Russian Arbitration Center

at the Russian Institute of Modern Arbitration

ARBITRATION DIGEST MAY 2023

CASE LAW DEVELOPMENTS

Real Madrid Is 1-0 Down: with the Cup, but without the Renovated Stadium

Spanish soccer club Real Madrid lost a EUR 550 million lawsuit against the International Petroleum Investment Company (IPIC), part of the Abu Dhabi-based Mubadala fund, that had refused to fund the renovation of the club's stadium (*Real Madrid CF v. International Petroleum Investment Company (IPIC)*). On 3 May, the ICC tribunal dismissed the claim by a majority vote. The tribunal stated that the sponsorship agreement, out of which the dispute arose, ceased to have effect because Real Madrid had not carried out the agreed-upon renovation works.

The sponsorship agreement was concluded in 2014 to finance the renovation of the Santiago Bernabéu stadium as well as construction of a hotel and a shopping mall. The deal collapsed after the Madrid courts had revoked amendments to the city's plan. The club was forced to change its renovation plan, as a result of which IPIC applied for termination of the agreement under the latter's terms.

The majority of arbitrators agreed with IPIC that the sponsorship agreement ceased to have effect because Real Madrid had not consulted IPIC before proceeding with the renewed renovation plans, which led to changes directly affecting IPIC's rights. The club-appointed arbitrator disagreed with the majority's findings, stating that Real Madrid had complied with the agreement that required the club only to obtain the necessary permits to begin construction.

Read

Recovery of Damages Caused by Non-signatory in Arbitration

The Paris Court of Appeal confirmed that it is possible to recover damages in arbitration incurred by a third party with whom the respondent does not have an arbitration agreement. The award was rendered by the ICC tribunal on a claim of Ivorian company against its Nigerian partner (*Société Nationale d'Opérations Pétrolières de la Côte d'Ivoire (Petroci) v. MRS Holdings Ltd,* ICC Case No. 23221/DDA (C-23222/DDA)).

The dispute arose after the parties decided to acquire the assets of a US oil company and on their basis set up a consortium. The consortium agreement contained an arbitration clause. Shortly after setting up the consortium, the parties had a corporate conflict: the Ivorian company accused its partner of effectively removing it from the consortium's operational management and in so doing caused the latter to suffer losses by withdrawing funds from the business. The Nigerian company, in turn, argued that its partner had not fully paid its share in the consortium. The arbitral tribunal sided with the Ivorian company and ordered the respondent to allow the claimant to participate in formation of the consortium's governing bodies and compensate the claimant for the damages respondent had caused to the consortium by withdrawing the funds.

The Court of Appeal held that the tribunal had rendered the award within its mandate, even absent an arbitration clause between the consortium and the respondent. According to the judges, the respondent

had caused damages directly to the claimant and that the amount of such damages was supported by the expert evidence.

Read

WeMade It Twice: Award in Favor of the Korean Video Game Developer Withstood an Attempt to Set It Aside

In the April digest, we reported on the ICC award rendered in favor of South Korean video game developer WeMade that had sued Chinese companies Shanda and Lansha, affiliates of Korean game developer Actoz Soft, over the licensing rights to the online game The Legend of MIR 2 (*WeMade and Chuanqi IP v. Shanda Games, Lansha Information Technology and Actoz*).

In a judgment of 2 May, the Singapore International Commercial Court (SICC) did not grant Actoz, Shanda and Lansha annulment of the award (*CNA v CNB and other and other matters* [2023] SGHC(I) 6). The Court rejected their arguments that the ICC clause had been superseded by a clause in the new agreement providing for extension and renewal of the license as well as dispute resolution at the Shanghai International Arbitration Center (SHIAC) since Actoz entered into the new agreement in a rush and in secret, trying to avoid ICC arbitration, while knowing that WeMade did not agree to renew the license.

The Court sided with the tribunal that Shanda and Lansha sought to gain an advantage by referring the dispute to SHIAC, and agreed that Actoz, as co-licensor, had a fiduciary duty to WeMade that was breached by conclusion of the license renewal agreement. SICC found that WeMade had right not to perform the license renewal agreement and the ICC arbitration clause did not cease to have effect.

Read

There Is a Right Time for Everything or How Radisson Lost to Hayat by Advertent Inaction

The English court refused to set aside the ICC partial award in a dispute between Radisson and Hayat. The court stressed that taking into account Section 73 of the 1996 English Arbitration Act, a party loses the right to challenge an award under Section 68 of the Act if it does not raise an objection timely but continue to participate in the case (*Radisson Hotels APS Danmark v Hayat Otel* 2023 EWHC 892 Comm).

Hayat sued Radisson in 2018 for breach of duty to properly manage the hotel in Istanbul, and Radisson filed a counterclaim for violation of payment obligations. In March 2021, a partial award was rendered in favor of Hayat, following which the arbitrators considered the amount of compensation. At the same time, Radisson held a series of meetings with former Hayat representatives, including former deputy general counsel Mehmat Onkal, who advised Hayat in arbitration until 2019, as a result of which Radisson learned that Onkal and a Hayat-appointed arbitrator communicated *ex parte*.

According to Hayat, Radisson first became aware of the *ex parte* correspondence in September 2021, but made a strategic decision not to use this information while continuing to participate in the arbitration. In

January 2022, Onkal gave Radisson a USB drive with documents related to the case, including a Word document containing copies of the email correspondence between the arbitrators on the merits of the case, which had been provided to him by Hayat-appointed arbitrator.

As the English court pointed out, Radisson applied for setting aside of the partial award only on 27 January 2022, 23 days after receiving the USB drive and after the deadline for the award's challenge set by Section 73 of the Act. However, Radisson was aware of the grounds for challenge by 13 January 2022, when the hotel group stated that its lawyers had reviewed the USB drive with the documents and discovered a Word document containing the arbitrators' correspondence.

Read

Polish and Italian Companies Sued Gazprom

EuRoPol GAZ, an operator of the Polish section of the Yamal-Europe gas pipeline, sued Gazprom for about USD 1,4 billion in the SCC Arbitration Institute.

The Polish company claims around USD 220 million outstanding debt for gas transportation as well as around USD 1,2 billion lost profit for discontinuing gas transit.

Gas transit was stopped because of the anti-Russian sanctions and the subsequent reciprocal Russian sanctions. Experts believe that regardless of the outcome of the dispute it will be difficult to recover the requested amount from Gazprom since its property available for confiscation in the EU has already been seized or put under temporary administration.

It is also reported that Italian company Eni has turned to arbitration due to Gazprom's reduction of natural gas supply in 2022.

Read

A Battle Against Arbitration Proceedings Commenced on the Advice of a Former Respondent's Representative

US pharmacy giant Walgreen Co applied for annulment of the award under which USD 642 million damages was recovered from Walgreen in favor of insurance firm Humana (*Humana Health Plan, Inc., Humana Insurance Company, and Humana Pharmacy Solutions, Inc. v. Walgreen Co. and Walgreens Boots Alliance, Inc.,* AAA Case No. 01-19-0002-5131). Alleged overpricing of drugs for Humana's insured caused the damages. The arbitrator held that the respondent should have offered such individuals the lowest possible prices, rather than selling them drugs at the regular market price. The lowest prices in the Walgreen Co pharmacy chain were for members of the Prescription Savings Club (PSC) bonus program. The arbitrator recovered from the respondent the difference between those prices and the market price of the drugs sold.

Currently, Walgreen Co is seeking to set aside the award, raising both procedural and substantive objections. The respondent pointed out that the claimant's representative used to advise the respondent, specifically related to the bonus program. Now, in its opinion, the law firm intentionally persuaded Humana

to resort to arbitration, even though for 10 years prior to the dispute, the insurance company had paid all invoices for drugs sold at regular prices and had no claims against Walgreen Co, knowing at the same time that the PSC program existed.

The respondent argued that the arbitrator was also prejudiced because he concurrently served as arbitrator and mediator in six disputes where the clients were represented by the same law firm where claimant's representative works. Nevertheless, the respondent did not challenge this arbitrator since, in its own words, he feared that the arbitrator would not accept the challenge and such an attempt would only reinforce his bias.

The claims stem from the fact that the arbitrator relied not on the provisions of the parties' contract, but on applicable case law in resolving the issue of correct price for the drugs.

In addition to seeking to set aside the award, Walgreen Co also sued the law firm whose employee represented Humana, seeking damages for an alleged breach of ethical obligations.

Read

Arbitration Under Lock and Key (and Stamp Duty)

In *N.N. Global Mercantile Private Limited (NN Global) v. Indo Unique Flame Ltd. & Ors. (Indo Unique),* Civil Appeal Nos. 3802-3803 of 2020, the Indian Supreme Court held that an unstamped arbitration agreement is unenforceable until the parties' stamp is affixed, and stamp duty is paid.

NN Global and Indo Unique entered into a subcontract that contained an arbitration clause. Because of the controversies under the contract, NN Global filed a claim to the commercial court, opposing the encashment of the bank guarantee securing Indo Unique's obligations. The respondent objected to the court's jurisdiction because of the arbitration clause.

As the court dismissed the claims, representatives of NN Global filed a writ petition before the Bombay High Court insisting that the subcontract was unenforceable since it was unstamped by the parties and unregistered under the 1899 Indian Stamp Act. This Act requires stamping of all agreements or documents and payment of the stamp duty. Therefore, the court cannot admit into evidence a document without a stamp and the payment of stamp duty. According to the respondent, the non-payment of stamp duty and the absence of a stamp were curable defects and did not invalidate the arbitration agreement prior to the arbitration.

The Constitution Bench of the Supreme Court held by a majority of 3 to 2 that a document containing an arbitration clause and requiring a stamp that is not affixed to it cannot be deemed to be a contract enforceable by law. Therefore, an arbitration agreement included in such a contract is also unenforceable. The Supreme Court held that it is the court and not the arbitral tribunal who has jurisdiction to decide whether the requirements of affixing a stamp or payment of a stamp duty have been complied with. Furthermore, the provisions of the Indian Arbitration Act (Section 11(6A)) relate to a contract and not to an agreement that cannot be treated as a contract.

Notably, according to the dissenting opinions of the other judges, unstamped arbitration agreements are valid at the pre-arbitration stage.

The experts note that the Supreme Court's finding contradicts the pro-arbitration approach and the principle of *kompetenz-kompetenz* since it sets an additional stage of verification by the courts of the arbitration procedure, which leads to an even greater delay in the appointment of arbitrators.

Read

INVESTMENT ARBITRATION NEWS

This is Not the Venezuela You Are Looking For

A US federal court enforced an ICSID award that recovered from Venezuela more than USD 500 million for expropriating the assets of a tortilla producer (*Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/13/11). The Venezuelan representatives objected to the enforcement of the award, arguing that they had not been permitted to participate in the annulment process also administered by ICSID under Article 52 of the Washington Convention.

Annulment was initiated at ICSID by the government of Nicolás Maduro. However, while the application was considered, a crisis in Venezuela took place and the National Assembly declared Juan Guaidó president. The Attorney General, appointed by Guaidó, demanded that the representative appointed by President Maduro be removed from the proceedings. The country itself at that moment was in a dual power situation – Guaidó's government was recognized by 50 foreign countries, including the US and European countries, while Maduro's government continued to control the most important state institutions.

After reviewing the Attorney General's request, the ICSID annulment committee found that the proper representatives in the case were those appointed by the Maduro government and the representatives of the Guaidó government were not allowed to participate in the case. The application for review of the award was denied.

During the enforcement proceedings in the US, the Venezuelan representatives appointed by the Guaidó government insisted that the award should not be enforced because the country had been denied the right of defense. They pointed out that representatives appointed by a government unrecognized by the US participated in the annulment proceedings that should have involved representatives of a recognized government.

The US judge pointed out that it was not within his authority to recognize a particular regime as legitimate and that was not required for enforcement of award in the US. As the judge noted, the annulment committee gave detailed reasons as to why it did not allow representatives of the Guaidó government to participate in the case, and the court had no authority to review the award.

Read

Money Out of Thin Air: Italian Investors Awarded Funds Owed to Albania

In 2019, the ICSID tribunal heard a dispute between Albania and Italian investors, finding that Albania had violated the provisions of an investment agreement with Italy and expropriated its investment in a television station (*Hydro Srl and others v. Republic of Albania,* ICSID Case No. ARB/15/28). The Italian investors were awarded EUR 110 million euros compensation.

During execution of the award, the investors got to the Belgian organization Eurocontrol (European Organization for the Safety of Air Navigation) that owed monies to Albania. In May 2022, the Belgian court

of first instance allowed seizure of portion of the funds belonged to the Brussels-based organization that were due to the respective Albanian company Albcontrol.

However, this year, the judgment of the court of the first instance was attempted to be challenged. Interestingly, not only Albcontrol, but also Eurocontrol itself, together with the Belgian government initiated this challenge. The organization relied on the fact that fees were due not to the state itself, but to a separate legal entity – Albcontrol, so these fees could not be recovered against debt of the state. The Belgian State, in turn, pointed out that Albania enjoyed sovereign immunity and that such recovery of state assets could lead to a serious diplomatic crisis.

The Court of Appeal disagreed with Eurocontrol and the Belgian government, stating that in its previous declarations Eurocontrol had explicitly identified Albania as the recipient of these fees. Regarding the state immunity, the court pointed out that, given the unsuccessful attempt to set aside the award and Albania's refusal to execute the award voluntarily, this situation does not fall under the general rule, which means that funds can be seized in favor of Italian investors.

This is not the first time when the parties turn to specific organizations, which make payments of air duties in favor of the states. Earlier, May 2022 digest reported that investors had turned to the International Air Transport Association (IATA) to seize Indian assets.

Read

Still a Citizen or No Longer a Citizen? ICSID Award on Lack of Jurisdiction Identified a Moment when Croatian Citizenship Was Lost

The dispute between Croatia and the investor arose over the territory near the Mirogoj Cemetery, one of Zagreb's leading tourist attractions (*Marko Mihaljevic v. Republic of Croatia,* ICSID Case No. ARB/19/35). Marko Mihaljevic, the claimant, thought that he had inherited the land from his father. The Croatian courts sided with the state, which argued that the original purchase of the land by the Mihaljevic's father had been invalid because it had not been concluded according to the law. On the other hand, the claimant insisted that the provisions came into force two years after the land purchase.

In 2019, for the first time Marko turned to ICSID arbitration to defend his right, but soon withdrew his request due to Croatian and German citizenship. To file his second request to ICSID, Michaljevic applied to have his Croatian citizenship revoked.

In considering the second request for arbitration, the tribunal first assessed whether it had jurisdiction. It turned out that the revocation of citizenship did not occur at the time of the request, but only five months later. Therefore, Marko Mihaljevic was still a Croatian national at the time of his second request for arbitration in ICSID. Accordingly, the arbitrators did not find the jurisdiction.

Read

To Strive, to Seek, to Find, and Not to Yield: Australian Magnate Clive Palmer Found a New Way to Sue an Australian State

Two years later, mining magnate Clive Palmer continues to fight the state of Western Australia that in 2020, passed a law removing any liability from the state for rejecting mining applications. The October 2021 digest reported on this situation in detail and Clive's plans to initiate arbitration under the Australia-Singapore free trade agreement.

In March, it became known that Zeph Investments, a company registered in Singapore, is filing a USD 200 billion suit under the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA) (*Zeph Investments Pte. Ltd. v. Commonwealth of Australia (II)*) Meanwhile, all other claims on the same subject-matter have been withdrawn since the AANZFTA prohibits any parallel proceedings.

It is also reported that a former Attorney-General of Australia is working on the side of Zeph Investments' representatives. Australian representatives have expressed concerns that it causes a conflict of interest.

Read

ARBITRATION NEWS

CIArb Published a Guideline on Multi-Party Arbitration

The Chartered Institute of Arbitrators (CIArb) published new guideline containing recommendations on the most common situations that arise in multi-party arbitrations. Meanwhile, the guideline only covers situations where one or several parties who are not a party to the arbitration agreement have expressly agreed to take part in the arbitration.

In particular, the guideline contains recommendations on joinder, consolidation and concurrent hearings.

Read

Russian Women in Arbitration Announced the Launch of a Website and Telegram Channel

In May 2023, Russian Women in Arbitration (RWA), an initiative for promotion of gender diversity and support of women's leadership in arbitration, announced the launch of its website and Telegram channel.

To learn more about RWA's history and values, its leaders, projects, and events, follow the link russianwomeninarbitration.ru. RWA is happy to welcome new members to its growing community! To join the RWA, it is simply required to fill out an application on the website.

You can also subscribe to the Telegram channel to keep up with all RWA activities, current events, and news on gender diversity in arbitration.

Read

Lawyers are No Longer Needed? A Neural Network Knowing All Russian Laws was Created in Russia

The developers of the AlliesVerse platform launched a project based on the artificial intelligence of LawAI, which has become the first virtual lawyer in Russia.

LawAI is a neural network, not a standard legal search bot. The virtual lawyer can think, analyze, even self-learn and improve.

LawAI helps users to find answers to accurately framed legal questions, explains legal terms, and searches by applicable legal provisions. In the future, there are also plans to make it possible to search for case law by name or case number, conduct dialogue within a "broad context" and "interview" the user. It is stated that LawAI is advantageously different from ChatGPT since the latter is based on an international array of data rather than the Russian legislation. However, the developers emphasize that currently the information

provided by the neural network is for information purposes only and does not give rise to legal consequences.

Read

The UK Signed the Singapore Mediation Convention

On 3 May 2023, the UK Government signed the Singapore Mediation Convention.

The Singapore Mediation Convention applies to cross-border written settlement agreements resulting from a mediation. The Convention guarantees that the settlement agreement shall become binding and enforceable (including by way of compulsory execution) under a simplified procedure in the contracting parties to the Convention.

Currently, 56 states have signed the Convention, but only 10 have also ratified it.

Read

ADR EVENTS

Summer Academy “Arbitration Holidays: Introduction to Alternative Dispute Resolution”

With a great pleasure, we invite our readers to register for the 2023 Summer Academy! Each year, the RIMA Summer Academy provides its students with a step-by-step study of arbitration proceedings: from drafting the arbitration clause to enforcement of the award. The course contains lectures, workshops, and discussions where attendees can get their questions answered by the renowned speakers, improve their knowledge of arbitration, and acquire practical skills. The Academy takes place on 31 July-4 August 2023. Please note that the Summer Academy requires full-time participation and is held in Russian. The applications are due 25 June 2023. The number of participants is limited!

Read

RAC and Delcredere Seminar

On 24 May, the seminar “Arbitration in the Russian Arbitration Center”, organized jointly with Delcredere Law Offices, was held at the International and Comparative Law Research Center. Yulia Mullina (RAC Director) and Valeria Butyrina (RAC Legal Counsel) spoke at the seminar that was moderated by Anton Garmoza (Lawyer, Partner, Head of International Arbitration Practice at Delcredere).

During the seminar, representatives of legal departments of large and medium-sized businesses inquired about how RAC administers arbitration, enforcement of awards, including in foreign jurisdictions, as well as learned about the main advantages of alternative dispute resolution.

Read

Arbitration at SPILF

On 11-13 May, the 11th St. Petersburg International Legal Forum took place in St. Petersburg, during which Yulia Mullina (RAC Director) and Sabina Ganieva (RAC Executive Administrator) spoke on behalf of the Russian Arbitration Center. The speakers talked about arbitration in Russia, shared statistics of domestic and international disputes administered by the RAC and emphasized the high demand for alternative dispute resolution from business.

Read

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