Russian Arbitration Center

at the Russian Institute of Modern Arbitration

ARBITRATION DIGEST DECEMBER 2022

CASE LAW DEVELOPMENTS

English Court Analyzes the Separability of an Arbitration Clause Where the Underlying Contract Has Not Been Concluded and Is Defective

The question before the English court was whether a charterparty, from which it clearly followed that it was to be approved by the consignor / consignee to be made (something that was not done), contained a binding arbitration clause that vested the arbitral tribunal with jurisdiction to establish whether the charterparty was made. The court concluded that to address the issue it had to analyze the principle of separability of arbitration clauses, whereby an arbitration clause must be considered independently from the underlying contract. The court ran a detailed analysis of how the principle was to be understood in two scenarios: first, where one of the parties asserts that the contract was not made, and, second, where one of the parties asserts that the contract is invalid, that is, defective. The court opined that the principle was to be applied differently in the two scenarios in question. In the former case, the argument that the underlying contract was not concluded must affect the execution of the arbitration clause – thus, it must be found that the clause, too, has not been made. In the latter case, one must analyze whether the defectiveness of the contract affects the validity or defectiveness of the arbitration clause. That means that a dispute on the validity of the underlying contract where the arbitration clause is found would not affect it, unless the ground of invalidity invoked by a party is a ground that "puts into question" both the arbitration clause itself and the underlying contract.

During negotiations in the case the parties had agreed that if a legally binding contract was to be made, it would contain an arbitration clause, nothing more. It is therefore incorrect to say that they made an agreement to arbitrate merely by accepting that any contract between them would contain such a clause. Consequently, the arbitration clause was not made since the underlying contract was not made in the first place.

Read

It's the Hard Knock Life: Arbitrators to Decide on the Value of Jay-Z's Company's Share in a JV with Bacardi

The International Centre for Dispute Resolution (ICDR) arbitrators are seized with a USD 2 billion dispute between Jay-Z and Bacardi over a cognac business.

Jay-Z's company exercised a put option, selling to Bacardi its share in a 50/50 joint venture D'Ussé. The dispute arose when the parties diverged in their valuations of the share. As follows from the claim, the rapper's company argued that its share was estimated at USD 2.5 billion, while Bacardi assesses its value at USD 460 million. Due to the substantial difference in valuations of the share, the partners engaged JPMorgan for an independent valuation. Yet, a dispute broke out over the reference date for the valuation and over which documents JPMorgan could review to perform it.

The panel of arbitrators delivered several successive partial final awards, first unanimously setting the date for the valuation and then ruling that the parties could not disclose to JPMorgan any materials that the bank had not requested specifically, as well as that the bank was to define the nature and scope of its analysis.

Further controversies emerged after JPMorgan requested that the parties develop a single five year financial forecast for D'Ussé as at the valuation date. To that Jay-Z's company replied that the bank was to base its findings on one of the pieces of evidence available in the case, that suggested that D'Ussé would sell over 2 million cases of cognac in 2026, earning almost USD 143 million.

In September, the tribunal issued the third award, concluding that the document did not meet the bank's request since that piece of evidence was an "ambitious target" rather than a forecast for the future, and invited the parties to send a joint letter to JPMorgan, stating that the forecast requested did not exist and has never been developed by the partners.

At present, Jay-Z's company has approached the Supreme Court of the State of New York with an application for partial setting aside of the third award on the ground that the arbitrators exceeded their mandate. The dispute is still pending.

Read

The Hottest Sports Dispute of the Decade

In February, the FIFA Council announced that the foreign players and coaches of Russian and Ukrainian football clubs were allowed to temporarily suspend their contracts until June 2022 due to the conflict between the two countries, in order to give both players and coaches an opportunity to work safely and receive salaries. The decision was renewed until June 2023.

The decision spurred indignation with a number of clubs. Thus, a Ukrainian FC Shakhtar filed a claim demanding that the FIFA decision be set aside and claiming a compensation of losses of EUR 50 million. In July, eight Russian clubs, including FC Zenit, PFC CSKA and FC Lokomotiv also lodged a collective action against FIFA to repeal the decision.

Two CAS panels have now simultaneously begun examination of the claims of the Ukrainian and Russian football clubs.

Read

Commercial Litigation and Arbitration in the EU: How Do They Work Together?

Back in 2020, we covered a multi-billion claim against the insurer The London Steam-Ship Owners' Mutual Insurance Association Limited (concerning an oil spill after the Prestige oil tanker broke in half by the coast of Spain in 2002, resulting in tens of thousands of tons of oil polluting kilometers of the coastlines of Spain,

France and Portugal). That marked the beginning of years-long litigations of several countries. Spain, along with 1,500 other claimants, filed a civil claim with the Spanish courts that ordered that the insurer pay EUR 900 million after hearing the claim.

The insurer, however, went to arbitration after the Spanish claim, based on the relevant clause in the vessel insurance contract. The arbitration resulted in an arbitral award whereby the damages claims filed by Spain with the Spanish courts had to be submitted in the arbitration instead. Furthermore, the arbitrators also concluded that the insurer could not be liable to Spain absent a preliminary compensation of damages by the vessel's owners. That award was endorsed by the High Court of England and Wales, as well as during an appeals procedure initiated by Spain.

Spain, in turn, submitted to the UK courts with a request to recognize the Spanish order on the enforcement of the judgment that mandated the insurer to pay a compensation for the damages caused. The High Court satisfied that application in May 2019. The insurer appealed, and the High Court resolved to refer the matters of interpretation of Regulation No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) to the Court of Justice of the EU (ECJ).

The ECJ ruled that Brussels I was to be interpreted in such a way that a judgment issued by a EU member state court on a matter related to an arbitral award cannot prevent recognition in that state of a decision issued in another member state, if a judgement entailing a result equivalent to that of such a decision could not be made by the court of the former member state without violating the provisions and key objectives of Brussels I, in particular, with respect to the relative effect of the arbitration clause included in the insurance contract in question, and the rules of *lis pendens*.

Put simply, the UK courts cannot refuse to recognize and enforce the judgment issued by the Spanish courts on the ground that such a judgment would be contrary to the domestic judgment of the UK courts delivered in line with the arbitral award. That means that the judgment based on the arbitral award was held to be inconsistent with the Brussels Regulation.

Read

It Isn't a 'Can', It's a 'Shall'!

Panasonic India Pvt. Ltd. and Shah Aircon entered into a distribution agreement for the sale of electronic goods. Yet, the relations between the parties went sour due to Shah Aircon's unpaid invoices. Eventually, Panasonic submitted to arbitration as the arbitration clause between the parties prescribed.

The clause read: "*The parties will attempt to settle any dispute, claim or controversy arising out of this Agreement through consultation and negotiation in good faith and in a spirit of mutual co-operation. If those attempts fail, then either Party* ***can*** *refer the disputes, issues or claims arising out of or relating to this Agreement for arbitration by a sole arbitrator who shall be appointed by the Managing Director of the Panasonic*."

Shah did not agree that it had signed the agreement and believed that the dispute was to be referred to a competent court in Gurugram, Haryana, which it did, bringing a claim against Panasonic and asking, among other things, for an anti-arbitration injunction. Panasonic, in turn, approached the Honorable High Court of Delhi to appoint an arbitrator in the arbitral proceedings.

The Single Bench of the Honorable High Court of Delhi ruled, after considering all the circumstances of the case, that the use of the term "can" in the arbitration clause could not render the intention of the parties to refer the dispute to arbitration invalid: "*The interpretation of an arbitration clause, as indeed of all contractual provisions, must be predicated upon a construction of the contract as a whole, and no particular word or phrase should be unduly emphasized to negate the clause of its true meaning.*" In comparing the levels of compulsoriness of the words "can" and "shall", the Court noted the other words used in the clause as well: "*the word 'can' is juxtaposed with the words 'either party', signifying the option of either Panasonic, or Shah Aircon, to refer disputes to arbitration. If either of the parties can exercise such an option by referring the disputes under the Agreement to arbitration, it is for all practical purposes, binding upon the other party as well.*"

As a result, the Court granted Panasonic's application and appointed an arbitrator for resolving the dispute by arbitration.

Read

Fraud Is Just Another Lottery

The US Court of Appeals for the Ninth Circuit has ruled that class actions against the cryptocurrency exchange Coinbase are to be heard by a state court.

The reason for the class action was a lottery arranged by the exchange. According to the lottery terms, one had to register at the exchange and sign the terms of use. The lottery winner would get USD 1.2 million in the cryptocurrency Dogecoin. Some of the lottery participants ended up encountering fraudsters who stole their money. Thus, one of the claimants asserts that he was persuaded to hand over access to an account where he had held USD 31 thousand.

During the proceedings, the exchange argued that the lottery participants were to file their claims in arbitration, since the terms of use contained an arbitration clause. The court, however, noted that the dispute concerned a lottery, and according to the State of California laws such disputes can only be heard by a state court.

Read

Bank Fails to Execute an Arbitration Clause with a Client

A US court has arrived at a conclusion that an arbitration clause was not made as the counterparty did not have a substantial opportunity to refuse to include it into an agreement. The agreement contained a condition allowing the bank to amend it at any time permitted by the law. The bank proceeded to include an arbitration clause into the agreement, to then send to its client a notification that he could reject the changes made to it by closing his account within 60 days. Although the bank claimed that the client had a right to refuse to include an arbitration clause into the agreement, the agreement itself provided that if the account were closed, all disputes with the bank would still have to be arbitrated. Additionally, the arbitration clause

contained a condition to the effect that the losing party was to compensate all costs incurred by the opposing party in the arbitration, including legal fees. The court found that the stronger party could not force such dispute resolution terms on its counterparty, so the clause could not be deemed executed.

Read

Beijing Goes to WTO over Washington's Chip Export Control Measures

China has initiated WTO dispute consultations after the US Department of Commerce decided, in October 2022, to introduce export control measures with respect to microchips and other products in relation to China, in particular restricting supplies to Chinese companies of products necessary to produce semiconductors.

The PRC's Ministry of Commerce informs that "China takes legal actions within the WTO framework as a necessary way to address our concerns and to defend our legitimate interests."

Read

Gazprom Faces New Complaints from German Companies

Following in Uniper's footsteps after it filed a EUR 11.6 billion claim against Gazprom Export LLC, the German power company RWE is bringing its claims. RWE's cause of action is the same as Uniper's – the company asserts that due to undersupply of gas it was forced to buy it at higher prices from the market.

RWE's power sources, however, are more diversified and the share of Russian gas in its procurement is relatively small: where Uniper under its contract received 200 terawatt-hours short of power from the Russian supplier, RWE's losses total 4 terawatt-hours. According to analysts' estimates, such losses equal around EUR 400 million in cash. The company itself has not specified the amount claimed.

Read

Rosatom's Chances to Win in a Dispute on the Construction of Hanhikivi 1 NPP Have Gone Seriously Up

ICC Dispute Review Board have recognized that the termination of the contract to construct Hankiviki 1 NPP and the refusal to accept works completed under the contract were unlawful, state corporation Rosatom informs in its press release.

Adjudication was provided by a contract between Rosatom's subsidiary RAOS Project Oy that was in charge of implementing the NPP construction project and its Finnish counterparty Fennovoima Oy. The contract was terminated in May 2022 at the initiative of the Finnish party. Contract termination involved mutual complaints: thus, Fennovoima Oy claimed that the contract was terminated due to improper performance by the contractor of its obligations and announced initiation of arbitral proceedings for EUR 2 billion against Rosatom subsidiaries; the Russian party, in turn, argued that the contract was terminated for political reasons and also voiced an intention to claim damages.

The adjudicators in the dispute sided with RAOS Project Oy, holding that terminating the contract was a material breach which triggered the right to claim damages. The adjudicators' opinion, however, is impossible to enforce and it contains no findings on quantum. The Finnish party therefore still has a chance to challenge it in arbitration unless the parties manage to settle their differences.

Read

Stockholm Arbitration Sides with Lukoil in a Dispute with a Malaysian Partner

A subsidiary of the Malaysian engineering group KNM launched an SCC arbitration in 2019, demanding that a Lukoil operating company in Uzbekistan compensate damages for the unlawful use of bank guarantees, payment of invoices, as well as a compensation of the costs related to breach and renewal of contract, for the total of USD 96 million.

Back in 2010, the parties had entered into a contract for the supply of engineering documents and equipment for developing the Adamtash, Gumbulak and Dzharkuduk-Yangi Kyzylcha deposits in Uzbekistan. In the course of performance, the contract price rose due to certain changes made to the contract itself.

In 2017, Lukoil claimed payment of USD 40 million under bank guarantees. The KNM subsidiary then moved for a provisional injunction before Malaysian courts to prevent payments under the guarantees. In 2010, the Court of Appeal of Malaysia found that Lukoil had made claims under the guarantees in bad faith while the parties were negotiating the contract's renewal.

Lukoil lodged a counterclaim for around USD 254 million as a fine for breach of the time limits for performing obligations under the contract, repair works and overdue payments under the contract. Eventually, the arbitrators ruled in favor of Russian Lukoil's subsidiary awarding it around USD 2 million.

Read

INVESTMENT ARBITRATION NEWS

New Facts – New Arbitrator?

The ICSID has published a decision on Albania's challenge of Charles Poncet, the arbitrator nominated by the claimants to the tribunal reviewing the arbitral award due to new facts appearing in *Hydro et al. v. Albania*.

After Albania initiated the review procedure, Mr. Poncet who had heard the case before as part of the original tribunal, expressed his willingness to be part of the review tribunal, but the other arbitrators informed the ICSID that they could not participate in the review of the award. After the claimant appointed Mr. Poncet, Albania filed a challenge against him, arguing that Mr. Poncet could not act as part of the review tribunal by virtue of Art. 1(4) of the 2006 ICSID Arbitration Rules. According to the arbitrators, Art. 1(4) of the ICSID Arbitration Rules providing that "no person who had previously acted as a conciliator or arbitrator in any proceeding for the settlement of the dispute may be appointed as a member of the Tribunal", did apply to the review tribunal, but that provision concerned only the persons who had acted as such prior to the initiation of the ICSID arbitration. The arbitrators therefore ruled that Art. 1(4) of the ICSID Arbitration Rules did not prevent partial reinstatement of the original tribunal in the context of the review procedure.

Read

ICSID Tribunal Declines Argentina's Request for Disclosure by the Claimant Twice

The ICSID tribunal in *Orazul v. Argentina* has declined Argentina's requests for disclosure of information with respect to one of Orazul's counsel and its expert.

Argentina has announced that David Kay, one of the claimant's representatives, was chief director for investments at Liti Capital, a Swiss litigation funder, and asked the tribunal to require the claimant to provide information on Kay's ties with I Squared Capital, Liti Capital or any other funder, as well as reveal any direct or indirect funding for the claim.

In the opinion of the arbitrators, as set out in Procedural Order No. 5 of 9 December 2022, there were no grounds for disclosure of information on the claimant's counsel, since the 2006 ICSID Arbitration Rules that applied to the arbitration did not provide for an obligation to disclose information on third-party funding. Despite Kay's experience as a party's counsel in other investment arbitration and arbitration funding, the tribunal saw no bases for doubts as to the claimant's assurances that there was no external funding.

Christoph Schreuer, Orazul's expert on law, was to testify by videoconference, like Argentina's own expert on law, Jorge Vinuales. A day before the hearing, however, the claimant informed that because Mr. Schreuer was suffering from COVID-19 aftereffects, he was unable to take part in the oral hearing, asking therefore not to allow the respondent's legal expert to participate either. Argentina, in turn, argued that Mr. Schreuer had been the main speaker at a conference that took place on 19-20 September 2022 at the University of Vienna, which showed that he was able to attend the hearings and that the claimant's intention was rather to prevent Professor Vinuales from taking part in the hearings.

Later, the claimant submitted its commentaries to the respondent's case, as well as Mr. Schreuer's detailed statement describing the progress of his illness and the reasons why he had been unable to prepare for the hearings and testify. According to the tribunal, the explanations provided by Mr. Schreuer were sufficient and required no further clarification.

Read

Azerbaijan Threatened with a Multi-Million Investment Dispute

On 5 December, the law firm Willkie Farr & Gallagher acting on behalf of 19 investors lodged a notice of dispute for hundreds of millions of US dollars against Azerbaijan under the Energy Charter Treaty. The dispute arose out of investments into 18 small HPPs in the Nagorny Karabakh regions restituted by Azerbaijan in the 2020 conflict.

The 2020 conflict ended in a tripartite agreement between Azerbaijan, Armenia and Russia, whereby considerable territories of the unrecognized republic of Artsakh were ceded to Azerbaijan, while most HPPs are located in the ceded territories of Kalbajar, Lachin and Martakert.

Before the 2020 conflict, a spurt of investments into infrastructure could be observed in the regions in dispute, especially in the renewable energy sector. After the plants now controlled by Azerbaijan were integrated into the state-owned energy company AZenergy, however, investors raised claims of expropriation, unfair and inequitable treatment, discrimination and other violations of the ECT.

Read

French Cassation Court Draws the Boundaries of State Courts' Control over Arbitral Awards

The Cassation Court of France has reversed an appellate judgment in the dispute between Oschadbank and the Russian Federation and remanded the case for re-trial by a new panel of judges. The repealed judgement was made in March 2021 – it is then that the Paris Court of Appeal found that the tribunal in the dispute between Oschadbank and the Russian Federation had no jurisdiction as the purported investments had been made before the entry into force of the Russia-Ukraine BIT. On that basis, the Court set aside an arbitral award on the recovery of USD 1.1 billion from Russia.

The Cassation Court held, after hearing the cassation appeal, that a state court had no right to revise a tribunal's decision on the merits, which was exactly what the judges of the Court of Appeal did when they independently established *ratione temporis* limitations in the Russia-Ukraine BIT.

Read

ICSID Tribunal Throws out a USD 6 Billion Claim against Turkey

Ipek Investments Limited (IIL), owned by businessman Akin Ipek, brought an ICSID claim in 2018 demanding a compensation of USD 6 billion for the alleged expropriation of its parent conglomerate Koza Group. The media and mining conglomerate's assets were confiscated and its companies were handed over to be controlled by third parties by Turkish courts in 2015 based on charges of the conglomerate's involvement in financing terrorism.

As it happens, the Turkish authorities accused Ipek of supporting the religious movement "Hizmet" which, according to Erdogan, was behind the attempt to overthrow his government in July 2016. Ipek denies terrorism charges that he says are politically motivated.

Turkey argued that the ICSID tribunal had no jurisdiction over the dispute and challenged the authenticity of the shares sale and purchase agreement whereby IIL had allegedly acquired Koza Group in 2015. Turkey's counsel at the ICSID stated that the shares sale and purchase agreement was "invalid in accordance with the Turkish laws" and that Ipek "had no functioning investments" in Turkey.

In the end, on 8 December, the ICSID tribunal decided that it had no jurisdiction over the claim filed by IIL.

Read

ARBITRATION NEWS AND ADR EVENTS

EU Investment Treaties, Episode 3: Chile

The EU and Chile have negotiated the text of the Advanced Framework Agreement (AFA) that includes provisions on investor-state arbitration. AFA is the latest in the series of EU investment treaties establishing a system of investment tribunals that comprises the Tribunal of First Instance (the Tribunal) and an Appeal Tribunal.

AFA enables the respondent to file a counterclaim, as well as sets forth clear-cut provisions on third-party funding, requiring disclosure of the name and address of the third party funder when submitting the claim and immediately upon execution of the funding agreement.

Moreover, AFA contains provisions designed to enhance the efficiency of arbitral proceedings, including a respondent's right to raise an objection for the early dismissal of claims, as well as the possibility of consolidating claims.

AFA permits participation of the other party to an investment agreement in the proceedings, allowing such a party to attend hearings and make written submissions. Third parties can also join the arbitral proceedings after proving direct and present interest in the specific circumstances of the dispute, but such intervention is confined to supporting the legal case of one of the parties.

Finally, the Tribunal's arbitral award may be challenged by either contending party based on an error in the interpretation or application of the law, as well as in case of a manifest error in the assessment of the facts, including domestic laws.

Read

Swiss Arbitration Centre Releases Swiss Rules for Corporate Law Disputes for Swiss Companies

Starting from 1 January 2023, an amendment will enter into force into the Swiss laws that will allow writing a clause on arbitrating all corporate disputes with a seat in Switzerland into the articles of association of Swiss companies. The arbitration clause will then be binding both for the company itself, its management bodies, the members of such bodies and shareholders, unless the articles of association provide otherwise. Parties that may be affected by the consequences of any resulting arbitral award should be informed of the commencement and termination of arbitrations and must have the opportunity to participate in the constitution of the arbitral tribunal and the arbitral proceedings as interveners.

The Rules feature a model arbitration clause, as well as terms for the commencement and termination of arbitral proceedings, notification of the parties, constitution of the arbitral tribunal, joinder of additional (third) parties, as well as interim relief and emergency arbitrators.

The Rules developed may prove not only useful in practice, but also in academic terms for researchers of arbitration of corporate disputes.

Read

Suriname Is the 171st Party to the New York Convention

A small state on the North-Eastern coast of South America – Suriname – has become the 171st state party to the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Convention will enter into force for Suriname from 8 February 2023.

Read

The Russian Institute of Modern Arbitration and Young IMA Hold a Series of Webinars on Arbitration in China: A New Way for International Business

On 22 and 23 December, the Russian Institute of Modern Arbitration held a series of webinars on arbitration in China and Hong Kong, where legal practitioners and representatives of arbitral institutions from China and Hong Kong covered such issues as the legal regulation of arbitration in mainland China in the context of proposals for a Chinese arbitration laws reform, as well as enforcement of arbitral awards in mainland China and Hong Kong. Speakers included Dr. Shouzhi An (Anjie Law), Dr. Fuyong Chen (BAC/BIAC), Wen Dai (Zhong Lun), Michelle Shi (Global Law Office), Leon Guo (Rede Chambers), Adela M. Mao (Tower Chambers).

Further, on 24 December, Young IMA organized talks with students and graduates of Chinese and Hong Kong educational programs on opportunities for getting an education in the region and their studies. Bauyrzhan Zhanadilov (China University of Political Science and Law), Ellina Izotkina (The University of Hong Kong), as well as Yaroslava Mavlyutova (The Chinese University of Hong Kong) shared their experience of being admitted to Chinese and Hong Kong universities and talked about an international student's life in Asia and potential challenges.

Read

Litigation Club: Forward Legal vs T Plus

On 16 December, the Russian Arbitration Center hosted the 11th Moot Court as part of the Litigation Club, the first moot court for legal practitioners, created by the team of Forward Legal.

Forward Legal (Danil Bukharin, Yana Medvedeva) and T Plus (Dmitriy Pasynkov, Elena Filichkina, Alexander Cheburakhin) teams exchanged written memoranda that were submitted to three judges – Elmira Kondratieva (Forward Legal), Valeria Butyrina (RAC), and Alexander Balyberdin (Russian Post).

The moot court problem was based on a real dispute on the transfer of property into the ownership of a monastery and challenging a decision of the Russian Federal Agency for State Property Management. The hearing itself took more than 1.5 hours, ending in all of the audience sharing their feedback with the speakers.

Read

Results of the 6th Annual Professor Mozolin Corporate Arbitration Moot Court 2022

On 3 and 4 December 2022, the Russian Institute of Modern Arbitration hosted the final offline rounds of the 6th Professor Mozolin Moot Court.

In 2022, the Moot Court has become even wider in scale with over 300 participants and 160 arbitrators from all across the country. The Moot Court problem this year concerned determining the applicable arbitration rules and substantive law, liability for the acts of an ex-employee, and violations of confidentiality provisions.

Based on the results of the rounds, the following teams received Moot Court awards:

1st place – Team 236, MGIMO University, HSE University

2nd place – Team 818, HSE University

3rd place – Team 189, Moscow State University.

Alexander Lukin was named the best speaker of the Moot Court (Team 189, Moscow State University).

Read

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