Russian Arbitration Center

at the Russian Institute of Modern Arbitration

ARBITRATION DIGEST OCTOBER 2022

CASE LAW DEVELOPMENTS

Different Approaches of English and French Courts to Law Applicable to Arbitration Agreements

In 2015, an ICC tribunal heard a dispute between two companies (Kabab-Ji and a company that later became a subsidiary of Kout) over a franchise agreement. Among other things, the agreement contained a clause on the choice of English law as the applicable law and a dispute resolution clause that provided for ICC arbitration with a seat in Paris, without expressly indicating the law applicable to arbitration clause.

The claim was brought directly against the parent – Kout – rather than against the subsidiary, which later gave rise to the issue of whether Kout was bound by the arbitration clause.

In the end, the tribunal, in applying French law, concluded that the clause did bind Kout as well. One of the arbitrators, however, disagreed with the award. In his dissent, the arbitrator recognized that French law applied to the arbitration clause but pointed out that under the English law rules Kout could not be deemed a party to that contract absent a written agreement, and, therefore, should not have been accountable to Kabab-Ji.

English and French courts took different stances on the arbitrators' decision: thus, an English court refused to enforce it, finding that the governing law chosen by the parties applied to the arbitration clause, while a Paris court upheld the award, accepting that French law applied.

Read

Turkish Contractor Drops Claims against Rosatom

Russian State Corporation Rosatom and the Turkish contractor IC Içtaş have settled their dispute on the construction of a nuclear power plant early into the arbitration.

The dispute arose over the construction of Turkey's first nuclear power plant Akkuyu. Rosatom decided to replace the general contractor due to numerous violations that were negatively affecting the course and duration of works. Due to the substitution of the contractor, IC Içtaş filed three claims against Akkuyu Nükleer, a Rosatom subsidiary. Total claims exceeded USD 5 billion.

As a result of negotiations, the Turkish company resumed construction of the power plant as general contractor and, accordingly, abandoned all claims.

Read

You Cannot Take an Uber to an Arbitration

The Pennsylvania Court of Appeals held that arbitration agreements between customers and Uber Technologies Inc. were unenforceable, since the online registration page lacked a clear statement to the effect that a customer waived their constitutional right to a jury trial.

Shannon and Keith Chilutti sued Uber, claiming a compensation for Shannon Chilutti's injury caused by her falling out of a wheelchair and hitting her head during an Uber ride. In setting aside that the ruling that granted Uber's motion to refer the dispute to arbitration, the Court of Appeals noted the need for a more rigorous approach in the context of a party's waiver of their constitutional right to a jury trial in signing up to arbitration agreements.

The Court's ruling has set a new legal standard in Pennsylvania for hyperlinked arbitration agreements: online forms should clearly state that the user is waiving their right to a jury trial. Such a waiver must be written in bold, in capital letters, at the top of the first page of the terms of use.

This decision deviates, for instance, from another US court judgment delivered earlier this year that was in our Digest for January. In that judgment, the court ruled that the user consented to an arbitration clause by double-clicking "yes", agreeing to the terms of use and to the creation of an account, irrespective of whether they read the terms of use or not.

Read

Pizza Chain Giant, Interstate Trade without Crossing Borders, and Arbitration

The US Supreme Court has remanded a case under a claim by ingredient delivery drivers against Domino's Pizza LLC where the claimants demanded explanations for which workers were involved in interstate commerce and consequently exempt from arbitration by virtue of an express exception set forth by the Federal Arbitration Act (FAA).

The Court reversed a December 2021 ruling by the Ninth Circuit Court of Appeals whereby the drivers were held not to be bound by arbitration agreements because they were delivering products, received from other states, from Domino's California warehouse to franchise stores all across the state. The Court of Appeals is to re-examine the case in light of the Supreme Court's judgment in Southwest Airlines Co. v. Saxon, covered in our Digest for June.

According to Domino's, the Court of Appeals had misinterpreted the FAA which generally encourages enforcement of arbitration agreements. FAA Section 1 exempts from its scope labor disputes with seamen, railroad workers or any other class of workers involved in interstate commerce. The pizza chain giant notes that it is impossible to define, based on the Southwest Airlines Co. v. Saxon ruling, which category of transportation workers is not caught by FAA.

At the same time, the drivers are claiming that the Ninth Circuit Court of Appeals ruling corresponds to the Southwest Airlines Co. v. Saxon approach since the court of first instance held that the FAA exemption covered even the workers involved in interstate commerce without crossing interstate borders.

Read

DIFC Court Denies an Injunction on an Onshore Litigation

The Dubai International Financial Centre (DIFC) Court has dismissed an application from a developer who asked to enjoin a Dubai contractor from litigating in the Emirate's onshore courts, despite arguments on the breach of the arbitration clause. To recall, UAE courts are divided into onshore courts with civil-law proceedings in Arabic and offshore courts in the offshore free trade zone (that includes the DIFC) with proceedings in English and under common law.

The dispute arose from a contract under which the developer agreed to pay 348 million dirhams for the construction of a house in Dubai. The contract provided for resolution of disputes under the rules of the DIFC-LCIA Arbitration Centre with the UAE and Dubai law as the applicable law and a seat in Dubai. However, under Decree No. 34 of 14 September 2021, the DIFC-LCIA was abolished and its cases were handed over to the DIAC in the onshore zone.

In January, the contractor filed a notice of arbitration, later proceeding to lodge a claim with the court of first instance in Dubai in June. The developer challenged the jurisdiction of the Dubai court on the basis of the existence of an arbitration agreement and approached the DIFC Court with an application to the effect that the parties were bound by the arbitration agreement and that a reference to the DIFC-LCIA meant that the DIFC was the proper arbitral forum. The Dubai court was to pronounce on its jurisdiction back in September, but instead it ordered appointment of an expert, what made the developer to go to court with an application for an antisuit injunction.

In doing so, the developer claimed that the arbitration clause was in fact silent on the seat of arbitration and that a reference to Dubai as the seat was only to the venue of hearings, while the DIFC was the seat by default. A DIFC judge denied an injunction since the developer was to prove high probability of the DIFC being the seat of arbitration or exceptional circumstaces justifying the injunction. The judge added that Dubai courts were to be deferred to and that it would be inappropriate to revise their judgment on jurisdiction.

Read

Oi, Lower the Price, Would Ya

Leading telecom groups Telefónica, América Móvil and TIM have initiated an arbitration against the Brazilian mobile operator Oi to lower the purchase price under a contract by USD 600 million. Back in 2020, the buyers acquired Oi's key assets at an auction, having jointly bid BRL 16 billion (USD 3.1 billion). The deal

was approved in a litigation on the financial rehabilitation of Oi that had filed an application for protection from bankruptcy with outstanding debt of USD 19 billion in 2016.

Now Telefónica claims that there had been manifest violations in the execution of the transactions by Oi, while TIM invokes changes in the working capital and expenses discovered in the documents that became available only after the deal was struck. Oi as the respondent submitted that it strongly disagreed with the contract price offered by the buyers in the adjustment, arguing that the price reduction was based on procedural and technical errors, as well as wrong methods adopted by their advisors – the Brazilian branch of KPMG.

Read

An Important Award for Asia's Energy Market

An LCIA tribunal decided in favor of the Pakistan energy company Pakistan State Oil in a dispute with energy trader Gunvor Group Ltd. In 2015, the parties entered into a long-term gas contract, Gunvor Group Ltd undertaking to supply 100 million cubic meters of LNG daily to Pakistan. During the performance of the contract, the Pakistan company paid not only for the gas, but also covered the port charges (for the use of port facilities), while repeatedly asking Gunvor Group Ltd for reconciliations.

When an audit of payments was carried out after all, it turned out that because of overstated prices Pakistan State Oil had paid an extra USD 14.6 million for the gas supplied. For that reason, the parties agreed on the supply of further volumes of gas, the Pakistan company believing that it should not pay for the extra supplies. In response, Gunvor Group Ltd lodged an LCIA claim against Pakistan State Oil. The tribunal, however, not only refused to grant the trader's claims, but in fact awarded USD 14.6 million to Pakistan State Oil.

This victory holds great importance for Asia's energy market, which has recently faced serious problems. Energy traders are refusing to enter into new long-term contracts, while not performing under the existing ones to instead supply the gas intended for Asia to other markets, where they can sell it at three times the prices under their existing contracts.

Read

Failure to Act in the Client's Best Interests

The US Financial Industry Regulatory Authority (Finra) has fined an ex-broker Charles V. Malico and disqualified him from working in the sphere for 6 months, believing that he had violated Regulation Best Interest (a rule that requires brokers to act in the best interests of their clients). According to Finra, the broker had advised a retail client to make a series of transactions that were not in the best investment interests of the latter.

Finra stated that the fine was triggered by an arbitration initiated by the client.

The broker, Charles V. Malico, advised a client, a 63-year-old tax preparer, to make more than 350 trades in his account, earning the broker USD 54,000 in commissions, yet causing the client to incur costs. The client, who had an annual income of USD 100,000 and liquid net worth of approximately USD 50,000, had an account balance of about USD 30,000. Such trades went against Regulation Best Interest, since they effectively generated income for Charles V. Malico and the company that employed him (Network 1 Financial Services Inc), but not for the client, Finra claims. It is noted that this case is the first example of a fine imposed for a breach of Regulation Best Interest and demonstrates the importance of setting a standard for brokers' conduct, as well as instruments to prevent violations in this sphere.

Read

Issues of Mass Consumer Arbitration Exemplified by Samsung

Samsung US has fallen victim to a phenomenon that has been dubbed "mass arbitration". Almost 50,000 users have seized an Illinois District Court with a joint plea to order that Samsung take their personal data claims to arbitration in line with the clause in the user agreements. The users believe that in processing their photos on Samsung devices, Samsung violated the Illinois Biometric Information Privacy Act (BIPA).

Procedural, rather than substantive issues are key to this dispute. The arbitration clause in the user agreement limits the right to submit collective claims to arbitration, yet under an individual claim the company must fully pay the arbitration fee required to initiate an arbitration with a consumer. Law firms with large resources thus accumulate thousands of individual claims with high chances of being granted and bring them to arbitration simultaneously. In such a situation even the simple payment of the arbitration fee becomes a pain for the company, while such claims ending up satisfied may entail very serious damages. Claimants thereby get great leverage over the opposing party from the outset.

Samsung had previously called such claims an attempt to "weaponize" the filing fees, but practice has shown that courts require that companies honor clauses which they themselves had drafted into the agreement. Some companies are therefore forced to exclude arbitration clauses from user agreements: thus, Amazon announced it was changing the dispute resolution procedure after facing 75,000 arbitration claims at once over the Echo smart speakers.

Read

Another Claim against the American Cryptocurrency Exchange Coinbase

Invoking a flaw in the security system of the cryptocurrency exchange Coinbase, which had allowed scammers to drain more than USD 21 million worth of assets from client accounts, around 100 individual investors filed a joint claim with the American Arbitration Association.

Investors accused Coinbase and its branches of negligence for failing to solve the security issues of its Wallet service that allows users to store their crypto assets. According to the claimants, Coinbase's failure to rectify the flaws in the running of the Wallet led to scammers being able to "seize" the user crypto wallets and drain their crypto assets. The claimants believe that scammers are using malignant smart contracts to siphon off all their assets through unauthorized trades. They claim that Coinbase had learned about the scam in late 2021, but refused to eliminate the problem and prevent the violations.

Investors are claiming a compensation of exemplary damages and an injunction against Coinbase. The claim was filed based on the Coinbase Wallet Terms of Service that are governed by the laws of California and the US and contain a special arbitration clause for users based in the US and Canada. Under the arbitration clause, disputes are to be resolved under the AAA Consumer Arbitration Rules, and, moreover, up to 100 claims may be heard jointly to increase the efficiency of arbitral proceedings.

Read

INVESTMENT ARBITRATION NEWS

A Mexico National to Intervene in a Dispute between an Investor and a State

The dispute initially arose over the issuance by the US investor Lion of a USD 33 million loan to a Mexico national for the construction of a resort and two skyscrapers in Mexico. The Mexico national Hector Cardenas never paid his debt which reached US 76 million in 2011. Lion soon learned that Mr. Cardenas had presented a settlement agreement to a Mexican court whereby his debt ceased to exist.

That had the investor to initiate an arbitration against Mexico, invoking a breach of the right to fair trial. The arbitral tribunal concluded that Mexico had indeed violated its NAFTA obligations by effectively allowing the fraudulent debt cancellation scheme.

Mexico is trying to reverse the award in arguing that the tribunal exceeded its mandate. Hector Cardenas himself is now trying to intervene into the setting aside proceedings now pending before the US District Court for the District of Columbia. According to him, the award affects his rights, first and foremost producing an adverse impact on his reputation. Mr. Cardenas is complaining that he was unable to take part in the case either as a party or as a witness and he had been given no opportunity to bring his arguments in defense of the settlement agreement before the arbitral tribunal.

Read

No Ratification – No Protection

An arbitral tribunal hearing a dispute under the ICSID rules has come to the conclusion that it had no jurisdiction over a dispute between a German investor and Iraq. The conclusion was based on the fact that the Iraq-Germany BIT had never entered into force. According to the tribunal, that was due to Germany's failure to ratify it and therefore ensure protection for its nationals in Iraq. As a result, the tribunal would be unable to protect investors' interests up until Germany ratifies the Iraq-Germany BIT.

Read

Venezuela Succeeds in Challenging an Arbitrator over a Colleague's Involvement in a Similar Dispute

Last year, an ICSID tribunal heard a case of the Canadian airline Air Canada against Venezuela. The merits of the dispute had to do with the issue of conversion of the company's local income into USD. The tribunal, chaired by Pierre Tercier, Senior Counsel at the Geneva-based Peter & Kim, ruled in favor of Air Canada.

In June 2021, the German airline Lufthansa started a PCA arbitration, the claims and facts of the dispute being rather similar to the Air Canada v Venezuela case.

Shortly after the appointment of co-arbitrators, Venezuela challenged the arbitrator Wolfgang Peter, nominated by Lufthansa. In its challenge, the state indicated that Mr. Peter, being the founder and partner of Peter & Kim, could be affected by the opinion of his colleague who had heard a similar case. Objecting to the challenge, Mr. Peter stated that having 40 years of experience, he was able to form his "own opinion and judgment on any given case."

In turn, Martin Czepelak, who had become the PCA Secretary General in June, arrived at the conclusion that the arbitrator had to be removed. In his decision, Mr. Czepelak indicated that the two cases were very similar indeed: "claims against the same respondent for the same effects caused by the same measures to similarly-placed actors in the same industry." As Pierre Tercier had already issued a decision in a very similar case, examination of the case by his colleague Wolfgang Peter could appear to be more than a simple coincidence to an informed reasonable third party. That said, Mr. Czepelak noted that he had no doubts as to the irreproachable reputation and professionalism of Mr. Peter.

Read

Rejection of Jurisdictional Defenses by Recognizing Jurisdiction: Exceeding the Mandate or Yet Another Bout of Bad Luck for Madagascar in Arbitration?

An ICSID annulment committee has upheld an award ordering that Madagascar pay EUR 7 million to two Belgian brothers whose clothes factory was looted and burned down during civil unrest. In its 14 October decision, the committee denied Madagascar's application to set aside the award in favor of Peter and Kristof De Sutter, co-owners of the clothes manufacturing business Polo Garments.

After the factory was destroyed in 2009, a Madagascar court ruled in favor of Polo Garments, obliging a local insurer to pay EUR 5.2 million, but the country's Supreme Court stayed enforcement at the government's request, to eventually annul the award in 2016.

After that, the brothers filed a suit with the ICC International Court of Arbitration under the Belgium-Luxembourg Economic Union BIT. In 2014, the sole arbitrator delivered an award in favor of the brothers, but Madagascar succeeded in annulling the award in 2016. Several months later, the brothers lodged an ICSID claim under the same BIT, for a compensation of around EUR 15 million, arguing that Madagascar's failure to protect the factory violated the full protection and security (FPS) standard, while the government's interference with the judiciary constituted a denial of justice. In the end, the arbitral tribunal made an award favoring the brothers and ordered that Madagascar compensate the losses.

Madagascar submitted that the panel acted manifestly ultra vires, skipping the issue of its jurisdiction in light of an already existing arbitral forum: the BIT offered to investors a mutually exclusive choice between ICC and ICSID arbitrations. According to the committee, having accepted its jurisdiction, the panel dismissed Madagascar's objections on the continuing arbitration agreement to arbitrate at the ICC, while the excess of mandate, even if established, may serve as a ground to annul an award only where it is manifest rather than moot. One of the committee members, however, dissented, stating that the arbitral panel had not dismissed the jurisdictional objections clearly enough in the award, despite the importance of the matter,

and that a general affirmation by the panel of its jurisdiction could not be accepted as the implied rejection of jurisdictional defenses.

Read

Swiss and UK Courts Side with the Yukos Shareholders

The Swiss Federal Court has dismissed Russia's appeal against the award issued in a Geneva-seated arbitration. Russia's argument to the effect that the Russian Parliament had not ratified the Energy Charter Treaty which underlay the arbitral tribunal's jurisdiction failed to convince the Swiss Court and was rejected.

Under the award that Russia strove to annul, Yukos Capital was awarded USD 2.63 billion. Yukos Capital was Yukos's financial company and issued loans to other group companies, in particular, Yuganskneftegaz and Samaraneftegaz. After Yukos underwent a bankruptcy procedure, Yukos Capital claimed a compensation of USD 13 billion for unpaid loans, which claim was partially satisfied by the arbitrators.

At the same time, a High Court judge ruled to resume enforcement of the award whereby the Yukos shareholders were granted USD 50 billion. According to him, the procedure was to be resumed in order to examine the jurisdictional defenses advanced by Russia that invokes sovereign immunities as a ground for the impossibility of enforcing the award.

Read

US and Mexico Prefer Negotiations to Arbitration

Despite the end of a 75-day cooling off period after which the USMCA allows a party to initiate an arbitration, Mexico and the US preferred to continue their attempts on amicable settlement. Their counsel have reported that negotiations are proving productive and differences are narrowing down.

The US claims against Mexico concern the Latin American state's policy: a Mexico state energy company was granted priority access to the power grid and other local producers enjoyed beneficial terms on emission standards and pricing, all while foreign companies were struggling to even obtain working permits. Later, Canada joined the US in its claims.

If the parties fail to settle the dispute amicably, the USMCA provides for the formation of a panel to settle disputes. Should it find any breaches in Mexico's trade policy, the panel will authorize the claimants to introduce penalty trade tariffs against Mexico.

Read

An Attempt to Drop Green Energy Cost Dearly to Romania

An ICSID tribunal has ruled in favor of European investors who had been building solar power plants in Romania. The investors demanded that the Balkan state compensate them for legislative changes that led to lower green energy incentives. Thus, foreign green energy producers had been entitled to six green certificates per megawatt-hour, which allowed them to earn an extra EUR 160-330 per megawatt-hour. In 2013, however, the number of certificates was reduced to 4 and payment under the existing ones was delayed.

In the proceedings, Romania argued that it had not guaranteed to its investors to never amend the laws. Yet, the tribunal held, in relying on the Energy Charter Treaty, that policy changes had been too radical.

Read

The Gold Is for the Eco-Activists!

A Chinese mining company (Junefield Gold) has filed a USD 480 million claim against Ecuador.

Activists protesting against mining due to its possible negative impact on the local population have had Ecuagoldmining, the claimant's subsidiary, lose control over a mine awarded under a concession agreement. The Ecuador authorities first sent the army to defend the mining site, but later called it off. According to the claimant, that Ecuador had allowed activists to breach into the mining site contributed to the claimant's losses. The claimant effectively lost control over the project from 2018 and accordingly claims that the "occupants" have been unlawfully mining gold and silver on the mining site, while the Ecuador government is failing to take any measures to rectify such breaches.

Read

ARBITRATION NEWS

Are you in Arbitration City?

A new social network for arbitration practitioners is in the works. A startup, designed by Dmitri Evseev, promises to offer new options for exchanges between professionals and revolutionise networking in arbitration.

According to the developers, the new social network will allow lawyers to interact more efficiently. In Arbitration City, they will be able to stream, plan participation in events via a global events calendar, as well as find suitable job offers. And, of course, the usual messaging function will not be forgotten.

That said, Arbitration City creators will take measures to exclude random content from the users' feed.

The platform's launch is planned in December.

Read

EU States Race to Withdraw from the ECT

As reported earlier in our Digest for September, some EU states intend to withdraw or have already withdrawn from the Energy Charter Treaty (ECT). This time, plans to renounce their ECT obligation have been announced by Spain, France and the Netherlands.

One of the key reasons for withdrawal is the issue of the ECT's inconsistency with the Paris Agreement and the objectives of the European Green Deal, aimed at the reduction of greenhouse emissions and the promotion of "green" energy in Europe. The ECT, signed in 1994, offers considerable protections for investors into fossil fuels, which may prevent transition to "green" energy. Environmental activists put special emphasis on this problem.

Interestingly, the announcements by the European states were made a month before more than 50 ECT contracting parties will take a vote on amending it. The "updated" ECT is expected to still protect investments into fossil fuels while allowing the contracting states to lift such measures in their territories.

At the same time, some experts believe that the sole real reason why EU members states are withdrawing from the ECT consists in their desire to escape their obligations to pay compensations in case of violation of investor rights under the ECT.

Read

LCIA to Accept Russian Money: A Balance between the Efficiency of Sanctions and the Right to Defense

The London Court of International Arbitration (LCIA) has been authorized to process fees for cases from Russian and Belarus parties despite financial sanctions.

The General Licence issued by the UK sanctions regulator will cover all cases administered under the LCIA Rules, but will not apply where the LCIA acts as a holder of funds or renders services in cases under the UNCITRAL Arbitration Rules.

The license has been granted indefinitely and allows the LCIA, among other things, to use funds transferred by parties who are now designated persons, prior to their designation, as well as to accept payments from non-designated parties where a designated party has not paid the arbitration costs.

Read

New ICSID Annual Report

The ICSID has published an annual report covering the period from July 2021 to June 2022.

Over this year, the ICSID has heard the total of 346 cases, more than in 2021 (332). The largest share of newly registered cases involves Latin American states (22% as compared to 14% last year). All Eastern European and Central Asian states together account for 20% of cases; while Central American and Caribbean states, for 12%.

Energy and mining industries continue to dominate among the cases filed: 24% concern power and energy sources; 22% – investments into oil, gas or mining. The share of cases related to water supply, sanitation and flood control has risen to 8%.

Nationals of 42 different jurisdictions have acted as arbitrators, the majority – 15 – originating from the US, and 12 – from the UK.

Read

ADR EVENTS

2023 Winter Academy “Across the Arbitration Universe: Different Perspectives on Dispute Resolution in the Modern World”

The Russian Institute of Modern Arbitration is happy to announce that registration is now open for the RIMA’s most ambitious educational project – the Winter International Arbitration Academy “Across the Arbitration Universe: Different Perspectives on Dispute Resolution in the Modern World”.

The RIMA believes that today educational projects based on the values of peaceful settlement of disputes are especially important. That is why the RIMA team has decided to continue the project and make participation absolutely free of charge this year.

The Winter Academy will take place on 16-27 January 2023. Over the course of two weeks, the participants will have a unique opportunity to talk to and attend classes and seminars taught by some of the most eminent and recognized experts and practitioners in the world of arbitration: those who do research in arbitration, have been involved in arbitration as arbitrators, counsel, representatives of arbitral institutions, etc.

Registration closes on 30 November 2022. For the sake of maintaining high quality interaction and live communication of the participants and speakers, the number of participants is limited and they will be selected after registration closes. The Winter Academy will be in English.

Register here.

Read

EFILA 2023 Essay Competition

The Editors’ Committee of the European Investment Law and Arbitration Review invites young professionals and students to take part in an essay competition. A participant must have no more than 7 PQE or be a student (LLB, JD, BCL, LLM, PhD, DPhil). Authors are free to choose a topic in European Investment Law or Arbitration. Submissions must be of high quality and never published before.

Read

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