Российский арбитражный центр

при Российском институте современного арбитража

ARBITRATION DIGEST
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CASE LAW DEVELOPMENTS

The French Court of Cassation Ruled That Compliance with Pre-arbitration Procedures Relates to the Admissibility

The French Court of Cassation ruled that failure to comply with the provision requiring mediation prior to arbitration relates to admissibility of the claim and not to the tribunal's jurisdiction, and thus does not justify annulment of the award under Article 1492,1° of the French Code of Civil Procedure.

Article 1492,1° of the French Code of Civil Procedure contains an exhaustive list of grounds for setting aside domestic arbitral awards: (1) the arbitral tribunal erroneously upheld or rejected its jurisdiction; (2) the arbitral tribunal was not properly constituted; (3) the arbitral tribunal has ruled on matters beyond its jurisdiction; (4) violation of due process; (5) the award is contrary to public policy; (6) the award lacks reasoning, date, arbitrators' names or signature, or the award was not made by a majority vote of the arbitrators. Since the French Court of Cassation ruled that compliance with the provision requiring mediation prior to arbitration relates to admissibility, the court cannot set aside the award based on tribunal's decision on admissibility. French courts generally take a similar position with respect to international arbitration seated in France.

The issue was brought before the court in a case where the contract contained a clause that all disputes are resolved through mediation and, if it failed, would be submitted to arbitration. One of the parties initiated mediation and a year later arbitration, following which an award was made. After that, the same party initiated another arbitration without resorting to mediation. The arbitral tribunal considered the claim admissible and accepted its jurisdiction. The respondent managed to set aside the award on the grounds that the tribunal lacked jurisdiction due to non-compliance with the procedure for resolving disputes stipulated by the contractual clause. However, the French Court of Cassation disagreed with this conclusion, noting that non-compliance with the mediation clause did not affect tribunal's jurisdiction, but related solely to the admissibility of the claim.

Read

Appointment as an Arbitrator Being a Factor Affecting Impartiality

The Panama Canal operator is facing the threat of setting aside USD 240 million award in its favor. The award was made in a dispute related to the reconstruction of the Panama Canal, which was carried out in order to increase its capacity. During the reconstruction, there were cost overruns and problems with construction materials.

In the setting aside proceedings, the respondent pointed out that the arbitrators did not disclose their ongoing relationship and cross-appointments in other cases. In particular, it turned out that the claimant's appointed arbitrator in this case facilitated the appointment of the presiding arbitrator to the same role in another case.

During the hearing, this fact raised concerns of the judges of the US Court of Appeals for the Eleventh Circuit. They underlined that the appointment as the presiding arbitrator in an international dispute promises a fee of hundreds of thousands of US dollars. At the same time, as noted by the respondent's representative,

the claimant's co-arbitrator was appointed in four proceedings at once related to the Panama Canal's reconstruction.

Despite the concerns expressed by the judges during the hearing, no final decision on the annulment has yet been made.

Read

Word-for-word: Swedish Court Set Aside an Award Since Arbitrators Exceeded Their Mandate

The dispute arose from a lease agreement, under which the lessee had the right to transfer the premises to its subsidiaries, subject to a security valid for the entire duration of the lease. With this, the Grand Group lessee provided part of the premises to its subsidiary.

As a result, the Landbyska landlord resorted to arbitration, in which he requested to:

1) terminate the lease agreement with the lessee's subsidiary, while requesting that the agreement between Landbyska and Grand Group be deemed to be in effect;

2) provide the following types of security: (i) unlimited or (ii) limited to SEK 555 400.894, or (ii) in an amount determined by the arbitral tribunal to be equivalent to the value of the entire obligation arising during the lease period.

In award, the lease agreement was found to be in effect. Regarding the security, it was stated that the amount of the security should be equivalent to 36 months of rent. The claimant applied to the state court, requesting to set aside this award since the tribunal exceeded its mandate. The court annulled the award, stating that the wording of the claimant's request set a certain mandate within which the arbitrator was to act. The arbitrator shall be deemed to have exceeded his mandate since he granted a different relief than requested by the claimant. The court also referred to the principle of party dispositions, which means that the arbitrator cannot decide in any direction (more or less) than was outlined in the party's specific request.

Read

The Clash between Advertising and Reality as a Reason for Arbitration

The sole arbitrator, hearing clients' complaints regarding the actions of the broker under the auspices of FINRA, sided with broker, finding the complaints unfounded. According to these complaints, the broker convinced his clients to invest in a strategy that he advertised as "conservative" and which in fact was not. According to clients, this strategy was "aggressive", that is being associated with high risk, and caused them financial losses.

In support of his award, the arbitrator stated that the broker properly described the strategy and possible risks at individual meeting with clients. They also signed disclosure documents detailing the strategy and

possible risks. Moreover, the arbitrator noted that two of the three clients who filed complaints are still working with the broker.

It is interesting to note that the company for which the broker worked also faced claims because of this strategy, but this time from the financial regulator SEC. It found that the company's advertising misled investors about the risks associated with the investment strategy. In this dispute, the company entered into a settlement agreement with the SEC, paying a fine of USD 25 million.

Read

Defying the Arbitrator

The Supreme Court of New South Wales granted an application to set aside an award in *Lieschke v Lieschke* [2022] NSWSC 1705. This decision provides a perspective on the possibility of judicial intervention in Australia as the pro-arbitration jurisdiction when identifying deviations from a fundamental principle enshrined in both the Commercial Arbitration Act and the UNCITRAL Model Law on International Commercial Arbitration, ensuring equal treatment of the parties and giving each party a reasonable opportunity to present its case.

The dispute, that arose in 2017, involved distribution of assets upon termination of the partnership agreement between the plaintiff, his son (the first defendant) and his daughter-in-law (the second defendant). As a result of various agreements and financial arrangements between plaintiff's other children and the partnership, the plaintiff had concerns that the partnership's accounting records were inaccurate. Therefore, the arbitration was bifurcated to resolve two separate issues, one of which concerned unresolved differences between the parties' experts related to accounting. While rendering an interim award on the first issue in favor of the respondents, the tribunal indicated its position on the second. The arbitrator reviewed the accounting statements and, despite at that moment he could not yet obtain all the documentation and positions of the parties, he already sided with the defendants on accounting issues, thereby rendering the bifurcation of the process meaningless.

Following interim award in favor of the defendants adopted in 2020, the plaintiff replaced its representatives and attempted to involve the competent accountants in the proceedings to better analyze the partnership data from the beginning. However, the arbitrator precluded the plaintiff and his representative from filing additional or new expert opinions on accounting issues. The plaintiff nonetheless hired a new expert who identified new circumstances with respect to the disputed property. Learning of this, the arbitral tribunal explicitly stated that no new expert opinions would be introduced to the case file. Even if they were submitted, the tribunal would ignore them, despite plaintiff's objections. Consequently, in 2021, the arbitrator issued a final award based on the original expert report, which led plaintiff to apply for annulment of the award.

As noted by the Supreme Court in reviewing the award, the arbitrator paid too much attention to ensuring that the parties did not go beyond their original agreements reached earlier in the proceedings. Therefore, if the arbitrator allowed the process to be changed in the way the plaintiff desires, then the arbitration procedure established by the arbitrator would be completely derailed. As a result, the court found that in "paranoia" over the need to ensure due process, including in the context of additional delays or costs, the arbitrator allowed a practical injustice to the plaintiff, although the latter made no attempt to delay the process in any way.

The Supreme Court set aside the award, relying on the statutory provision that an award may be set aside if the court finds that it is contrary to the public policy of the State of New South Wales and finding that the applicant was denied a reasonable opportunity to present the case due to the arbitrator's "critical view" of the plaintiff's position.

Read

Context is Everything

Claimants-cocoa sellers, Africa Sourcing Cameroun Ltd and Africa Sourcing Côte d'Ivoire, failed to set aside an award of the Federation of Cocoa Commerce (FCC) Appeal Board for serious irregularity under section 68 of the 1996 English Arbitration Act.

The claimants, who were not members of the Cocoa Trade Federation, sued LMBS Société Par Actions Simplifiée (acting under the brand name Rockwinds), an FCC member. At the same time, the Rockwinds CEO acted as an FCC arbitrator and took an active part in the work of the Federation's committees. The claimants also sued the second respondent, Eric Bourgeois, a cocoa vendor with 30 years of professional experience and a member of the FCC Board, who also chaired the Appeal Board for four years.

The dispute arose out of three contracts for the sale of cocoa, each containing an arbitration clause. The claimants, however, first went – unsuccessfully – to the Bordeaux court, France, which pointed to the arbitration clauses and lack of its jurisdiction over the dispute. Then, the claimants went to FCC arbitration, hoping for a ruling that the FCC did not have jurisdiction to resolve the dispute with Rockwinds. However, they were surprised when the arbitral tribunal asserted jurisdiction over the dispute and that the claims had no statute of limitations, thus awarding the claimant more than EUR 5 million.

Rockwinds appealed to the FCC Appeal Board, because, among other things, the statute of limitations had expired. The Board determined that the claimants had missed the contractual deadline by more than two years and made no attempt to extend it. Unhappy with this outcome, the claimants applied to the English court for setting aside the award.

The Commercial Court rejected claimants' arguments that the Chairman of the FCC Board failed to disclose various circumstances regarding professional contacts with respondent and other FCC members, and that this created an appearance of bias. The chairman was not required to disclose these circumstances, and furthermore, the court stated that the arbitrator should avoid additional delays and costs in disclosing information that would not cause an impartial and informed observer to have relevant concerns. The court pointed out that context was key, and because the dispute arose in a small market, the vendors and FCC arbitrators likely knew each other or were acquaintances. An impartial and informed observer in such circumstances, in the court's view, would not have found that there was a real possibility of bias. Finally, the burden of proving substantial injustice rested with the claimant, unless the alleged failure to disclose the information was so egregious that the substantial injustice was inherently probable.

Read

Cayman Islands: A Paradise Not Only for Vacation, But Also for Interim Awards

A Cayman court confirmed for the first time that foreign interim awards made in a state party to the New York Convention are enforceable in the same manner as final awards.

In November 2022, an interim award was adopted in favor of Qatari businessman Nasser Sulaiman Al Haidar in a case administered by the Dubai International Arbitration Center (DIAC), which seized the assets of the managing director of the UAE-based oilfield services company Petronash. In December, Al Haidar *ex parte* applied to the Cayman court for enforcement of the award, arguing that enforcement of interim awards is possible because the term "award" in the 1997 Cayman Islands Foreign Arbitral Awards Enforcement Law (FAAEA) was defined broadly enough to include both final and interim awards.

Cayman Islands Grand Court Judge Ian Kavali enforced the award since foreign interim awards are enforceable under Section 5 of the FAAEA in conjunction with the 2012 Cayman Islands Arbitration Act, which allows enforcement of interim measures awarded in arbitration both in the state parties to the New York Convention and in other states. As Kavali pointed out, prior to the 2012 Act, the FAAEA only applied to final awards. However, adoption of the 2012 Act, which expressly provide for enforcement of foreign interim measures, expanded the scope of the FAAEA.

Read

US Court of Appeals Upheld Legality of Entering into Binding Arbitration Agreements to Refer Labor Disputes to Arbitration

In its recent decision in *U.S. Chamber of Commerce v. Bonta*, the US Court of Appeals for the Ninth Circuit held that the Federal Arbitration Act (FAA) takes precedence over state law, and California employers may sign a binding arbitration agreement with employees when hire them.

The decision reversed an earlier anti-arbitration approach, stemming from California's 2019's Assembly Bill 51 (AB 51), which prohibited employers from requiring employees to enter into an arbitration agreement as a condition of employment. AB 51 fines employers if they require employees to conclude arbitration agreements but the bill allows enforcement of those agreements after their conclusion.

The bill was proposed as the US Court of Appeals for the Ninth Circuit initially supported the anti-arbitration approach to binding agreements to arbitrate labor disputes between employees and employers in California, but then decided to revisit this issue to resolve the paradox created by US Supreme Court precedent. Under the Supreme Court's approach, state law that prohibits mandatory arbitration agreements between employees and employers takes precedence over the Federal Arbitration Act (FAA).

Read

No Direct Indication of the Consequences of Choosing Arbitration as a Form of Dispute Resolution Is Required

In *County of Passaic v. Horizon* Healthcare Services, the New Jersey Appellate Division (the Appellate Division) clarified that arbitration agreement between sophisticated parties is not required to expressly state the consequences of entering into an arbitration agreement, namely a direct refusal to resolve disputes in courts.

According to the facts of the case, Horizon Blue Cross Blue Shield of New Jersey (Horizon) managed the Passaic County's (County) health benefits plan under the contract containing a binding arbitration agreement. County filed a claim on breach of contract in a state court, which agreed with Horizon's arguments that there was a binding arbitration agreement, and the dispute should be referred to arbitration.

However, County appealed, relying on the New Jersey Supreme Court's decision in *Atalese v.U.S. Legal Services Group*, which required the consumer arbitration provisions to clearly and unambiguously warn plaintiffs of waiver of their right to bring claims in state court. Moreover, in Atalese v. U.S. The Legal Services Group, the court stated that consumer arbitration agreements were only enforceable "when phrased in plain language understandable to the reasonable consumer".

The New Jersey Appellate Division disagreed with County and held that the *Atalese* findings did not apply to the present dispute because the arbitration agreement in question was concluded between the sophisticated parties and not ordinary consumers.

Read

Fintech Giant Initiated SIAC Arbitration against Former CEO

Fintech unicorn BharatPe has initiated arbitration under the SIAC rules, seeking to claw back the shares of its former managing director, Ashneer Grover, and his "co-founder" title. Mr. Grover, who has been accused of cheating and embezzlement by BharatPe, owns about 8.5% of the company's shares. According to the sources, the arbitration was initiated after Grover had refused to comply with the shareholders' agreement.

This is not the only BharatPe lawsuit against Grover. Previously, the company also filed a civil suit in the Delhi High Court and initiated a criminal prosecution on suspicion of committing an economic crime.

In its lawsuit, BharatPe alleges that Grover and members of his family created fake bills and hired fictitious suppliers to provide services to the company.

Read

Tom Cruise Will Appear before the Arbitral Tribunal: Claim Against Church of Scientology to Be Heard in Arbitration

Ex-follower of the Scientology teachings Valerie Haney filed a lawsuit against the Church of Scientology, arguing surveillance, intimidation and Internet attacks. According to Valerie, in 2019, the organization held her against her will while she was working for a sea organization (Sea Org). She managed to escape from the church by hiding in the trunk of a car.

The court refused to consider the claim, because Haney entered into an employment contract with the church containing an arbitration clause. During the arbitration, Valerie invited the tribunal to call prominent Scientologists Tom Cruise and Elisabeth Moss as witnesses to testify.

Read

Gazprom Is Once Again Facing a Lawsuit from a European Company

The French energy company Engie has initiated arbitration against Gazprom Export LLC, as stated in the company's annual report. The grounds for Engie's claims are the same as those of other European companies that sued Gazprom earlier – the gas delivery shortage in 2022. The claimant demands recognition that the Russian company has breached its obligations under a long-term contract for the supply of gas, and to recover from it a contractual penalty for this breach. The report does not specify to which arbitral institution the claim has been filed and whether the arbitral tribunal has been constituted to date.

Engie is not only one of the largest energy companies, but also an important partner of Gazprom. In particular, it owns large stakes in the operators of both Nord Stream pipelines.

Read

The Russian Court Refused to Recognize LCIA Award Since the Debtor Did Not Sign the Arbitration Agreement

The Moscow District Commercial Court confirmed that the LCIA award is not subject to recognition and enforcement since the debtor did not sign the arbitration agreement.

The LCIA tribunal heard a dispute between V.I. Smagin, Kalken Holding Limited, and A.G. Yegiazaryan. According to the award, Kalken Holding Limited and A.G. Yeghiazaryan were jointly and severally liable to pay damages in favor of V.I. Smagin amounting to more than USD 72 million, interest on this amount and costs.

Financial manager V.I. Smagina applied to the Commercial Court of City of Moscow for recognition and enforcement of the LCIA award. The court dismissed the application due to the absence of arbitration agreement and the expiration of the time limit for the enforcement application.

The applicant attempted to challenge the ruling of the court of first instance before the Moscow District Commercial Court. The district court upheld the ruling. In particular, the court emphasized that A.G. Yegiazaryan was not a party to the shareholder agreement where arbitration clause was contained and on which the applicant relied to support its argument that the arbitration agreement existed between the parties. The court also agreed with the finding that the time limit for submitting an enforcement application had expired, because at the time of the application five years had passed from the award's adoption.

Read

The Commercial Court Prohibited SCC Proceedings to Recover USD 148 Million from Continuing

On 1 March 2023, the Tyumen Region Commercial Court issued a ruling based on Article 248.2 of the Russian Commercial Procedure Code. The court upheld the claim of the Russian company Tyumenneftegaz against the American company First National Petroleum Corporation to prohibit ongoing proceedings in the SCC Arbitration Institute in dispute No V 2021-094 on the recovery of interest on the previously awarded damages amounting to USD 148.199.853 for the period from 25 December 1998 until the date of payment.

The dispute arose in connection with the activities of the Tyumtex, a Russian-American joint venture, established in 1992 on the basis of articles of association.

The Commercial Court noted that First National Petroleum Corporation first initiated arbitration in 2007 (SCC Arbitration V 179/2007), but the proceedings were terminated due to non-payment of the advance on costs. In 2011, the American company again initiated arbitration (SCC Arbitration V 196/2011), the award was adopted in 2013, and in June 2015, was set aside by the Svea Court of Appeal (Sweden) due to procedural irregularities. Subsequently, the respondent initiated arbitration again on the same grounds (SCC Arbitration V 2015/178). The respondent was awarded USD 70 million due to unlawful liquidation of the joint venture in 1998, as well as USD 150 million interest on the recovered amount. On 2 June 2021, the Svea Court of Appeal (Sweden) set aside the award with respect to recovery of interest. In this regard, First National Petroleum Corporation initiated the latest arbitration to recover USD 148.199.853 from Tyumenneftegaz.

In granting Tyumenneftegaz's application, the Commercial Court underlined in the reasoning part that the claimant's representatives repeatedly stated that they would be forced to stop participating in the case due to sanctions, and about potential problems with the claimant finding new representatives and experts, which required termination or suspension of the arbitration. The court held that the SCC Arbitration Institute, by citing the right to access to justice, simultaneously violated the claimant's right to defense by not agreeing to postpone or suspend the proceedings in order to find new representatives.

Read

Irish Lessor GASL Leasing Ireland No. 2 Limited Was Banned from Continuing LCIA Arbitration in Its Dispute with Ural Airlines

In March 2022, GASL Leasing Ireland No. 2 Limited, an Irish lessor, filed a claim with the LCIA for the return of an aircraft (an Airbus A319-100) provided to Ural Airlines under 2015 leasing agreement.

In turn, Ural Airlines applied to the Sverdlovsk Region Commercial Court for an injunction to continue the LCIA proceedings under Article 248.2 of the Russian Commercial Procedure Code since the applicant is a sanctioned person and unable to participate in the arbitration. According to the applicant, "there is a risk of unlawful recovery of losses by the lessor from the lessee where the latter will be deprived of the opportunity to exercise his defense due to the existing restrictive measures of unfriendly foreign states."

In granting the application, the Commercial Court found that the applicant is a sanctioned person since, according to the EU Regulation of 25 February 2022 No 2022/328, lessors from the EU, in particular GASL Leasing Ireland No. 2 Limited, are prohibited to provide aircraft leasing services to Russian airlines.

The Commercial Court noted that "a dispute involving a person based in the state that applied restrictive measures would be heard on the territory of a foreign state without observing the guarantees of a fair trial, including those relating to the judicial impartiality, which is one of the elements of the access to justice." The court also pointed out that the 28-day deadline for filing a response under Article 2.1 of the LCIA rules was unilaterally shortened by the LCIA secretariat by more than half, depriving the applicant of sufficient time to prepare a position on the case, and thus impeding the applicant's access to justice.

Read

INVESTMENT ARBITRATION AND PUBLIC INTERNATIONAL LAW NEWS

Disputes Saga between Armenia and Azerbaijan Continues: Compensation for Lost Opportunities

Azerbaijan has filed a claim against Armenia under the Energy Charter Treaty, seeking redress and financial compensation for the exploitation of energy resources during "almost 30 years of illegal occupation" of its territories.

The dispute concerns the Sarsang hydro power plant on the Tartar River, a large facility built by Azerbaijan in 1976, which fell under the control of the unrecognized Republic of Artsakh after the first Nagorno-Karabakh conflict in 1991 and returned under the control of Azerbaijan after the second Nagorno-Karabakh conflict in 2020.

Azerbaijan argues that it lost hundreds of millions of dollars from the inability to access, use and develop the hydro power plant, as well as the potential development of renewables in Nagorno-Karabakh. Azerbaijan also accuses Armenia of allowing the construction of at least 37 additional unauthorized hydropower facilities on Azerbaijan's sovereign territory in order to create a unified system of electricity distribution for Armenia.

Read

The Paris Court of Appeal Disagreed with the Lack of Jurisdiction Ratione Temporis and Set Aside the Award

The Paris Court of Appeal set aside the award in Rikita Mehta, *Prenay Agarwal and Vinita Agarwal v. Uruguay*, in which the tribunal had dismissed the case due to lack of jurisdiction *ratione temporis* under the United Kingdom – Uruguay BIT. In its award, the tribunal unanimously held that, at the time the dispute arose, the claimants had only limited rights under the trust and did not have investor status.

In turn, the Paris Court of Appeal held that the BIT applies to all investments, regardless of their date, and to all disputes arising after its entry into force in 1997. Therefore, a State's consent to arbitration is not based on the requirement that the investment precede the dispute. Regarding Uruguay's contention that investment arbitration could not be commenced with respect of investments made after the dispute had arisen, the court found that this issue was for the merits.

The Paris Court of Appeal also disagreed with Uruguay that a BIT required active acts of investing, so that claimants could not be considered investors by simply inheriting the relevant assets through a trust. As the

court pointed out, the BIT contained no such requirement and covers "any kind of assets", including a list of examples, some of which did not always involve any active act on the part of the investor.

Read

Property Attachment *a la Parisienne*

The Paris Court of Appeal held that the claimants in *Al-Kharafi & Sons v. Libya* could not enforce the award against assets owned by the Libyan Investment Authority (LIA) without a special authorization from the French authorities. In March 2013, the claimants were awarded more than USD 1 billion due to, as the tribunal found, Libya's violation of the Unified Agreement for the Investment of Arab Capital in the Arab States.

Investors tried to enforce the award in the French courts, which in October 2020 seized the monies deposited in the LIA's name in the French bank Société Générale. In February 2022, the Paris Court of Appeal lifted these attachments, pursuant to the judgment of the Court of Justice of the European Union (CJEU) according to which Libyan funds frozen under the EU sanctions regime could not be attached without prior authorization from the relevant national authorities. The approach of the Paris Court of Appeal was upheld by the French Court of Cassation.

In February 2023, the Paris Court of Appeal rejected the claimants' latest attempts to reinstate the attachments of the LIA's assets. The court did not see any grounds for referring the issue of extending the sanctions regime for LIA to the CJEU, and rejected the claimant's argument that prior authorization to freeze the funds was unfounded and disproportionate. The court pointed out that the freezing of assets at the EU level was aimed at fostering peace and stability in Libya.

Read

Inconvenient Interpretation

In *Lao Holdings NV*, the Singapore Court of Appeal affirmed the principle that arbitral awards could not be set aside due to errors of fact or law, and held that, with different interpretations of an arbitration agreement, a court would not revisit a tribunal's interpretation if the construction of the agreement's text was open – even if the court prefered a different interpretation than the tribunal adopted (*Lao Holdings NV; and Sanum Investments Ltd v The Government of the Lao People's Democratic Republic Lao Holdings NV; Sanum Investments Ltd v The Government of the Lao People's Democratic Republic* [2022] SGCA(I) 9).

Lao Holdings NV and Sanum Investments Ltd filed a request for arbitration against the government of the Lao People's Democratic Republic for breach of obligations under a BIT. Laos responded, arguing that it had evidence of bribery and corruption against the claimants.

Shortly before the merits hearing, the parties entered into a settlement deed, under which neither party was "permitted to add any new claims or evidence" that had not yet been introduced to the case file. However, eventually, Laos filed a motion to admit additional evidence regarding the claimant's misconduct.

Deeming the provision prohibiting introduction of new claims and evidence to the case file as not an absolute obstacle, the arbitral tribunals accepted the respondent's motions, finding that they retained the right to make such a decision. Subsequently, the arbitral tribunals ruled against the claimants, as a result of which the latter applied for setting the award aside to the Singapore International Commercial Court (SICC).

The SICC held that the parties had vested in the arbitral tribunals jurisdiction to decide on the interpretation of the disputed provision and, therefore, dismissed the application. The SICC also noted that in any event, the investors did not demonstrate the “necessary prejudice” caused by non-compliance with the agreed procedure and necessary for annulment of arbitral awards. The claimants did not stop there and appealed the decision to the Singapore Court of Appeal.

The Singapore Court of Appeal set out conditions for filing an application for non-compliance with arbitral procedures:

- an agreement between the parties on the agreed order and procedures of arbitration existed;

- the arbitral tribunal did not follow this agreed procedure;

- the failure to comply with the procedure had a causal relationship with the award in that the award could have been sufficiently different if the tribunal complied with the agreed procedure; and

- the party challenging the award could not invoke this circumstance unless it raised an objection before the arbitral tribunal during the proceedings.

Examining the circumstances of the case and the applicants' arguments, the Court of Appeal held that, when multiple interpretations of the arbitral procedure were possible, the court would not revisit the tribunal’s decision to adopt a particular interpretation. However, it was also stated that the court could intervene if the tribunal misinterpreted the agreed arbitral procedure, i.e. interpreted it in a way that is not possible. Finally, in *obiter dicta*, the court agreed with the interpretation adopted by the arbitral tribunals in the present case.

Read

Trillion Dollar Question: ICC Will Hear a Claim against a Vietnamese Bank on Payment of Fine

A group of investment companies (from Germany, Portugal and Vietnam), acting on behalf of the claimant, filed a claim to the ICC against the government of Vietnam, the State Bank of Vietnam and Vietinbank, demanding payment of a fine. The value of the claim is several trillion euros. The dispute arose from investment activities of European companies. During the execution of the transaction, Mekolor Joint Stock Company, registered in Vietnam, received about EUR 10 billion, which were then illegally appropriated by Vietinbank and further used in an illegal money laundering scheme. According to the claimants, the Vietnamese government, as well as the leaders of the State Bank of Vietnam, ignored the claimant’s demands to suppress illegal activities, as a result of which European companies were forced to apply to the ICC for the protection of their capital.

Read

Currency Devaluation as a Basis for the Recovery of Damages

In a dispute between Georgia and subsidiaries of the Russian energy holding Inter RAO, the ICSID tribunal ruled in favor of the latter, recovering USD 76 million in damages from Georgia. In support of their contentions, the claimants argued that when setting electricity tariffs, the State Commission for Electricity and Water Supply failed to take into account the devaluation of the national currency, which made the tariff too low.

In conjunction with this award, the parliamentary opposition accused the former Georgian minister of energy of corruption. The accusations were based on the fact that, with the minister's participation, the right of Inter RAO to demand a tariff increase if national currency depreciated, had been included into the agreement between the Government of Georgia and Inter RAO. In exchange, Inter RAO agreed to reduce the existing tariffs. This clause subsequently helped the claimant prevail in the arbitration.

Read

Jurisdiction Being Dependent on the State Court's Decision

The arbitral tribunal in a dispute between China and a Singaporean investor found that it lacked jurisdiction to hear the latter's claims for the alleged expropriation of assets. The tribunal based its decision on 1985 BIT between the People's Republic of China and Singapore on the Promotion and Protection of Investments. According to the majority of the arbitrators, this BIT did not provide for a claim for recognition of the fact of expropriation, but allowed only claims for compensation for expropriation, the fact of which must be confirmed by a national court. The claimant's appointed co-arbitrator disagreed with his colleagues, noting that, in his view, this interpretation of the BIT led to absurd results.

The claims were related to the decision of the Chinese authorities not to renew the license for phosphate mining in the national park, where a reserve for giant pandas was going to be set up. According to the investors, they had legitimate expectations that the licenses would be renewed as long as there were phosphate deposits in the area. To protect its interests in the arbitration, the investor also secured funding from a third party, whose identity he refused to disclose due to the terms of the funding agreement.

Read

Interstate Arbitration Over the Use of Natural Resources

The dispute between India and Pakistan over the use of water resources took a new turn when India sent a notice to amend the 1960 Indus Waters Treaty. According to Indian officials, the notice was due to Pakistan's alleged violation of the Treaty. As India stated, because of the Pakistan's actions, two parallel dispute resolution processes over the use of the water resources were underway, which constituted a violation.

India’s construction of several dams triggered the dispute, which, according to Pakistan, reduced its water flow and land drainage. To resolve the dispute, India requested the World Bank, with whose cooperation the Treaty was concluded, to appoint an expert. In turn, Pakistan demanded commencement of arbitration. The World Bank made an extraordinary decision, simultaneously appointing an independent expert and initiating arbitration.

India disagreed with the World Bank's decision to simultaneously initiate two dispute resolution procedures and stated that it would not participate in hearings. At the same time, in India’s view, Pakistan was to blame for the parallel proceedings. Currently, the already difficult process was further complicated by India's demand to modify the Treaty due to Pakistan's violations.

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ARBITRATION NEWS AND ADR EVENTS

New Executive Administrator of the RAC

As of 1 March, Sabina Ganieva, who has been working at the RAC for more than four years, has extensive experience in administering disputes and since 2018 has acted as an assistant to the arbitral tribunals, has become the Executive Administrator of the RAC.

Yulia Mullina remains on the team as Director of the RIMA and the RAC, continuing to be involved in projects and active development of international arbitration.

Read

FIFA Published Awards of the Court of Arbitration for Sport

Following its approach to transparency, FIFA has published a number of non-confidential awards of the Court of Arbitration for Sport (CAS), issued since 1 January 2019. Scholars and practitioners can read the full text of the awards, including those rendered in cases involving Russian parties. For example, the text of the award dated 25 November 2022 involving claims of the Russian Football Union (*CAS 2022 A 8708 Football Union of Russia (FUR) v. FIFA et al.*) is available on the FIFA website.

Read

ICCA Forms an Expert Group to Develop an Annex to the Paris Agreement

ICCA launches an expert group to develop a conciliation annex to the Paris Agreement, an international treaty on climate change, to encourage its adoption by member states. The panel of experts brings together professionals from private practice, judicial and government bodies, arbitral institutions, and academia. The project is driven by the urgent need to set up an effective dispute resolution procedure under the Paris Agreement. One of the Paris Agreement's provisions stipulates that if there is no agreement between states to submit disputes to the International Court of Justice (ICJ) or arbitration, disputes are resolved by means of inter-state conciliation. The group of experts will study this procedure. The draft proposals are scheduled to be submitted for discussion in November 2023.

Read

Revised Arbitration Rules of the Hague Court of Arbitration for Aviation

The Hague Court of Arbitration for Aviation (HCAA) has published revised version of its Arbitration Rules. Historically, most disputes arising under aviation contracts have been referred to the state courts of New York or California. Such dispute resolution mechanisms were certainly less advantageous to the submission of disputes to arbitration, where awards are governed by the 1958 New York Convention and are confidential. Notably, the rules emphasize in a separate provision the need to be mindful of the benefits of diversity and the impact of arbitration on the environment. In particular, Article 59 states that when proposing or appointing an arbitrator or expert, the parties, their representatives and the arbitral institution, shall, without prejudice to the rights of the parties, bear in mind the benefits of racial, gender, religious, age and cultural diversity.

Read

Extensive Procedural Reform in Italy: Changes in the Field of Arbitration

Currently, a large-scale procedural reform is being implemented in Italy, with changes also affecting arbitration. The procedure for granting provisional measures by arbitral tribunals has undergone the greatest reform.

The new legislation leaves no room for the parallel coexistence of the powers of arbitrators and national courts to grant interim measures – once they are appointed, arbitrators have exclusive powers. While before that, interim measures can only be granted by Italian state courts. However, in any case, the Italian courts will have jurisdiction over challenges against the arbitrators' decisions to grant or deny interim measures (the application must be submitted to the court within 15 days).

Other novelties involve the procedure for the appointment of arbitrators, as well as their independence and impartiality. Here, the reform follows international practice and require each arbitrator to disclose the circumstances when accepting his appointment. If the arbitrator fails to submit a statement or disclose any circumstance giving rise to a challenge, either party shall have the right to apply to the court for a challenge within 10 days from the date when the party discovered the undisclosed circumstance.

The reform also provides for a shortened time limit for filing an application to set aside an award (from 1 year to 6 months), a more efficient regime for the transfer of cases between a state court and arbitrators, for example, the ability to consider evidence gathered in the original proceedings as supplementary evidence (*argomenti di prova*) in the new proceedings.

Read

Will ChatGPT Allow Up to 80% of All Arbitration Lawyers to be Fired within Three Years?

ChatGPT and its impact on various areas of life have become the mainstream of recent months. In short, ChatGPT is an AI technology tool capable of understanding and generating human language. This network processes and analyzes large amounts of data and, unlike other neural networks, ChatGPT 3.5 is capable of understanding context.

The authors of the Kluwer Arbitration Blog analyzed how ChatGPT can be used in arbitration. The results are impressive, as arbitration lawyers can use ChatGPT for almost any activities when it is required to assess information, whether it is research, writing articles, or even predicting the outcome of a dispute. For example, the system can quickly access the necessary judicial precedents, legal acts, and then draw up a procedural document (observing the given style and using all the necessary details).

In addition, ChatGPT can simplify the procedural relationship of the parties, for example, help to identify the different positions of the parties on the facts of the case, as well as to draft the Redfern Schedule. Of course, ChatGPT can greatly simplify the preparation of arguments on procedure: to identify weaknesses in the opponent's legal strategy – the only requirement is to submit the case file for system's analysis.

Despite the obvious advantages, one should not forget about the risks and limitations of ChatGPT. A system may be biased if it is trained on data that may contain bias. In addition, the use of ChatGPT is seen as a risk of unethical legal practice and manipulation of arbitration. In pursuit of an externally high level of argumentation, the system can create evidence that otherwise does not exist. Finally, if an arbitrator uses ChatGPT to write awards, they may not in fact reflect the arbitrator's own independent and impartial decision-making. These considerations may raise doubts about the validity of the award.

Read

Memorandum of Understanding between the RAC and the Israeli Institute of Commercial Arbitration

On 3 March, the Israeli Institute of Commercial Arbitration (IICA) and the RAC signed a Memorandum of Understanding during Tel-Aviv Arbitration Week.

IICA is the first and leading arbitral institution in Israel. Over the years, IICA has administered several thousand disputes in all areas of business, including real estate, corporate disputes, media, and construction.

The parties to the memorandum hope that cooperation can benefit the arbitration community and, in particular, the parties located in Russia and Israel.

Read

Nikolskaya Consulting x YIMA Vis Pre-Moot

On 3 March 2023, Nikolskaya Consulting x YIMA Vis Pre-Moot, preliminary rounds for teams from Russia and Belarus participating in the Willem C. Vis International Commercial Arbitration Moot in Hong Kong or Vienna, took place in Moscow. Eight teams and more than twenty arbitrators participated in the event. The Pre-Moot was organized by Margarita Drobyshevskaya (Russian Arbitration Center) and Ksenia Zbyshevskaya (Nikolskaya Consulting).

After two rounds, according to the results, the places were as follows:

- 1st place: Lomonosov Moscow State University;

- 2nd place: Kutafin Moscow State Law University;

- 3rd place: Belarusian State University.

Varvara Degteva, a member of the Lomonosov Moscow State University team, was crowned the best speaker.

Nikolskaya Consulting Law Firm and Young IMA would like to thank all participants, coaches and arbitrators for their interest in the event and participation, wishing good luck to all teams in the main rounds of the competition in Hong Kong or Vienna!

Read

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