Russian Arbitration Center

at Russian Institute of Modern Arbitration

ARBITRATION DIGEST FEBRUARY-MARCH 2022

CASE LAW DEVELOPMENTS

Singapore Court Rules on What to Do When Considering New Arguments of the Parties

The dispute (*Convexity v. Phoenixfin*) arose between Phoenixfin and Convexity that entered into a paid services agreement, whereby Phoenixfin provided IT security services. During the performance of the agreement, Convexity announced that it was terminating it, asserting that Phoenixfin had breached the agreement. Convexity initiated an expedited arbitration at the SIAC, claiming the make-whole amount and late interest provided by the agreement. The tribunal composed of a sole arbitrator dismissed Convexity's claims, since the make-whole amount and interest agreed by the parties were a penalty unenforceable under the applicable English law.

When considering the setting-aside application, the court in Singapore was to focus on the conduct of the proceedings. The key question required defining the stage where Phoenixfin made the argument that the make-whole clause agreed by the parties was unenforceable under English law and whether the tribunal was right to consider it and even use it as a basis for its award. During the arbitration, the parties and the tribunal agreed on the timetable (schedule) of the arbitration, setting the time limits for the exchange of, among others, lists of witnesses, experts and debatable issues. After the set time limits expired, Phoenixfin, as the respondent in the arbitration, raised a new argument to the effect that the penalties were unenforceable, which Convexity opposed as an issue to be included on the agreed list of issues. That was what proved to be the stumbling block for future litigations.

The Singapore court considered whether the tribunal acted in breach of the arbitration procedure when it admitted the argument. It has noted that it is necessary to differentiate between two kinds of issues in dispute that an arbitral tribunal may face, based on whether (1) the argument made is purely an issue of law, or (2) it is a mixed issue, meaning that it pertains to both law and facts and therefore requires that they be analysed and the opposing party be given an opportunity to make its case. In the latter case, the parties must be accorded a reasonable opportunity to consider the facts underlying the legal argument raised. In the opinion of the court, that was not considered by the arbitral tribunal in the case under review, which resulted in the breach of the arbitration procedure.

Read

Negotiations No Longer Possible, Arbitration It Is

In a February judgment in *Maisonneuve et al. v Clark et al.*, 2022 ONCA 113 (CanLII), the Court of Appeal for Ontario upheld the rulings of the first instance court and held that the limitation period did not start to run until after it became or should have become known that one of the parties would no longer negotiate.

The agreement between the parties provided that, if the parties were unable to settle the disputed issue, it "[then] shall be fully and finally referred to the Arbitrator for resolution." When interpreting that provision, both courts decided that the inclusion of the word "then" rendered the clause both temporal and conditional, and therefore an attempt at settling by negotiations was a prerequisite to arbitration.

The lower court also drew a distinction between the agreement at hand and the agreement in Markel Insurance Company of Canada v. ING Insurance Company of Canada, 2012 ONCA 218 (CanLII), 109 OR (3d) 652, since, in the latter case, the Insurance Act that the parties relied on did not contain a "then" clause, hence negotiations were a not a prerequisite to the arbitration.

The appellants sought to base their objections on the fact that it was difficult to ascertain when negotiations were at an end and they were uncertain as to the application of limitation periods. The Court of Appeal, however, held that the parties were free to provide for any steps to settle disputes in their arbitration clause and the appellants themselves could let the opposing party know at any time that they did not wish to continue the negotiations.

Read

Three Men in a Boat (Including the Non-Signatory)

The *Lifestyle Equities CV & Anor v Hornby Street (MCR) Ltd & Ors* [2022] EWCA Civ 51 case is an unusual example where legal proceedings were stayed in a case where the claimant was not a party to the arbitration agreement and the Court of Appeal's judgment also containing a dissenting opinion on the central issue of the appeal.

In 2009, Lifestyle Equities acquired BEVERLY HILLS POLO CLUB trademarks in the UK and the EU, and then, in 2020, sought to commence High Court of Justice proceedings against the companies that owned similar trademarks, SANTA BARBARA POLO & RACQUET CLUB, due to alleged infringements of rights to Lifestyle's trademarks. There was one interesting detail, however: in 1997, before acquiring the Lifestyle trademarks, the former owner entered into a coexistence agreement with one of the parties that Lifestyle later named in the proceedings as a respondent. That agreement provided for the settlement of any disputes by arbitration under the Rules of the American Arbitration Association with Los Angeles as the seat of arbitration and bound the parties, their "heirs, administrators, successors, licensees", as well as other persons. Lifestyle was unaware of that agreement when it acquired the trademarks in 2009.

The main question in that case effectively boiled down to whether the company was bound by the arbitration agreement, while not being a party to it, and what law was to apply – English, EU or California law. The judge of the court of first instance concluded that Lifestyle Equities became a party to the 1997 agreement and was estopped from denying it, as well as stayed the proceedings in the case. By a majority decision, the judges of the Court of Appeal, while not agreeing that the company became a party to the 1997 Agreement, have found that, according to California contract law, Lifestyle was bound by the arbitration clause contained in the agreement, and upheld the decision to stay the proceedings. Nevertheless, one of the judges did not agree with the findings of his colleagues on the key issue and stated that English law and EU law constituted the laws that should have been applied to UK and EU trademarks, respectively, when resolving whether Lifestyle was bound by the arbitration agreement.

Read

Arbitration Clause from the Underlying Agreement Applies to Cheques and Bills of Exchange

A court in Hong Kong was seized with the issue of whether arbitration clauses could be extended to apply to cheques or bills of exchange (*T v W [2022] HKCU 233*). As a rule, both cheques and bills of exchange are considered to be obligations independent from the underlying agreement. The court ruled that the issue must be decided by interpreting the agreement relying on the precise wording and the existence of circumstances that supported arbitration at the time when the agreement was made.

Interestingly, the court has reviewed the arguments that are frequently offered in English judgments, and, in particular, in one of the most famous precedents – *Fiona Trust* – suggesting that reasonable entrepreneurs intend their disputes to be resolved in a single forum. The Hong Kong court has decided that such an intention may follow only from clear and unambiguous wording stating that disputes from cheques or bills of exchange must be referred to arbitration; such wording, however, cannot be said to exist in the case under review. That affirms the approach of Hong Kong courts towards the issue at hand.

Read

Malaysia Does Not Recognize a Spanish Arbitrator's Order to Pay USD 15 Billion to the Sultanate's Heirs

The dispute arose out of an 1878 agreement between the Philippine Sultanate of Sulu and Britain's North Borneo Company (a British chartered company that held a British royal charter in 1881-1953 that provided for territorial jurisdiction over North Borneo) for mineral extraction in the territory of the island. After Malaysia gained independence in 1963, it continued to pay approximately USD 1.5 thousand per year to the Sultan's descendants under the agreement.

In 2013, Malaysia stopped its payments due to civil unrest on the island that was aimed at the resurrection of the Sultanate. The heirs decided to defend their rights under the agreement in arbitration. First, they sought to commence an arbitration in the UK, but were not successful, and proceeded to refer the issue to the Supreme Court of Justice in Madrid which, in 2019, appointed an arbitrator to resolve the dispute.

In 2021, the same Spanish court revoked its decision to appoint the arbitrator, following an application from Malaysia. The arbitrator appealed that decision to the higher court (and the appeal is still pending) and relocated the seat of arbitration to France. In the arbitral award, the Spanish arbitrator awarded to the heirs the damages in the amount of approximately USD 15 billion, as well as indicated that he was subjected to threats and pressure on the part of the Malaysian authorities.

Malaysia did not agree with the arbitral award rendered and, arguing that the arbitral tribunal had been constituted unlawfully, filed an application to set it aside with the Paris Court.

Read

Arbitrator's Academic Article Not a Ground for Challenging the Arbitrator

Swiss companies filed two claims with the Swiss Arbitration Centre against the British company SSP with respect to a breach of licensing agreements. In the course of two arbitrations, the claimants filed applications for the payment, by the respondent, of a portion of the advance on costs. After the respondent refused to pay a portion of the advance, one of the claimants filed additional claims for the recovery of damages occurring due to the payment of the respondent's share by the claimant.

Once these claims were dismissed, the claimant challenged the arbitrator, indicating that he was clearly prejudiced against the claimant's position on the recovery of damages, given that the arbitrator, in one of his articles, reflected on the partial payment of advance by a party and called into question the obligation of the other party to pay a portion of the advance. In the same vein, he criticized partial arbitral awards, under which a party received funds paid for the other party.

The Arbitration Centre did not accept the claimant's arguments, noting that the article was general and abstract and did not concern any particular facts of the disputes, as well as that the paper was published after the arbitrator made the order concerning the advance payment in those two cases. Nevertheless, the Swiss Arbitration Centre recommended arbitrators not to publish articles that may concern potentially sensitive issues.

Read

Swiss Court Refuses to Set Aside an Arbitral Award on the Ground That a Colleague of a Co-Arbitrator Served as an Honorary Consul in the Claimant's Country

In 2019, a member of the Philippines Parliament initiated a case in the ICC that was considered by three arbitrators.

Subsequently, the respondent applied to a Swiss court asking to set the arbitral award aside and claiming that a colleague of a co-arbitrator (one of the partners at a German law firm) had close ties with the claimant's country, that is, the Philippines.

The co-arbitrator's colleague indeed served as an honorary consul in the Philippines from 2011 and until 2019. On the basis of that fact, the respondent argued that the actions of the co-arbitrator and his colleague should be treated as the actions of the claimant's counsel.

The court did not accept these arguments and held that those persons could not be treated as the party's representatives. Furthermore, the Swiss court has noted that the colleague of the co-arbitrator occupied that position voluntarily, was not paid for it and the functions performed by him in that office were incompatible with his activities of an attorney.

Read

Italian Company Fails to Set Aside an Arbitral Award in the Case on the Acquisition of a Chemicals Plant

In the August 2021 Arbitration Digest we discussed the case related to the acquisition of a chemicals plant by the Belgian company Solvay from the Italian gas and electricity distribution company Edison.

In July 2021, the ICC arbitral tribunal made a partial award in favor of Solvay, ordering Edison to cover more than EUR 90 million worth of damages, as well as the losses incurred by the Belgian company in the period up to 2016.

The Italian company sought to have the award set aside by the Federal Supreme Court of Switzerland. Edison invoked a violation of public policy and indicated that the case was not adjudicated on the basis of Italian substantive law, but rather on the basis of equity.

The Swiss court did not find Edison's arguments persuasive and upheld the arbitral award, observing that the arbitrators had relied on the Italian Civil Code and cited a detailed analysis of the Italian case law.

Read

No Escape from an Annulled Award

Initially, the *Société Générale de Surveillance S.A (SGS) v. Republic of Benin* (ICC Case No. 22581/DDA, SGS v. Benin) case was considered by the ICC with the seat of arbitration in Burkina Faso, as the parties has not determined the seat of arbitration in their arbitration agreement.

Even before the claim was filed with the arbitral tribunal, the local Beninese courts declared the disputed agreement invalid. That did not preclude the arbitral tribunal from rendering an award that ordered Benin to pay a compensation of EUR 7 billion to the Swiss supplier of inspection services SGS Société Générale de Surveillance. Benin unsuccessfully sought to challenge the award in the courts of Burkina Faso; however, only the OHADA Common Court of Justice and Arbitration, acting as the highest authority in the OHADA zone, annulled it as contrary to public policy, since the disputed agreement had been already declared invalid.

That notwithstanding, SGS applied for the enforcement of the arbitral award to the Paris Court, that deemed uncompelling Benin's argument that the enforcement of the award contravened international public policy. According to the Court, first, a foreign arbitral award must be seen through the lens of the French laws. Setting aside a foreign arbitral award at the seat of arbitration does not affect its recognition in France, as international arbitral awards are not linked to a state's legal system. Second, in light of the arbitration clause and the intention of the parties, the award where the arbitral tribunal ruled that it had jurisdiction was lawful. Finally, recognition of the arbitral award did not contradict the *res judicata* principle, as Benin did not claim recognition of the Beninese court decisions in France and, as long as those decisions were not recognized in France, they would not have any legal effect there. The Paris Court of Appeal agreed with that approach and upheld the award.

Read

“Bailout of Prisoners” or Illegitimate Means of Achieving Legitimate Aims

The UK Government has finally paid Iran nearly GBP 400 million – that is, the debt arising out of an ICC award rendered two decades ago. The UK Government has been prompted to do so after two British nationals were allowed to return home after several years of detention in Tehran.

The main dispute arose between a currently non-existent organisation of the UK Ministry of Defence called International Military Services (IMS) that had signed several contracts for the supply of tanks and armored vehicles to Iran worth GBP 650 million back in the 1970s, and Iran. The contracts were terminated in 1979 after the Iranian Revolution overthrew the Sheikh, which led the parties to arbitration, and, under the award issued in 2001, IMS was mandated to pay GBP 141 million, plus interest and costs.

In 2019, however, the Commercial Court in London held that IMS did not have to pay interest under the award rendered at the time when Iran’s Ministry of Defence was subjected to the EU sanctions. Later, that position was upheld by the appellate court.

For a long time, the parties to the dispute denied that the refusal to pay the arbitral debt under the ICC award was a stumbling block on the way to the release of the prisoners, namely two persons holding British-Iraqi nationality and convicted for political offences. But the facts begged to differ. Once the debt was discharged, the individuals in question were set free.

Read

Singapore Court Rejects Formalism and Follows the Logic of Legal Succession

The Singapore Court of Appeal has recognized that a Norwegian oil company may enforce an award made in favor of another company that no longer exists, holding they are “for all intents and purposes” the same legal entity.

A panel of three judges has reversed last year’s decision of the High Court of Singapore that barred a Norwegian subsidiary of Houston’s National Oilwell Varco (NOV) from recovering SGD 3.8 million from Keppel FELS.

The Singaporean conglomerate Keppel FELS commenced the arbitration under an equipment supply agreement against the Norwegian company Hydralift in 2007. In 2019, a court in Singapore issued a decision in favor of Hydralift. Yet, Hydralift ceased to exist in 2004, when it was merged with another legal entity and excluded from the Norwegian Register of Business Enterprises. That entity, in turn, merged with the predecessor of NOV Norway the same year. Nevertheless, NOV Norway was acting in the arbitration on behalf of Hydralift and was doing the same in the relevant legal proceedings in Singapore.

The Court of Appeal has noted that the court of first instance "erred in not appreciating that the effect of the mergers under Norwegian law is that NOV Norway, is for all intents and purposes, the same legal entity as Hydralift."

Read

Put in a Word for the Tribunal's Secretary, Would You? Part II

Belgium's Court of Cassation is now considering the possibility and conditions of the delegation of some powers to draft arbitral awards to the secretaries to arbitral tribunals. This analysis has been prompted by a complaint by a Cyprus construction company against an ICC award that was drafted by the secretary (see the July 2021 Digest for more details about this dispute).

In their cassation appeal, the petitioners state that the principle of non-delegation of judicial powers must extend to arbitrators as well. Furthermore, an infringement of that principle violates the Belgian Judicial Code and contravenes public policy.

In addition, the Court will review the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration in terms of the possibility of delegating powers to draft certain sections of the award and questions to experts. According to the petitioners, that possibility violates the rules of procedure approved by the parties, which serves as another ground for setting the award aside.

Admittedly, the final decision of the Belgian court will clarify the existing approaches to the role that secretaries play in arbitration. We note that Russia had alleged earlier that the award in the Yukos case was partially written by the arbitral tribunal secretary, but those allegations were rejected by the Dutch courts.

Read

The English High Court Refuses to Set Aside an Award on Fictitious and Formal Grounds

In 2018, Agronefteprodukt LLC ("Seller") and Ameropa AG ("Buyer") entered into two contracts for the sale and purchase of Russian milling wheat. Both contracts contained an arbitration clause referring any disputes to a London-seated arbitration under the "Grain and Feed Trade Association" ("GAFTA") Rules.

Subsequently, disputes arose under each of the contracts and the buyer sent the seller a notice aiming to commence arbitral proceedings. Although the disputes involved claims under two separate contracts, the notice frequently referred to operative words in the singular (for example, "arbitration" and "the arbitration clause"). Nevertheless, the final paragraph of the notice also included an express request to the seller to accept, for the sake of efficiency, that "the two contracts/disputes be adjudicated together under a single arbitration". The seller did not respond to the notice.

In the course of the arbitration, the parties managed to negotiate a settlement requiring the seller to pay certain amounts to the buyer. As the seller did not abide by the terms of the settlement agreement, the buyer resumed the arbitration. But, this time, the seller invoked the lack of jurisdiction, given that the buyer had failed to commence arbitration under each of the contracts properly. Various GAFTA bodies dismissed the seller's objection.

The High Court agreed with the buyer, noting that, aside from minor linguistic points, the only sensible reading of the notice was that it was intended to commence two separate arbitrations in relation to separate claims.

Read

Does Court Have Jurisdiction to Freeze Assets of a Third Party, Especially an Alien? Input from the Australian Federal Court

The Federal Court of Australia has rendered a precedent on the claim for freezing the assets of a foreign enterprise that was a subsidiary of the debtor.

In the arbitration, the claimant company managed to recover from the respondent – the Chinese company Ruyi – a sum of USD 18.7 million. The claimant intended to enforce the award in Singapore through the forfeiture of the respondent's share in the Singapore company CSTT, which was the majority shareholder in two Australian companies. In order to oppose changes in the CSTT asset structure, the claimant referred to an Australian court asking to freeze the company's assets. Initially, the court ordered CSTT to notify the claimant about any change in the structure or value of the assets. CSTT did not agree with the position of the court, believing that the court could have issued such an order only if the claimant had initiated legal proceedings in Australia.

The Australian Federal Court concurred with CSTT and revoked the injunction. The Court also noted that such measures were too drastic, extraordinary and inapplicable to the case, as they were aimed not at the assets of the immediate debtor, but at an independent third party, over which the debtor did not have sufficient control.

Read

INVESTMENT ARBITRATION NEWS

The Czech "Purely Academic" Anticorruption Exercises

A Swiss investor into residential development filed an application to annul an ICSID award, claiming that it was undermining anticorruption policies.

The dispute concerned a disrupted development project in the Czech district of Benice on the outskirts of Prague. The applicants had purchased a land plot for development in 2007 and obtained an approval from the Prague regional government, but the Supreme Administrative Court of the Czech Republic blocked the project, holding that the land had been allotted for construction unlawfully.

In hearing the case, an ICSID tribunal established that the Head of Benice has demanded that the applicants make cash payments that had no basis in the Czech laws. In the end, even though the tribunal found that the state was responsible for unlawful solicitation of payments, it dismissed the plea for compensation of damages, since the conduct of the district Head did not result in any losses.

The applicants believe that the refusal of the ICSID tribunal to award damages despite its ruling recognizing that the state was responsible, creates an impression that the arbitration was a "purely academic exercise", one at odds with the global approach to combatting corruption.

Read

No More Jam Tomorrows for the Investor from Pakistan

A US court has rejected Pakistan's petition to stay enforcement of USD 6 billion ICSID award in favor of Tethyan, a joint Canadian-Chilean mining venture, dubbing the state's hopes to have the award annulled "wishful thinking".

The long-standing dispute concerned the creation in 2006 of a joint venture in the Pakistan province of Balochistan for exploration of copper and gold deposits. When the province denied the right to develop the Reko Diq deposit, Tethyan proceeded to file a claim with the ICSID in 2011.

In 2019, an ICSID tribunal issued a final award in favor of Tethyan. Since then, however, Pakistan had filed two applications to have the award set aside by an ad hoc committee and revised by the original tribunal. The applications filed resulted in a temporary stay of enforcement, but in 2020 the setting aside committee ruled that Tethyan could recover up to half of the amount awarded.

The US District Court for the District of Columbia concluded that judicial economy did not allow it to stay proceedings in the US, even though Pakistan would have to litigate the same issues before two fora. The key reason cited for the Court's judgment was that the likelihood of the ICSID award being annulled was "low", judging by the existing court practice. Conversely, staying enforcement of the award "only prolongs justice denied", which is detrimental to Tethyan.

Read

UK Court Finds That UNCITRAL Tribunal Has Jurisdiction

In 2020, a UNCITRAL tribunal unanimously concluded that it had no jurisdiction over a Canadian investor's claim against Kazakhstan. The arbitrators reasoned that Kazakhstan was not bound by the Canada-USSR bilateral investment treaty (the FIPA), since it was not the USSR's legal successor and had not "acquiesced" to applying the FIPA terms.

Nevertheless, the investor managed to successfully challenge the tribunal's decision on the lack of jurisdiction under Article 67 of the 1996 Arbitration Act. Providing the reasoning for setting the arbitral award aside, English Justice Andrew Baker stated that communications between the parties confirmed Kazakhstan's consent to apply the FIPA, while the numerous exhibits submitted by Kazakhstan had nothing to do with the case and could not rebut that fact.

Thus, Justice Baker took a look at the 1992 Declaration received by the Canadian Government from Kazakhstan officials. The Declaration indicated that the parties intended to develop cooperation in accordance with the FIPA. Subsequently, Kazakhstan and Canada engaged in exchanges on the execution of a trade agreement, where the Kazakhstan party affirmed that the USSR-Canada treaties remained in effect until new treaties were made. The correspondence between Canada and Kazakhstan resulted in the execution of the 1995 Trade Agreement, whose preamble also contains a reference to the FIPA.

Additionally, Justice Baker relied on the Agreement establishing the Commonwealth of Independent States where the parties guaranteed performance of international obligations deriving for them from treaties and agreements of the former USSR.

Read

ICSID Tribunal Analyzes Limitation Period in a Dispute between a Spanish Investor and Colombia

The Madrid banking investor AFC Investment Solutions filed an ICSID claim against Colombia. The dispute broke out around the liquidation of the Bogota bank Internacional Compañía de Financiamiento (ICF) in 2015 over misrepresentation of its operations. The bank attempted to challenge the decision of the government, but the court dismissed the appeal and ordered a freeze of the ICF assets.

Two years later, in November 2018, the Madrid investor filed a notice of dispute under a bilateral investment treaty. Then it filed several more notices, and a request for arbitration from AFC followed as late as in January 2020.

Colombia asked to terminate the arbitration due to violation of the treaty-based limitation term, namely, three years after the injured party learned about the alleged breach. The claimant, in turn, argued that the notions of "claim" and "dispute" were identical and that a party would only need to file a notice of dispute within the three-year term provided. Furthermore, AFC submitted that the respondent had waived its right to invoke expiry of the limitation period, as it only raised that argument in 2021.

In its award in the case, the arbitral tribunal came to the conclusion that the claimant had incorrectly interpreted the limitation period clause and indeed missed the three-year term provided under the treaty. The tribunal also rejected the claimant's argument that the respondent was estopped from invoking the expiry of the limitation period, ruling that the principles of Colombian law did not apply to the dispute.

Read

Two Phones Are Luxury, One Phone Is Bliss, or Why Sweden Fears Huawei

Well-known Chinese telecom company Huawei has commenced an ICSID investment arbitration against Sweden. This is the first time in history when Sweden as a state has faced a BIT claim.

Against the backdrop of accusations of the US that the Chinese government was going to conduct espionage via Huawei devices, the Swedish regulator excluded the Chinese telecom giant from the rollout of 5G network technology citing national security reasons.

Interestingly, a number of other countries have already denied Huawei a 5G rollout for the same reasons (for example, the UK and Australia).

Read

Venezuela Challenges an ICSID Award over Breach of Notification Procedure

Venezuela has successfully appealed the US recognition of an ICSID award for over USD 42 million in favor of a French manufacturer of plastic materials, relying on material breach of procedure.

In its decision, delivered on 25 January, the US Court of Appeals for the District of Columbia reversed the judgment and remanded the case to the District Court for the District of Columbia after finding that the Venezuelan counsel had not been served a notice as required by the Venezuelan laws.

The issue of proper notification is also key in lower courts. In its decision, however, the Court of Appeals deemed unconvincing the ruling of the court of first instance that a notification of the central authorities was sufficient without receiving relevant documents confirming receipt of the notice. Moreover, the French company could use other means of notification, such as, for instance, diplomatic channels.

Apart from that, Venezuela advanced arguments referring to the political situation in the country, claiming that the Ministry of Foreign Affairs was not functioning properly as Venezuela's representative for the purposes of notification, since it had been "usurped by the Maduro regime" and was not controlled by the lawful representatives of Venezuela.

Read

Brussels Court Overturns an Award Rejecting the Tribunal's Arguments on Poor Performance of the Polish Judiciary

A Brussels court has set aside a UNCITRAL award that ordered that Poland pay USD 10 million to the US company Manchester.

The US investor had invested into a Polish developer, Leopard, that was constructing a residential complex in Krakow. After the developer was declared bankrupt, the Polish Supreme Court further invalidated a loan extended by the investor and refused to include Manchester on the creditors' list.

In 2015, acting under the US-Poland BIT, Manchester initiated an arbitration. According to the award of the arbitrators, the US company was to receive USD 9.5 million due to Poland's breach of the BIT, as the claimant had been denied justice.

In 2019, Poland applied to a Brussels court to set the award aside. The Brussels court in its judgment interpreted Article 6 of the European Convention on Human Rights on access to justice and held that it did not agree with the conclusions of the arbitrators. According to the court, the Supreme Court of Poland had not acted in a discriminatory and unjust manner and even if the Court had indeed made a mistake in the application of the law, such a violation would not have been sufficient to declare that the entire national system of the judiciary was functioning poorly.

Read

Fixed Exchange Rate as a Ground to Go to ICSID

The dispute between an Austrian bank and Slovenia concerns the law on the restriction and allocation of foreign exchange risks between creditors and borrowers in Swiss francs that was passed by the National Assembly of Slovenia on 2 February.

The law obliges lenders to retroactively impose a 10% cap for exchange rates in loan agreements denominated in Swiss francs, made from mid-2004 through 2010. Banks will be obliged to refund any amounts exceeding that cap to the borrowers that had discharged their loans. Notably, loans in Swiss francs were popular due to low interest rates, but in 2015 the Swiss franc-to-euro exchange rate soared making such loans much more expensive for the public.

The claimant informs that the newly adopted law is contrary to the Slovenian Constitution and the European laws and will cost over EUR 110 million for the bank.

Read

ARBITRATION NEWS

RAC Publishes Arbitration Guidelines

The Guidelines contain general recommendations for the Parties, arbitrators, and assistants to the Arbitral Tribunals on various aspects of the proceedings and also reflect the world's best practices in arbitration. The Guidelines apply in disputes administered by the RAC according to the RAC Rules; when the RAC performs the function of the appointing authority according to the UNCITRAL Arbitration Rules, the RAC *Ad Hoc* Arbitration Rules, any other arbitration rules, including those stipulated by the Parties' agreement; and when appointing emergency arbitrators *mutatis mutandis*.

As a general rule, the Guidelines are not binding, but the Parties and arbitrators are encouraged to take them into account as the best practices in arbitration. The Parties may also agree to make the Guidelines binding in relation to a specific dispute.

The RAC Guidelines include: Guidelines on Jurisdiction, Guidelines on Oral Hearings, Guidelines on Arbitral Awards, Guidelines on Appointment of Arbitrators, Guidelines for Assistants, and Guidelines on Conduct of Arbitration.

Read

ICSID Investment Arbitration Reform Completed

Amendment of the documents governing investment arbitration at the ICSID concludes the reform that has taken five years. The amendments developed will take effect from 1 July 2022. The ICSID has announced that it will publish guidance notes in the next few months to help navigate the new rules. These include introducing new mechanisms that allow referring disputes to the ICSID for parties other than the Contracting States within the meaning of the ICSID Convention; the opportunity for the EU as a union to be a party to arbitral proceedings; enhanced transparency and new mechanisms to protect confidentiality (specifying, for instance, how to identify information that cannot be publicly disclosed); rules on third-party funding of arbitrations; and a lot more.

While working on the amendments, the ICSID had published the results of discussions and the working group's documents on multiple occasions.

Read

New ICC Report on the Use of Information Technologies

The ICC Arbitration and ADR Commission has updated its 2017 report on the use of information technology (IT) in international arbitration. Led by Canadian arbitrator Stephanie Cohen, a dedicated working group of experts drafted the new report, having analyzed responses from more than 500 representatives of the

international community. This survey is especially important in view of cyber security considerations and the negative contribution of international arbitration to CO2 emissions.

The report offers a multitude of practical solutions and considerations in terms of using procedural language on IP, checklists for virtual hearings, etc., offering to the participants of international arbitration a basis for a more efficient use of technologies without prejudice for fairness and effectiveness of the dispute resolution process.

Read

ICCA Launches a Special Search for Female Arbitrators

In collaboration with the Equal Representation in Arbitration (ERA) Pledge, the International Council for Commercial Arbitration (ICCA) has announced that it will be implementing a new tool for searching for female arbitrators in databases with a view to facilitating their appointment in arbitrations and ensuring equal opportunities to the women who are qualified specialists in their area, even where they are less known. The new search tool requires 1) an interested party to fill in an online form containing, in particular, information on the arbitrator's specialization and language of arbitration, 2) send a request, and 3) receive a search result based on the filters used.

A request that is strictly confidential, is sent to Equal Representation in Arbitration (ERA). To meet the requirements of impartiality, the committee does not include representatives of law firms, but comprises solely the representatives of dispute resolution organizations that have volunteered to assist. ICCA guarantees that it will not make any recommendations on the issue of electing female arbitrators, nor will it inform potential arbitrators whenever their names are suggested.

Read

The First "Foreign" Secretary-General in PCA History

Polish diplomat Marcin Czepelak has become the new Secretary-General of the Permanent Court of Arbitration in The Hague. It is the first time in the 122 years of this arbitral institution that this office has been taken by a person who is not a national of the Netherlands.

Czepelak has stated that his past diplomatic and administrative experience will help him further develop arbitration and promote the PCA's work. He will take office on 1 June.

Read

At a Crossroads between Cultures and Mediation

In her article, Vasantha Stesin explores the influence of cultural differences on the outcome of mediation. Mediators need to apply additional skills to achieve a settlement between the parties whose values fall on different planes. The author notes that mediation is premised on effective communication, whose methods, in turn, depend on historical development, legal systems, ethnic and cultural backgrounds of each jurisdiction.

To set up an effective dialogue, the mediator needs, first and foremost, to assess their own prejudice and attitude to the relevant culture that may manifest in unconscious stereotypes and associations. A mediator's inability to take stock of their own bias and failure to ensure inclusivity may prove to be a hurdle to settling the dispute.

Read

Victims of Harassment in the US Will Be Able to Choose Where to Sue

On 3 March, the US President Joe Biden signed a law ending forced arbitration of sexual assault and sexual harassment. The law amends the Federal Arbitration Act (FAA) and makes unenforceable all predispute arbitration agreements and waivers of collective action for any and all claims filed in the abovementioned categories of disputes. From now on all victims of harassment at their workplaces will be able to choose whether to submit to a court or an arbitration, irrespective of their arrangements set forth in the agreements with their employers.

Read

DIAC: First Takeaways

21 March marked the end of the transition period introduced after the abolition of the DIFC-LCIA arbitration center. The center was created by the Dubai International Financial Centre (DIFC) together with the London Court of International Arbitration (LCIA) to increase the appeal of the DIFC as a seat of dispute resolution, but in September 2021 it was liquidated by a Decree of the Ruler of Dubai, and all disputes were handed over to the newly-created Dubai International Arbitration Centre (DIAC).

Despite the end of the transition period, many questions remain unresolved. Thus, due to DIFC-LCIA's lack of access to accounts, arbitrators are still waiting for their fees, and cases commenced prior to the reorganization remain suspended for that reason. At present, it is unclear how those cases will be continued: it has been discovered during the reorganization that the new center will be unable to proceed with the

cases under the DIFC-LCIA Rules and an agreement needs to be reached with the LCIA to resolve that issue, yet negotiations are still ongoing.

Nevertheless, the DIAC can already start hearing new disputes. The DIAC Rules entered into effect on 21 March and all arbitration clauses that provide for dispute resolution under the DIFC-LCIA Rules allow referral to the new center. The DIAC Rules have been drafted to incorporate many modern trends in arbitration. Thus, they provide for the possibility of resolving a dispute in an expedited procedure, appointment of an emergency arbitrator, consolidating arbitrations and joining new parties. The reality of post-COVID society has also been taken into account, with the new Rules stipulating that disputes can be heard via videoconference. The DIAC Rules set the DIFC as the default seat of arbitration, yet the parties may agree or the tribunal may decide to change the seat.

Read

Launch of an App to Calculate the Arbitration Costs

International law firm Reed Smith LLP has developed a mobile app that helps users calculate the arbitration costs in various arbitration institutions.

The app was developed by a Singapore attorney, Timothy Cooke. The key goal is to allow the parties to "quickly and accurately navigate the myriad cost structures" at 37 international arbitration centers. Moreover, the app is useful for arbitrators, too, as they will be able to calculate their fees for hearing the case.

The app is available in Apple Store and Google Play.

Read

Civil Claims Can Now Be Funded by Crypto Tokens

The RYVAL crypto project is creating the so-called "stock market of litigation financing". Ryval's concept is to create a market for crypto tokens that will represent shares in a claim, by providing access to litigation funding to unaccredited individual investors.

Tokenization opens an opportunity for the creation of a highly liquid and widely dispersed market for trading in shares (including derivatives) in legal claims. This ensures the efficiency of scale and distribution of investors' risks. Each claim may potentially have tens of thousands of investors or even more.

Despite extensive criticism and doubts that such an ambitious project can indeed be implemented, the concept of tokenization offers new opportunities for financing claims by potentially creating entirely new markets for funding and classes of investors.

Read

ADR EVENTS

Legaltech: Scientific Solutions for Professional Legal Practice

On 14–16 April 2022, IX Moscow Legal Forum “Legaltech: Scientific Solutions for Professional Legal Practice” will take place in Moscow. The key goal is to start a conversation between the representatives of legal academia, practitioners and young scholars, research and other students. The format of the Moscow Legal Forum includes a wide spectrum of academic and practice-oriented discussions. Planned events feature a panel on “Legaltech in Private Law”, an all-Russian conference with international participants “Problems and Prospects of the Development of LegalTech”, a round table on “Theory and Legal Principles of Automation of Legal Practice”, and a foresight session “Legaltech: Solutions to Enhance the Efficiency of Justice”.

Format: hybrid (offline and online).

Read

75th session of the UNCITRAL Working Group II

UNCITRAL held the seventy-fifth session of UNCITRAL's Working Group II: Dispute Resolution from 28 March to 1 April. The session took the form of a colloquium in which speakers and representatives of delegations discussed developments in dispute resolution in the digital economy, the use of online platforms for dispute resolution, technology-related dispute settlement and adjudication.

Yulia Mullina, RAC Executive Administrator, participated as a speaker in one of the sessions of the Colloquium on dispute resolution in the digital economy and the use of technology in arbitration.

Read

FIAMC Pre-moot 2022

In 2022 the Moscow Pre-Moot gathered online 55 unique arbitrators all over the world and 18 student teams from Armenia, Austria, China, France, Germany, The Netherlands, Nigeria, Singapore, Slovenia, South Africa, Russian Federation, United Kingdom, USA and Uzbekistan.

After the completion of two rounds by each participating team and based on the received results, the Moscow Pre-Moot Finale was held between the teams of the American University Washington College of Law and Goethe University Frankfurt am Main. The tribunal consisting of our distinguished arbitrators Josefa Sicard-Mirabal, Stavros Brekoulakis and Sergey Alekhin decided to award the victory to the team of the

American University Washington College of Law (codename in the Pre-Moot – Randolph, members – Lauren Keller, Nora Elmubarak, Gabrielle Feulner) with the best oralist being Gabrielle Feulner.

On the eve of the rounds, the traditional Moscow FIAMC Conference was held. The topics touched upon the controversial issues of investment arbitration and were also related to the FIAMC 2022 Moot Case, divided into two sessions:

Session I. "Yours badfaithfully" - How to Detect the Sabotage in the Process.

Session II. Bond. State Bond: No Time to Define Investments.

The list of our prominent moderators and panelists included:

Timothy Nelson (Skadden, Arps, Slate, Meagher & Flom LLP), Philippe Pinsolle (Quinn Emanuel Urquhart & Sullivan LLP), Josefa Sicard-Mirabal (Independent Arbitrator, Fordham University School of Law in New York City), Dr Greg Lourie (Cleary Gottlieb Steen & Hamilton LLP), Dmitri Evseev (Arnold & Porter).

The sessions were moderated by Anna Korshunova (LALIVE) and Dr Crina Baltag, FCIArb (Stockholm University).

The recording of the conference is available here.

Read

National rounds of the Air Law Moot

In cooperation with Aerohelp, the RAC held national rounds of the Air Law Moot Court Competition in-person.

Leading experts, heads of legal departments of well-known air carriers, such as Aeroflot and S7, acted as arbitrators. By taking part in the competition, the teams gained a great deal of experience and received valuable advice on building their positions and structuring their presentations.

The international round will be held online on 19-21 May.

Read

23rd Annual IBA Arbitration Day

On 24–25 March 2022, the 23rd Annual Arbitration Day “Innovation 360: New and Novel Ideas for the Practice of Arbitration – Critically Tested” was held under the aegis of IBA in Istanbul. The 2022 Arbitration Day featured a series of panels, the panelists discussing, in particular, the specifics of assessing damages, the ways to improve arbitral procedure, developments in the presentation of witness testimony, as well as

promotion of the idea of diversity and inclusion through procedural rules and institutional reforms. Another part of the Arbitration Day was the Young Practitioners' Symposium.

Read

CIArb Holds an Online Meeting on the International Women's Day 2022

On 8 March 2022, under the motto "Break the Bias: Imagine a Gender Equal World", the Chartered Institute of Arbitrators (CIArb) held an online meeting on the occasion of the International Women's Day. The speakers of the online event – 10 women specialists in alternative dispute resolution – shared empowering personal stories of facing gender inequality at work, breaking the bias and making others abandon their prejudice towards women in that sphere. The speakers also outlined their position on the role of women in alternative dispute resolution and how they see that role in the future. Speakers included Catherine Dixon, Dixon LLB Hons (MBA, Solicitor, UK), Jane Gunn (FCIArb, UK), and Catherine Green (FCIArb, New Zealand).

Read

IX Michael G. Rosenberg International Commercial Arbitration Moot Competition

On 15-18 March 2022, the Russian Foreign Trade Academy hosted the IX Michael G. Rosenberg International Commercial Arbitration Moot Competition. The Competition is designed to enable the participants to learn practical skills of working in the area of private international law, get to know how to formulate their arguments in a dispute and defend the client in international arbitration. In 2022, the Competition was held in Russian, English, and French, in two stages. During the first stage, the teams prepared their memoranda for the claimant and respondent, while the second stage took place in the form of oral pleadings in an arbitration.

The Competition program for 17 March 2022 also featured the II International Scientific and Practical Conference "Current Trends in the Practice of International Commercial Dispute Resolution". Conference participants included scholars, arbitrators, legal practitioners in the sphere of international commercial arbitration, and PhD students. Among the issues put to discussion were the topical issues of legal regulation and practice in the sphere of international commercial relations, international arbitration and other means of dispute resolution in the changing world. The Competition and Conference were held offline. The Conference additionally included a Student Section "Traditions and Innovations in the Practice of Resolution of International Commercial Disputes". A collection of Conference abstracts is planned based on the results of the Conference.

Read

7th Model of International Commercial Arbitration 2022

On 6 April 2022, the the final round of the Competition “Model of International Commercial Arbitration” 2022, organized by the Legal Modelling Department of the Kutafin Moscow State Law University (MSLU), will take place. This has been the seventh Competition. In 2022, the central topic of the Competition was the “Cross-Border Exchange Agreement and the Consequences of Failure by Companies to Meet Their ESG Obligations”. The Competition problem also touched upon the issues of validity and enforceability of an arbitration clause concluded by way of an exchange of emails and the consequences of violation of the imperative and dispositive Rules.

Read

Blockchain, NFTs and the Metaverse: Is Arbitration Ready to Verse into a New Universe?

Blockchain, cryptocurrency, and NFT technologies and their effect on the emergence of new categories of disputes in arbitration will become the central issues discussed by the representatives of the legal community and arbitrators at the event hosted by CIArb on 1 April 2022 in hybrid format. Panelists will explain the essence of such technologies and make an effort to find answers to a number of questions concerning, in particular, the use of blockchain technologies in the arbitration of disputes, transformation of arbitration in light of blockchain technologies, resolution of disputes in the “metaverse”, and arbitration in the field of arts and NFTs.

Read

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