator – one could not come to the Hague as Costa Rica's boundaries remained closed; another had a surgery – and declared that the tribunal's decision not to hold an in-person hearing was based on an assessment of "risk and profitability", rather than a "definitive assertion" about the impossibility of travel.

As regards the arbitrators' participation in FIAMC, Malpass noted that the Moot Court was an academic event; the arbitrators demonstrated that they had received no remuneration for participation in the same; hence, there was no proof of "relationship" between the arbitrators and the claimants' counsel.

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| ICSID Award against Albania to be Enforced in Austria

In 2015, a group of Italian investors initiated an ICSID arbitration claiming compensation of EUR 650 million worth of damages resulting from a series of measures taken against their investments in Albania.

Shortly before the start of the arbitration, a criminal investigation was initiated: the prosecution asserted that the investor Francesco Becchetti and his accomplices were involved in money laundering. According to the prosecutors' version, the investors had been forging documents to overstate the cost of works for the construction of a hydro power plant in the South of Albania. Furthermore, they were charged with evading taxes. The investors, on the contrary, claimed that prosecution was a campaign orchestrated in order to exert pressure on them in certain commercial disputes.

Albania sought to have the investors extradited from the UK to bring the charges, but the English court suspended proceedings in the extradition case to allow the investors to take part in the ICSID arbitration.

The ICSID claim was filed under the 1996 Italy-Albania BIT. The panel of arbitrators issued an award in the dispute in April 2019, ordering that Albania pay compensation due to a *de facto* expropriation of a TV station that had been a target of a politically motivated campaign.

Albania's Government refused to execute the award, hence the investors made an attempt to enforce it in Austria. The Austrian court dismissed all of Albania's arguments and issued a decision ordering enforcement in favor of the investors.

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| Investment Arbitration against Kosovo

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

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

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

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

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

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

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| US Investors Get a Second Chance to Resume Arbitration against Poland

The French Court of Cassation has ruled that a US national Vincent Ryan and his companies are not estopped from advancing new arguments in support of jurisdiction of the arbitral tribunal after the arbitration.

Ryan and his companies held a controlling stake in Kama, a manufacturer of edible fats that went bankrupt in 2003 after paying USD 14 million worth of taxes. In 2011, they initiated an ICSID arbitration, claiming that Poland breached the 1990 BIT with the US as a result of conduct of tax and bankruptcy procedures. Four years after that, the arbitral tribunal with a seat in Paris concluded that it had no jurisdiction over the dispute, since it fell under the BIT's tax carve-outs.

In turn, the US investors sought to set the award aside, making two jurisdictional arguments before the Paris Court of Appeal that were not discussed in the arbitration itself. First, they claimed that the arbitral tribunal was wrong to apply the carve-out in a situation where the state acted in bad faith. Second, the arbitral tribunal should have relied on the treaty's most favored nation clause to assume jurisdiction under other treaties that did not carve out matters of taxation. The Court found these arguments to be impermissible, as they were not raised during the arbitration.

The French Court of Cassation, however, disagreed with that conclusion, holding that where jurisdiction was concerned, the parties were not prohibited from bringing new arguments and evidence in the setting-

aside proceedings. According to the Cassation Court, the case is to be referred to the lower court for a new trial.

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| Belgium Seeks ECJ Opinion on the Energy Charter Treaty

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

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

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

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| Consortium Reaches an Agreement with Kazakhstan

An international energy consortium has paid USD 1.3 billion to Kazakhstan to settle a long-running arbitration over revenue-sharing at the Karachaganak oil and gas condensate field. Kazakhstan has filed a notice on the termination of the arbitration.

The dispute concerned a product-sharing agreement signed by and between the consortium members and Kazakhstan in 1997. Under the agreement, the consortium members were to create a joint venture. The agreement also defined how much of the profit from the field was allocated to Kazakhstan and to the consortium. Kazakhstan claimed that the index was not applied properly and spent a year seeking to have the issue resolved by negotiations before initiating an arbitration. The claim was eventually filed, but in December 2020, the parties succeeded in settling the dispute.

One of the parties stated that in their settlement, they agreed on a cash compensation and a new methodology of product-sharing, whereby the state was to receive additional profit of USD 600 million as early as by the end of 2037.

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ARBITRATION NEWS

Young IMA Has Published an Arbitration Practice Review for Q3 2020

This year's final Young IMA Review is entitled "Notifications, Costs and Sanctions in Arbitral Tribunals." In drafting their Review, the authors also focused on such issues as the validity and enforceability of arbitration clauses and whether they can be amended by courts; substantive succession; and jurisdiction of state courts.

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The Russian Supreme Court Approves 2020's Third Review of Its Court Practice Clarifying Issues of Jurisdiction in Cases Involving Individuals

In para. 41 of its Review, the Russian Supreme Court indicated that a commercial (arbitrazh) court in the Russian Federation shall examine an application for a writ of execution for enforcing an arbitral award (including an international commercial arbitral award) in an economic corporate dispute irrespective of whether the participants of the legal relations giving rise to the dispute or claim are legal entities, individual entrepreneurs, other organizations or individuals (Commercial Procedure Code of the Russian Federation, Art. 27(6)(2)).

Accordingly, if the arbitral tribunal considered the economic corporate dispute, arising, for instance, from shares sale and purchase agreements, a commercial (arbitrazh) court would be the competent court, even if one of the parties were an individual.

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The Ministry of Finance Clarifies Whether Arbitration Costs May Be Counted in the Income Tax

As the Ministry of Finance states in its Letter No. 03-03-06/1/101901 dated 23 November 2020, arbitral tribunals are not part of Russia's judiciary, hence the costs incurred by the parties in arbitrating their dispute cannot be viewed by analogy with the costs incurred in litigation and under judicial acts.

That said, the Ministry of Finance notes that the costs related to arbitration of a dispute can be reported as part of overhead costs, as other reasonable expenses, provided that they meet the requirements of Article 252 of the Russian Tax Code.

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Queen Mary and PwC Release a Study on Damages in ICC Arbitral Awards

The Study, based on the analysis of 180 unpublished ICC awards issued over the period from 2011 to 2018, is a valuable contribution as for assessment of damages and the participation of expert witnesses in arbitration. Below are the four key findings made by the Study's authors:

1. There is a very significant gap in the quantification of damages by claimants and respondents (the latter quantifying damages on average at only 12% of the amount claimed), while tribunals award on average 53% of the amount claimed;
2. In 51% of cases, there is no evidence of quantum assessment, resulting in wrong or unconvincing assumptions and speculative claims;
3. Claimants are more likely than not to use an expert for claims from USD 10 to 25 million;
4. Only 11% of experts are women.

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Hong Kong and China Sign an Arrangement on Mutual Enforcement of Arbitral Awards

On 27 November 2020, Hong Kong and mainland China signed a Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards. The document lifts the current limitation, enabling enforcement of Hong Kong or China awards simultaneously in both jurisdictions and allowing courts to decide on the issue of post-award interim measures before or after the admission of the application to enforce an award.

The signing of this Arrangement is also explained by the recent Chinese legislative changes that provide that Hong Kong courts will enforce arbitral awards issued under the PRC Arbitration Law, irrespective of whether it was rendered by a Chinese or a foreign arbitral institution seated in mainland China. The issue of enforceability of *ad hoc* awards, however, remains unsettled, since the PRC Arbitration Law still does not allow *ad hoc* dispute resolution.

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The SIAC Opens an Office in New York and Announces Record Caseload in 2020

The Singapore International Arbitration Centre (SIAC) has announced that it is opening an office in New York.

The launch of the first office outside of Asia is an important milestone in the institution's development. US parties are consistently among the top foreign users of the SIAC, topping the foreign user rankings in 2018. In 2020 alone, over 500 US parties have arbitrated their disputes under the SIAC Rules.

In his keynote speech at the launch ceremony, K. Shanmugam, the Minister for Home Affairs and Minister for Law of Singapore, congratulated the SIAC on the launch of its New York office and announced a new record this year: as at 30 October 2020, the SIAC had received 1,005 new cases. This is the first time the SIAC's caseload has crossed the 1,000-case threshold.

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The ICSID Continues Work on the Code of Conduct for Adjudicators in Investment Disputes

The Secretariats of the International Centre for Settlement of Investment Disputes and the United Nations Commission on International Trade Law (UNCITRAL) are collaborating on a draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement.

The Code addresses such matters as independence and impartiality of arbitrators, the duty to conduct proceedings with integrity, fairness, efficiency and civility. It is based on a comparative analysis of the standards found in codes of conduct in investment treaties, the arbitration rules applicable to investor-state disputes, and rules of international courts.

The first draft of the Code was published on 1 May 2020. The ICSID and UNCITRAL received many valuable commentaries during their consultations with states and other interested stakeholders. The Russian Federation has already submitted its [commentaries on the draft](#).

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Six Leading Law Firms Publish an Online Case Management Protocol for International Arbitration

Six law firms (Herbert Smith Freehills Ashurst, CMS, DLA Piper, Hogan Lovells, and Latham & Watkins) have issued an "industry standard" on online case management in international arbitration.

In July, a working group, comprising lawyers from six law firms, published a draft version of the protocol, inviting feedback from stakeholders in the arbitration community.

Over four months of consultations, the working group received input from law firms, arbitral institutions, arbitration associations, practicing arbitrators and IT companies. The protocol was viewed over 4,000 times across 106 jurisdictions.

In the end, on 30 November 2020, Herbert Smith Freehills posted an updated version of the protocol, stating that the plan to launch a standard for online case management was now “a step closer to reality.”

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EVENTS ON ALTERNATIVE DISPUTE RESOLUTION

Conference on Arbitration of Corporate Disputes and the Final Rounds of the V.P. Mozolin Corporate Arbitration Moot

On 5-6 December 2020, the Russian Institute of Modern Arbitration held the 4th Professor Mozolin Russian Corporate Arbitration Moot. In 2020, a record number of participants registered for the Moot: over 100 teams from 36 universities located in 18 different regions of Russia. This year's participants were to establish whether an arbitration agreement in a company's charter may bind a former shareholder; demonstrate whether it is possible to hold the controlling person liable; look into the issues of invalidation of major transactions and transactions made with a purpose contrary to the fundamental principles of the legal order and morality. A video of the Final Round is available [here](#).

A conference was held in advance of the Moot on the issues of the case. Speakers at the event included Yury Babichev (Counsel, Bryan Cave Leighton Paisner), Olesya Petrol (Partner, Petrol Chilikov Law Offices), and Roman Bevzenko (Partner, Pepeliaev Group). They spoke on the applicability of arbitration agreements to the parties to corporate disputes, discussed how purposes and motives affect the invalidity of transactions, as well as debated the case's most challenging issue of the correlation between public interests and fiduciary duties. A video of the livestream of the conference is available [here](#).

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Online Conference on the Discussion of the UK Supreme Court Judgment in Halliburton v Chubb

On 22 December 2020, the Arbitration Institute of the Stockholm Chamber of Commerce, the international law firm Bryan Cave Leighton Paisner and Zakon.ru (network for Russian law community) held a conference on the analysis of the decision of the UK Supreme Court in the Halliburton Company v Chubb Bermuda Insurance Ltd case, where the Court ruled on the issue of whether an arbitrator must disclose appointments in related cases, as well as the consequences of non-disclosure of that information.

The program of the conference also included such questions as the appointment of arbitrators in insurance, oil and gas and other specialized arbitrations; the substance of the obligation to disclose circumstances that may give rise to doubts as to the arbitrators' independence and impartiality; the correlation between an arbitrator's obligation to disclose such circumstances and the confidentiality of arbitral proceedings.

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| Young and Full of Hope in the COVID-19 Era

Following in the footsteps of the [AAA-ICC-ICSID 36th Joint Colloquium on International Arbitration](#), held online for the very first time, ICC YAF, ICDR Y&I and Young ICSID held a roundtable discussion of the challenges that young practitioners in international arbitration face and how they can stand out in the COVID-19 era; what career opportunities the pandemic presents; as well as shared tips on what steps young practitioners should take.

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| AdHocArbitrationForum2020

On 18 December 2020, the Third Ad Hoc Arbitration Forum took place, where the speakers outlined their vision on the future of *ad hoc* arbitration, its pros and cons, as well as made projections for the place of *ad hoc* arbitration in Russia's arbitration framework in 2021. The Forum's participants could also learn how *ad hoc* arbitration is used in investment disputes involving states. 14 experts participated as speakers at the Forum, including the representatives of the LMAA, ICC, SCC, UNCITRAL, the AC at the RUIE, and the ICAC at the Russian CCI.

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| Conference “Virtual Arbitration - Digitalization in International Arbitration”

On 22 December, the Tashkent State University of Law, together with the Russian Institute of Modern Arbitration, held a conference on “Virtual Arbitration - Digitalization in International Arbitration.” The General Director Yulia Mullina delivered the welcoming remarks and spoke about online arbitration at the Russian Arbitration Center.

On 23 December, the Tashkent State University of Law and the Russian Institute of Modern Arbitration signed a Memorandum of Understanding.

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The First International Conference for Academics and Practitioners “New Horizons of Private Law”

On 9 and 10 December, MGIMO-Odintsovo hosted the First International Conference for Academics and Practitioners “New Horizons of Private Law” dedicated, in particular, to specific topical issues of international commercial arbitration, cybersecurity, the applicability of the *force majeure* doctrine, and the ways of securing the enforceability of arbitral awards.

A video of the livestream of the conference is available [here](#).

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