Russian Arbitration Center

at the Russian Institute of Modern Arbitration

ARBITRATION DIGEST FEBRUARY 2021

CASE LAW DEVELOPMENTS

Native American Tribe to Pay Casino Revenues to New York

A US Appeals Court upheld the award of the American Arbitration Association ordering the Seneca Nation of Indians to pay over USD 1 billion in casino revenues to the State of New York over the next few years.

The Seneca Nation that owns reservations in the West of New York is recognized as domestic dependent sovereign nation. The Seneca tribe was permitted to open three casinos with exclusive rights to operate gambling and arcade machines in the Western New York under a revenue sharing agreement that provided for the disbursement of 25% of the revenues to the State.

After renewing the agreement in 2016, the Seneca Nation declared that it was not obliged to share revenues. The State of New York initiated arbitration for underpaid and future revenues. A 2019 award ordered the Seneca Nation to pay as much as USD 256 million (the revenue for 2017 and 2018), as well as make "all future payments" as per the contract. The Seneca Nation argued that the tribunal ignored the rules of the US Indian Gaming Regulatory Act, mandating that any agreements between the US States shall be approved by the Secretary of the Interior, whose department manages federal land.

The US Court of Appeals upheld the judgment of the US District Court for the Western District of New York that affirmed the award, dismissing Seneca Nation's arguments that the arbitrators manifestly disregarded the law, as the initial agreement had been duly approved.

Read

US Supreme Court Dismisses Petrobras Bribery Arguments

In 2018, the Houston-seated tribunal at the ICDR issued an award recovering a penalty for termination of a contract allegedly procured through bribery from Brazil's oil and gas company Petrobras in favor of the offshore drilling company Vantage.

In 2019, the US District Court for the Southern District of Texas rejected the arguments of Petrobras that the arbitral tribunal disregarded evidence of bribery, while one of the arbitrators demonstrated "open hostility" during the hearing, and upheld the ICDR's award.

In January, Petrobras applied to the US Supreme Court asking to set the award aside, claiming that it "would run afoul of the clear United States public policy against bribery and corruption."

On 22 February 2021, the US Supreme Court refused to hear the appeal.

Read

Ghana Held Liable over a Cancelled Energy Deal

The 2015 electricity supply crisis pushed Ghana to execute a contract with Ghana Power Generation Company (GPGC), whereby GPGC undertook to relocate two gas turbine power plants from Italy to Ghana. They were to supply the state with electricity for four years.

In 2017 Ghana's newly elected government became concerned that the GPGC contract would result in a "considerable excess of electricity supply" and therefore terminated it, arguing that the company failed to perform its obligations under the project.

In 2018, GPGC initiated an arbitration claiming over USD 134 million for the contract termination. Ghana, in turn, filed a counterclaim, claiming damages for breach of the contract terms.

The arbitral tribunal sided with GPGS, agreeing with it that the only reason for terminating the contract was that it was less expensive for Ghana than honouring it. Ghana's counterclaim was dismissed.

Read

Spain's Constitutional Court Sets a High Bar for the Review of Arbitral Awards

The Spanish Constitutional Court has reinstated an annulled award in a EUR 600 million dispute on inheritance between the relatives of a prominent deceased aristocrat.

The Court disagreed with the Supreme Court's that an insufficiently reasoned award violates public policy.

The Spanish Constitutional Court ruled that state courts should follow the narrow interpretation of public policy, while the right to a reasoned award means that the award should contain simple reasoning, even if it is incorrect. The Constitutional Court also stated that courts may not review awards on the merits when ruling on public policy challenges. Courts exist to guarantee due process. For a breach of due process to have occurred, the arbitration award must either be "arbitrary, illogical, absurd or irrational".

Read

Dutch Supreme Court Holds Hearings in the Yukos Case

Another turn in the battle between the former Yukos shareholders and Russia has unfolded this year before the Dutch Supreme Court that held hearings on Russia's cassation appeal against the judgment issued by the Hague Court of Appeal exactly a year ago. By that judgment, the Court upheld the award in favor of the

former Yukos shareholders that obliged Russia to pay USD 50 billion, the largest amount in investment arbitration history.

In its arguments, the Russian party relied on the violation of the public policy of the Netherlands and the EU, as well as the lack of ratification of the Energy Charter Treaty, which, according to it, excluded the arbitral tribunal's jurisdiction over the dispute.

The Dutch Supreme Court may deliver its judgment by the end of 2021.

Read

Sierra Leone Loses Its Challenge of an ICC Award

An English court has upheld an ICC award to allow SL Mining claims against Sierra Leone to go forward. The ICC arbitration was initiated in view of SL Mining's claims to the effect that Sierra Leone was trying to unlawfully force the company to revise the contract terms, including by opening criminal proceedings against its employees and banning exports.

SL Mining filed an ICC request for arbitration in August 2019 under a licence agreement governed by the laws of Sierra Leone and allowing either party to initiate an ICC arbitration should they fail to settle their dispute within three months. Sierra Leone argued that the claim could not be considered as the three-months period for settlement had not been observed. The English court found that the state's objections concerned admissibility rather than jurisdiction, hence they could not be challenged under the Arbitration Act 1996.

Sierra Leone is a small state in West Africa. In January 2021 Sierra Leone became the 166th state to join the New York Convention, and the mass media started to report arbitrations involving that state.

Read

Australian Authorities and Facebook Reach an Agreement on Social Media Platforms Bargaining and Mass Media Laws

Reuters reports that the unprecedented standoff between the internet giant Facebook and the Australian government is over. The conflict arose after the Parliament passed, in the second reading, the draft law known as the "News Media and Digital Platforms Mandatory Bargaining Code". The law obliges digital platforms to pay traditional media companies for their content.

The demand triggered an all-or-nothing response on the part of Facebook that blocked all its Australian users from posting, sharing, and viewing news.

Soon, however, Australia's Government and Facebook managed to strike a compromise: Australia did not abandon its intention to adopt the law, but will enact it after a number of revisions. In particular, the draft

law provides for a two-months mediation procedure to reach a settlement between the mass media and a media platform on the issue of payment for the content. If mediation fails to settle the controversy, the parties will need to arbitrate it. The list of arbitrators will be kept by the Australian Communications and Media Authority (ACMA) and it will also appoint arbitrators. The parties will, however, be able to agree on arbitrators outside the list, but they must be impartial – if the ACMA suspects a conflict of interests, it may dismiss such an arbitrator.

Read

Washington Senate Adopts a Draft Law Reforming Labor Arbitration in the Police

The need for reform was explained by the imperfection of the existing laws that required an approval of a potential arbitrator by the police department and officers, hence such arbitrators would usually rule in favor of the police, hoping to be invited next time to resolve discipline cases.

The new law provides for drawing a list of arbitrators that will be appointed in the alphabetical order. Potential arbitrators will have to have at least six years of experience as arbitrators or labor relations advocates, and will need to complete training in implicit bias (learning about the daily work of the police) and anti-racism training. In particular, the future arbitrators will go on a ride-along with the police patrols and participate in interactive firearms training.

Read

INVESTMENT ARBITRATION NEWS

Jersey Hopes to Sign Its First-Ever Bilateral Investment Treaty with the United Arab Emirates

Jersey, an island situated in the English Channel between France and the UK and a British Crown dependency, plays today an insignificant part in international arbitration, but that may change soon. At present, Jersey is negotiating a BIT with UAE. This BIT is noteworthy for several reasons.

First, it will allow Jersey to come closer to meeting the criteria of statehood found in the 1933 Montevideo Convention on the Rights and Duties of States.

Second, since Jersey is not a state, the Jersey-UAE BIT would not be a "treaty" in the meaning of 1969 Vienna Convention on the Law of Treaties.

Finally, one of the most exciting reasons is that investors may potentially use the BIT to file claims both against Jersey and the UK. Depending on the agreement's wording, the claimant will be able to argue that the BIT imposes obligations on the UK, too, in order to hold it liable.

The draft Jersey-UAE BIT has not been published, however, and it is impossible to know whether it will contain provisions limiting the UK's obligations and responsibility for Jersey's violations or which institutional rules will apply to the dispute resolution mechanism under it.

Read

A German Court Blocks an Intra-EU Claim against Croatia

Two banks initiated an arbitration under the Austria-Croatia BIT in response to amendments to the bankruptcy laws by Croatia and the alleged systematic refusal of Croatian courts to grant them legal protection. The claim is to be considered before a Frankfurt-seated tribunal administered by the Permanent Court of Arbitration.

In turn, Croatia applied to Frankfurt court with an application seeking to recognize the banks' claim inadmissible in view of the European Court of Justice's ruling in *Achmea* (*Slovak Republic v. Achmea B.V. (Case C-284/16)*), according to which the investor-state arbitration provisions in the Netherlands-Slovakia BIT were deemed incompatible with the EU law.

On 11 February, the Frankfurt court accepted Croatia's argument that the investor-state arbitration clause in the Austria-Croatia BIT was incompatible with the EU law and there was no arbitration agreement between the banks and Croatia.

Notable, unlike the majority of EU member states, Austria has not signed the agreement terminating all intra-EU BITs.

Read

American Investor's Funder Asked to Unmask

A tribunal at the Permanent Court of Arbitration has ordered to reveal the third-party funder of an American investor's claim against Peru.

The investor claims that it had to forfeit its investments into the oil industry as the Peru Government made an attempt to drive it to bankruptcy. It also accuses Peru of corruption in view of execution of a contract with another party by bribery. According to the investor, Peru's conduct violates fair and equitable treatment obligations. Peru, in turn, believes that the company created by the investor had not met the requirements of the bidding procedure and that any accusations of corruption are baseless.

During the arbitration, Peru asked to reveal the third-party funder and the terms of the funding agreement to exclude any conflicts of interests with the arbitrators and ensure fair proceedings. The state argued that it filed this request to make sure that the investor could cover the arbitration costs.

The arbitral tribunal ruled that Peru had failed to bring any evidence supporting its concerns as to the investor's ability to cover the arbitration costs. The tribunal came to the conclusion that third-party funder will be disclosed, but the details of funding agreement will remain unseen by the other parties of the proceedings.

Read

Mainland China versus Ghana

Beijing Everyway Traffic and Lighting Tech Co Ltd has initiated an arbitration against Ghana in view of the termination of a contract to develop an intelligent traffic management system in the country's capital.

The contract was made in 2020 and provided that the company was to develop and implement an intelligent traffic management system. To that end, the necessary equipment was shipped to the country.

The project that suggested installation of video control and automatic licence plate recognition systems that would detect traffic offences was funded by a loan from the China Development Bank. In late 2020, Ghana terminated the contract in favor of other Chinese companies. Everyway believes that Ghana's conduct entailed an expropriation and breached fair and equitable treatment.

The Ghana-China BIT was concluded in 1990 and provides that the constituted arbitral tribunal itself should define the arbitral procedure and may "take … as guidance" the SCC or ICSID rules. This arbitration will be one of the first disputes between mainland Chinese investor against an African country.

Read

VEB.RF Is Looking to Recover Damages from Ukraine in the Prominvestbank Dispute

On 31 January 2021, the SCC issued an interim award recognizing VEB.RF as an investor within the meaning of the Russia-Ukraine BIT. The arbitrators also confirmed that VEB.RF discharged its duty to try to settle the dispute.

VEB.RF is planning to recover from Ukraine damages that arose in view of the arrest and subsequent auctioning of shares in its subsidiary, Prominvestbank.

According to the UNCTAD, the Russian state corporation's claims amount to USD 200 million.

Read

ARBITRATION NEWS

Russian Arbitration Center Supports the International Environmental Initiative Campaign for Greener Arbitrations

The Russian Arbitration Center has become one of the institutional supporters of the Campaign for Greener Arbitrations movement that sets the global goal of reducing the carbon footprint of the arbitration community. The key objectives of the initiative are reducing travel, minimizing hard copy documents, as well as energy consumption and waste in arbitration.

At present, the Campaign for Greener Arbitrations has drafted Green Protocols that will suggest specific measures to promote an environmentally responsible approach to dispute resolution. Any comments or suggestions are welcomed and can be sent to protocol@greenerarbitrations.com by 15 March 2021.

Other arbitration centers, such as, for instance, the HKIAC, have become the institutional supporters of the initiative.

Read

ICCA Publishes the Preliminary Results of a Survey on the Right to a Physical Hearing

After receiving additional national reports, the ICCA has summarized the preliminary results of its survey on the right to a physical hearing.

The reporters concluded that the majority of surveyed jurisdictions have no specific provisions on the right to a physical hearing. This right is often not exercised due to three key trends currently in existence: the broad procedural discretion of the arbitral tribunal as to the modalities of the hearing; the possibility to order documents-only arbitrations; and provisions in the Arbitration Rules of the most relevant institutions in those jurisdictions expressly allowing remote hearings.

The survey also touched upon the issue of interpretation of the terms “oral hearing” and “physical hearing.” In most jurisdictions (Canada, Colombia, Georgia, Greece, India, New Zealand, South Africa, Sri Lanka, Turkey), the reporters came to the conclusion that the right to an oral hearing does not exclude holding one through videoconferencing. In Hungary, a recent reform had the word “oral” specifically deleted from the laws. In Bahrain and Denmark, the issue of whether “oral” and “physical” are equivalent terms remains open.

The reporters have also noted diverging approaches of domestic laws to the agreement of the parties to hold a physical hearing. Thus, in the Czech Republic, an agreement of the parties to hold a physical hearing is not binding for the arbitrator. In Brazil, France, and Indonesia, it is binding only if it was made before the constitution of the tribunal. Violation of the parties’ agreement to hold oral hearings will result in the annulment of the award in Bahrain, Hungary, India, Russia, Sri Lanka and Turkey, whereas in England and Wales, such a violation will not entail annulment of the award unless it has caused substantial injustice.

Notably, the survey is not completed: the ICCA is expecting more reports from other jurisdictions.

Read

IBA Publishes Updated Rules on the Taking of Evidence in International Arbitration

Since their publication in 1999, the IBA Rules on the Taking of Evidence were revised only once, in 2010. The 2021 amendments to the Rules have not changed the document dramatically but rather introduced small updates for the Rules to better meet the realities of the present day.

The amendments concern, among other things, virtual hearings, illegally obtained evidence, and undue influence on witness testimony by videoconferencing.

A new article envisages the right of an arbitrator, at his/her discretion or under the agreement between the parties, to schedule online hearings. In that case, the tribunal must consult with the parties to set forth the specific rules to hold the hearing "efficiently, fairly and, to the extent possible, without unintended interruptions."

The Rules also provide examples of specific measures to minimize undue influence on the witnesses: inspection of the room where the testimony is being given; installation of mirrors behind the witness; use of fish-eye lenses; or the physical presence of a representative of opposing counsel with the witness.

Read

Africa Arbitration Academy Publishes Africa's 30 Arbitration Powerlist 2020

The list of 30 Africa's most influential arbitration specialists is a new initiative created by the Africa Arbitration Academy, Africa Arbitration and the Association of Young Arbitrators to celebrate the professional achievements of all those who have made a considerable contribution to the development of arbitration in Africa in 2020. This initiative is supported by a number of leading arbitral institutions and organisations, such as the ICSID, Cairo Regional Center for International Commercial Abitration, LACIAC, Nairobi Centre for International Arbitration, East Africa International Arbitration Conference, AfricArb, IResolve, and others.

The list features Dr. Mohamed Abdel Wahab, Kamal Shah, Emilia Onyema, Harry Matovu and other arbitration specialists.

Read

Ukraine's Verkhovna Rada Adopts in the First Reading a Draft Law Aimed to Reform Arbitral Tribunals to Increase Trust in this Dispute Resolution Mechanism

According to the draft law, only non-commercial organizations existing for at least five years will be able to establish permanent arbitral institutions.

According to the legislator's design, the decision on whether a new arbitral institution meets the law's requirement will be delegated to Ukraine's Arbitration Chamber, while the institution's registration is suggested to fall within the purview of Ukraine's Ministry of Justice.

At the same time, the draft law expands the competence of arbitral tribunals, in particular, allowing to resolve disputes on the protection of consumer rights.

Read

EVENTS ON ALTERNATIVE DISPUTE RESOLUTION

XII Moscow Vis Pre-Moot

On 13 and 14 March 2021, the 12th Moscow Pre-Moot will take place as part of the 28th Willem C. Vis International Commercial Arbitration Moot.

This year, the Moot will unite 53 teams from Russia, the UK, Germany, Italy, France, Switzerland, the Czech Republic, Turkey, India, Malaysia, Guatemala, China, Indonesia, Bosnia and Herzegovina, and other countries.

On 12 March, the participants will be able to join an online conference traditionally held together with the Moscow Pre-Moot. The event will consist of a workshop and two discussion panels featuring Russian and international arbitration specialists.

Register for the Conference here.

Read

A View From Abroad

Russian Women in Arbitration invites everyone to take part in a series of events commemorating the International Women's Day.

On 4 March at 16:00 MT, Russian Women in Arbitration organised an event "Building a Career in International Arbitration," with young Russian specialists now working abroad – Ksenia Koroteeva, Daria Kuznetsova, Victoria Khandrimaylo, and Maria Kiskachi.

The speakers shared their experience regarding their first steps, the reasons why they received their education abroad, and what they are currently doing to build a successful career in international arbitration.

The event took place in Clubhouse.

Read

RAA40 & ICC YAF Event: Women in Arbitration

This year, RAA40 will resume its tradition and hold a networking event to discuss the role of women in legal profession on 11 March. The speakers of the event: Yanina Stanyulenaite (Evraz), Liya Grishaeva (EXIAR),

and Anna Kozmenko (Schellenberg Wittmer). The event will be moderated by Svetlana Popova (URALCHEM) and Marina Akchurina (Cleary Gottlieb).

The participants will discuss the challenges of building a career in law, share their secrets of success and personal experience.

Participation is limited. To register, email raa40@arbitrations.ru.

Read

14th International Student Dispute Resolution Moot Court to Take Place in India on 20-23 May 2021

Organized by the National Law School of India University and Trilegal law firm, the National Law School Trilegal International Arbitration Moot is India's only Moot Court.

The Moot Court aims to increase student engagement with international arbitration law and practice by providing students with a unique opportunity to gain understanding of arbitration through a simulated version of arbitral proceedings.

Previously, the Moot's were arbitrated by such eminent specialists as Gary Born, Martin Hunter, and others.

Registration for international teams is available until 25 March 2021.

Register here.

Check the Moot's key dates here.

Read

V Moscow FIAMC Pre-Moot and Conference on Investment Arbitration

On 19 February 2021, on the eve of the V Moscow FIAMC Pre-Moot, the Russian Institute of Modern Arbitration held a traditional Conference on Investment Arbitration. The Conference speakers included the leading experts, such as Christoph Schreuer (Zeiler Floyd Zadkovich), Catherine Titi (French National Centre for Scientific Research), Peter Tzeng (Foley Hoag LLP), Olga Hamama (V29 Legal), Joe Tirado (Garrigues UK LLP), Legum Barton (Dentons Europe LLP). The Conference was moderated by Alexandra Anufrieva (JustStruct), as well as Elena Burova (Ivanyan & Partners). The livestream of the Conference is available here.

On 20-21 February, the V Moscow FIAMC Pre-Moot rounds were held online. The Pre-Moot's Final Round teams were Auriga (Government Law College, Mumbai) and Hercules (National Law University, Delhi). The team of the Government Law College, Mumbai was declared the winner.

Following the Moscow Final Round, the Grand Finale between the champions of the V Moscow FIAMC Pre-Moot (Government Law College, Mumbai) and II Milan Investment Arbitration Pre-moot (University of Zenica) took place. The Grand Finale winner was the team of the Government Law College, Mumbai.

14 teams from Russia, India, Turkey, France and other countries participated in Pre-moot, judged by 54 arbitrators from all over the world.

Read

Kovalyov Readings 2021

On 18-20 February, the International Research-to-Practice Conference "Kovalyov Readings 2021" took place in Yekaterinburg that included a session on "Sanctions Influence on the Resolution of Disputes: New Trends," where the participants discussed the recent amendments to the Russian Arbitrazh (Commercial) Procedure Code (Russian CPC).

The participants first discussed the practice of application of Articles 248.1 and 248.2 of the Russian CPC, as well as the hurdles of arbitration in foreign arbitral institutions for the Russian sanctioned persons.

Read

AUTHORS

Valeria Butyrina

Arina Akulina

Ekaterina Bubnova

Svetlana Grubtsova

Alina Shirinyants

Mikhail Makeev

Margarita Drobyshevskaya

Valeria Teslina