

SUMMARY

International Commercial Arbitration Review Issue No. 2 for 2016

Articles

Karimullin R.I. Arbitration of Corporate Law Disputes

The author provides a review of the regulation of corporate law arbitration in Russia from the standpoint of the revised Russian arbitration laws of 2015. According to the new legislation most corporate disputes are acknowledged as arbitrable, subject to the following four conditions being fulfilled: the seat of arbitration is in Russia, the dispute is considered by institutional arbitration, the arbitration agreement is to be signed by all the shareholders and the company, and specialized corporate arbitration rules are to be used as approved by the respective arbitration institution, these being modelled on the Supplementary Rules for Corporate Law Disputes adopted by the German Institution of Arbitration (*DIS*) in 2009, in follow-up to the German Supreme Court judgment of 6 April 2009 on Arbitrability II (*Schiedsfähigkeit II*). The Russian translation of Supplementary Rules for Corporate Law Disputes as prepared by the author is attached to the article.

On the basis of a review of foreign judicial and arbitration practice the author also considers other issues that need to be implemented into the new Russian arbitration institutional rules related to corporate law disputes, such as (co-)appointment of arbitrators in and consolidation of multiparty proceedings. Finally, the author provides recommendations for practical use in arbitration of corporate law disputes such as arbitration clauses in articles and shareholders agreements which will be deemed enforceable in Russia starting from 1 February 2017.

DIS Supplementary Rules for Corporate Law Disputes 09 (Russian translation)

Zhiltsov A.N. Overview of Arbitration Practice of the International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry for the Years 2014–2015

The author considers statistical data related to various aspects of practice of the ICAC at the Russian Chamber of Commerce and Industry which is based on the analysis of all the awards and orders rendered by arbitral tribunals under the ICAC Rules during the years 2014–2015. According to the collected data, during the indicated period the ICAC arbitral tribunals rendered 495 arbitral awards and orders on termination of arbitral proceedings, all of which related to disputes arising out of international commercial transactions. Of these, 21% of awards were rendered in less than 180 days, 65% in less than a year, and 12% in less than two years, but more than a year. While the biggest part of awards was rendered in disputes relating to minor and moderate claims (66% of awards relate to claims of up to 500 000 USD), the analysis shows that there is a definite

trend towards the increase in the number of cases brought to the ICAC that relate to substantial amounts claimed (12.3% were rendered in cases with claims from 1 000 000 up to 10 000 000 USD and 13.1% were rendered in cases with claims from 10 000 000 USD up to 100 000 000 USD). Parties from 59 countries participated in the proceedings, while the greatest number of cases was rendered with participation of one party from the Russian Federation. Another new trend which may be discerned on the basis of analysis of recent awards relates to the growing number of disputes without participation of a Russian party in which the ICAC was used as a neutral forum from the perspective of nationalities of both disputing parties (32 cases). Regarding the substance of claims brought to the ICAC, the biggest category of claims arises out of contracts for the international sale of goods, which is typical for ICAC practice. In this regard the new trend consists in the increase in the number of claims arising out of credit agreements, construction contracts, contracts for the rendition of services, lease contracts and licensing agreements. The article also contains interesting data regarding the choice of law methodology as applied in the course of ICAC proceedings, particularly on the arbitrators applying the conflict rules which they deem appropriate in the absence of the parties' choice of the governing law, on the application of international treaties and supranational regulating rules such as the UNIDROIT Principles of International Commercial Contracts.

Rusakomsky K.I. Security for Costs in International Commercial Arbitration

This article presents a theoretical understanding of the practice of the London Court of International Arbitration (LCIA) regarding the application of injunctive measures in respect of security for costs. Practical material is combined with an excursus into the history of legal doctrine and the development of security for costs mechanisms in English law. Approaches and assessments that apply to the order of presentation of claims, and their consideration and execution, are also summarized and characterized in the present article. The experience of the *Paradigma* Law Firm in imposing interim measures on a claimant in the course of arbitration proceedings is also discussed in the article.

Serakov V.V. Application of Incoterms in the Practice of International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry

This article was prepared on the basis of the author's presentation at the conference organized by the ICC Russia and the Russian Chamber of Commerce and Industry, "Incoterms: 80 Years in International Trade", held in Moscow on 28 September 2016. The article contains an analysis of ICAC awards, including previously unpublished awards, in which Incoterms were applied. Statistical data is presented for the years 2014–2015.

Tereshkova S.A. Agreement on Waiver of a Right to Challenge an Arbitral Award: Russian Approach to Its Interpretation in International Perspective

The author analyzes Russian judicial practice on the interpretation of agreements on waiver of a right to challenge an arbitral award in the state courts of the seat of arbitration.

Comparing Russian, Swedish and Swiss practices, the author concludes that Russian courts interpret "exclusion agreements" quite liberally. This tendency reflects a pro-arbitration approach and makes Russia quite attractive for arbitration. However, the courts should be more cautious interpreting agreements on waiver of setting-aside actions and, probably, the established practice should be reconsidered. Otherwise, it increases a risk of declaring an "exclusion agreement" valid even if none of the parties initially intended to waive their rights for recourse.

The author proposes changes to the current Russian practice regarding the interpretation of the parties' agreement on the finality of awards, considering the foreign experience on interpretation of "exclusion agreements" and recent amendments to Russian arbitration legislation.

Kot A.A. Pathologies of Arbitration Clauses and Possibilities of Their Being Overcome, on the Example of Ukrainian Legislation and Court Practice

This article deals with the main types of pathologies of arbitration clauses, preventing the initiation of proceedings in international commercial arbitrations. The author considers the following types of pathologies encountered in practice: pathology of stating the name of an arbitration institution, pathology of the subjects of application to the arbitration institution (usually, this is the case of conclusion of an arbitration clause between the parties which cannot apply to the arbitration institution), pathology in the object of disputes (disputes which cannot be referred to arbitration), as well as some others. On the example of the practice of Ukrainian courts, the author examines possibilities of overcoming the pathologies of arbitration clauses by recognizing arbitrability of a dispute, as well as legal consequences of such decisions.

Savransky M.U. The Independence and Impartiality of Arbitrators: New International Standards

This article deals with the issue of the need to improve regulation at the international level of such areas as independence and impartiality of arbitrators in international arbitration.

The author considers the pre-project study of the possible proposal for a future code of ethics for arbitrators in international arbitration made by the United Nations Commission on International Trade Law (UNCITRAL). The article contains an analysis of requirements for arbitrators as contained in UNCITRAL instruments previously developed. The article also provides an overview of the changes to the International Bar Association Guidelines on Conflicts of Interest in International Arbitration that had been made in 2014. Additionally, the article contains an analysis of several recent court decisions relating to the issue of independence and impartiality of arbitrators.

Karimullin R.I. Journey to the East: International Arbitration Practice in the Hong Kong Arbitration Centre (HKIAC)

This article contains a mini guide on Hong Kong arbitration prepared from the perspective of a Russian practitioner. How to commence arbitration at the HKIAC, appoint arbitrators, use expedited procedure or consolidate disputes: these and other practical questions are addressed in the article.

In the course of an arbitration practice internship in Hong Kong the author had the opportunity to review the relevant HKIAC awards thanks to the courtesy of the HKIAC Secretariat. On commenting the innovative 2013 HKIAC Rules, the author provides practical examples of a single arbitration under 100 delivery orders, the US-originated baseball arbitration as applied to the termination of a license and settlement of a dispute that had arisen from scratching a football match in China. The pro-arbitration and pro-enforcement attitude of the Hong Kong courts is illustrated by recent judgments on anti-suit injunction in restraint of foreign court proceedings (e.g. *Ever Judger* [2015]) and ten principles of enforcement of awards in Hong Kong (e.g. *KB v. S. and Others* [2015]).

Due to rising concerns of reduced neutrality, a choice of a friendly jurisdiction with effective arbitrators is becoming increasingly crucial for Russian businesses to ensure operative arbitration agreements and awards enforceable in Russia and elsewhere. The author summarizes Hong Kong practice of settlement of disputes involving Russian parties. The author notes that there is a significant growth potential for new Russian – Hong Kong trade agreements and disputes. In

addition to the Double Taxation Treaty ratified in 2016, Russia and Hong Kong are expected to sign a bilateral investment treaty (BIT) soon. Besides companies from China, which is the first Russian foreign trade partner at the moment, HKIAC might provide quality arbitration service for disputes involving parties from other Asian countries, such as India, Vietnam and Korea. Hong Kong might also offer a high caliber solution for arbitration of Russian-related disputes with companies from the USA and Europe.

The author thanks Mr. Joe Liu, LLM, the HKIAC Managing Counsel, for his interview which is published following the article.

Interview with Mr. Joe Liu, LLM, the HKIAC Managing Counsel, of 28 September 2016

This interview with Mr. Joe Liu was taken by Mr. R.I. Karimullin, member of the editorial board of *International Commercial Arbitration Review*, on 28 September 2016 in Hong Kong, especially for the readers of our journal. In this interview Mr. Liu not only gives a very interesting general overview of the practice of the Hong Kong Arbitration Centre and related statistics, but also answers questions which are of particular relevance for potential Russian parties, such as previous experience of HKIAC in resolving Russian-related disputes, the possibility of choosing Russian arbitrators, selecting the language of the proceedings and a comfortable neutral venue for the hearings. Reference is also made to the sources where the potential parties may find additional relevant information on arbitration under the HKIAC Rules.

Kaysin D.V., Bezruchenkov M.V. Enforcement of Russian Judgments Abroad: Contemporary Trends

Nowadays, there is no universal international treaty that provides a mechanism for enforcing judgments of Russian courts in foreign countries. A number of key partners of Russia have not yet signed bilateral treaties in this sphere. In particular, the Russian Federation has no bilateral treaties with such countries as France, Germany or the United Kingdom, while economic ties with these countries are close. As a result, the procedure for enforcement of judgments is complicated and quite unpredictable. Yet creating an effective and convenient regime for the enforcement of foreign judgments can be easily considered as an important precondition to doing business globally. In this article, the authors consider issues related to the enforcement of Russian judgments in France, Germany, the United Kingdom and some other countries. This article also analyzes three major approaches to enforcing judgments abroad, namely enforcement under international treaty; enforcement according to the principles of reciprocity; and comity. The authors support the international comity approach and urge the drafting and adopting of a universal convention on enforcement of foreign judgments. Based on recent examples of enforcing Russian judgments abroad, the authors point out a favorable attitude to the acts of the Russian judiciary globally.

Chaeva N.A. A New EU Model of Investor-State Dispute Settlement and the Existing Investment Arbitration System

Promoting the public-law approach to Investor-State Dispute Settlement (ISDS), the EU-United States of America Transatlantic Trade and Investment Partnership (TTIP), the EU-Vietnam Free Trade Agreement and the EU-Canada Comprehensive Economic and Trade Agreement (CETA) bring some profound changes to the traditional way of adjudicating investment disputes. A new EU-model ISDS dismantles the existing system of dispute settlement where States and private parties can choose arbitrators of their choice for each particular dispute. Instead, it establishes a two-tiered investment court system, with standing Tribunals and Appeal Tribunals,

composed of preselected members. This paradigm shift in ISDS explains the need to assess the main features of the proposed investment court system within the existing framework of dispute resolution in the field of foreign investment established by the ICSID Convention. This article is published in the English language.

Frolov O.M. Anti-Suit Injunctions Issued by Arbitrators: Analysis of Current Trends with Reference to Ukrainian Legislation

The article analyzes powers of an arbitral tribunal, in particular an arbitral tribunal seated in Ukraine, to issue anti-suit injunctions against a party to an arbitration agreement which initiated court proceedings in violation of a valid agreement to arbitrate.

This article also takes a close look at circumstances that empower the arbitral tribunal to issue such interim measures. The author analyses the forms in which tribunal-ordered anti-suit injunctions may be issued, consequences of filing a request for anti-suit injunctions at different stages of arbitral proceedings as well as issues of advisability and effectiveness of this type of interim measure. This article is published in the English language.

Chervets E.I. Trust as One of the Methods of Property Segregation: The Use in Obligations, Analogies with Constructions of National Law

In this article the author takes a comparative law approach to issues of legal regulation of property segregation in civil-law and common-law countries, with particular focus on relations among participants of segregation (initiator, holder of separated assets, and beneficiary, *i.e.* an entity to whom the separated assets are assigned), its negative effects, and the ways of using trust and trust-like constructions in the creditor-debtor relationship.

Kroes-Lastochkina J. The Decision of the Hague District Court on Setting Aside Yukos Arbitral Awards, from the Perspectives of Dutch and Russian Legislation

In April 2016 the Hague District court rendered a decision by which it vacated six arbitral awards obliging the Russian Federation to pay 50 billion USD to former Yukos shareholders. Despite a number of defenses raised by the Russian Federation against the awards, the Hague District court based its decision only on a single ground of an arbitral tribunal lacking competence under the ECT which was signed, but not ratified by the Russian Federation. In her article the author analyzes the decision of the Hague District court from the perspectives of Dutch and Russian legislation.

Arbitral Awards

Award of the ICAC at the RF CCI dated 20 February 2014 in Case No. 1/2013

In this case the ICAC panel of arbitrators had to consider an action for damages arising from a contract for international sale of goods. Differences in the interpretation of the contractual terms (based on FOB Incoterms 2010) resulted in the breach of the contract by the parties and the contract being terminated. The main problem facing the arbitral tribunal was not only interpretation of the contract, but also determination of the order of proper fulfillment of contractual obligations on the basis of the parties' correspondence and practices which they had established between themselves.

From the procedural point of view, the most interesting issue in this award is the subsequent confirmation of the acts of plaintiff's representatives (including filing the suit) in a situation of a power of attorney being invalid.

This award was successfully challenged in the state arbitrazh court on the ground of it being contrary to public policy. It should be noted though that it seems that the state court exceeded the limits of its competence and reviewed the award on the merits.

Order of the ICAC at the RF CCI on Termination of Arbitral Proceedings dated 20 October 2015 in Case No. 62/2015

In this case the plaintiff initiated parallel proceedings with the same claims in the state arbitrazh court and the ICAC. The defendant objected to the competence of the ICAC, referring to the uncertainty of the arbitration clause, invalidity of the signature of a party representative on a contract, *etc.* The arbitral tribunal dismissed the proceedings because the arbitration agreement became inoperative due to the parties' actions which resulted in the ICAC losing its competence.

Award of the ICAC at the RF CCI dated 25 December 2015 in Case No. 121/2015

This decision was rendered on a case that is typical in the practice of the ICAC. An open joint stock company with its place of business on the territory of Russia (the applicant) and a firm with its place of business on the territory of Italy (the defendant) entered into a contract for international sale of goods whereby the Russian company agreed to deliver some goods to the Italian firm and the latter undertook to accept the goods and pay for them. The company fulfilled its obligation under the contract while the firm failed to perform its duty to pay for the goods in full. For that reason the company submitted the application to the ICAC which further ruled in favor of the applicant and ordered the firm to pay the price for the unpaid goods.

The decision rendered by the ICAC on this case reflects several questions of law that might be of interest. The author of this commentary highlights some that seem to be the most important: competence of the ICAC to hear a case; right of an arbitration court to suspend arbitration proceeding in a situation of parallel proceedings initiated in another court; decision on the issue as to whether a party to proceedings conducts itself in bad faith or abuses its rights.

Award of the ICAC at the RF CCI dated 29 January 2016 in Case No. 29/2015

This award is of interest because it relates to a dispute which arose out of a loan agreement governed by English law. In justification of their positions, the parties referred to various English legal doctrines (contractual estoppel, promissory estoppel, *etc.*), the application of which were subject to thorough analyzes by the arbitral tribunal that engaged deeply with the English case law.

The heart of the matter was a written agreement under which the borrower was released from its duty to pay loan interest to the lender despite continuous accrual of the interest during the period up to the conclusion of this agreement. In this connection of particular interest are the arguments of the arbitral tribunal that rejected plaintiff's case according to which the debt waiver was only admissible provided there was consideration on the part of the debtor.

In terms of substantive law, the award is notable for the fact that the dispute in question originated out of a complex contractual framework of loan agreements including a legal assignment. During the course of the arbitral proceedings the arbitral tribunal had to answer the question of whether a borrower's obligation to return a loan amount is discharged via execution of payments in favor of third parties in the absence of relevant instructions from a lender. The arbitral tribunal dismissed the defendant's (borrower's) arguments that such payments in view of the previous practice between the parties should have been considered as due performance by the borrower under a loan agreement. In that regard it was emphasized that a borrower's obligations shall be considered as duly performed only provided that it was proved that the lender explicitly instructed the borrower to perform payment

to the advantage of a third person. A simple notification by the lender of a third party of a possible payment from the borrower's side cannot be accepted as such an instruction. At the same time the lender's letter addressed to the borrower's parent company with a request to return the loan via payment in favor of a third person was recognized as a proper instruction in this context.

Along with the solution of the question as to which extent the parties have performed their mutual obligations, the arbitral tribunal had to answer another question: whether it was possible to recover from the borrower in favor of the lender a penalty prescribed by the loan agreement, from the perspective of English law. In this regard, the arbitrators concluded that penalty as an intimidating remedy compelling a party to perform its contractual duties cannot be enforced. However, if an amount as agreed by the parties is determined as "liquidated damages", such a fixed amount can be claimed and recovered.

Special focus was made on the application of the contractual provisions establishing priority of a certain language version of the agreement. It was concluded that such provisions should be applied only in the case of an irremediable contradiction between the respective versions of the agreement. Otherwise discrepancies between different language versions shall be considered as complementary.

Finally, the award is notable for the arbitral tribunal's approach in allocating parties' expenses connected with the arbitral proceedings. Having satisfied a defendant's claim to recover expenses for legal representatives in the amount equal to the amount of arbitration fee paid by the plaintiff, the arbitral tribunal ruled to set off the relevant amounts. Consequently, none of the parties had to compensate to another party any expenses connected with the arbitral proceedings.

Award of the ICAC at the RF CCI dated 9 February 2016 in Case No. 145/2015

In this case the dispute arose out of an action for the recovery of the unpaid part of a contractual price established for the supply of equipment and supervision of its installation. As the defendant objected to the claim by arguing that the unpaid amount was the cost of supervising installation works which were not fulfilled due to the fault of a third party, the main issue that was considered by the arbitrators related to determining the legal nature of contractual relations between the parties. Having analyzed the obligations of the parties as established by the contract as well as the procedure for determining the contractual price, the arbitrators came to a conclusion that the argumentation of the defendant according to which the contractual relations had to be considered as being comprised of elements of contracts of various types (sale of goods, construction works, *etc.*), each element being subject to differing applicable laws, was not to be relied upon and the contract was to be regarded as subject only to the rules on delivery of goods. In addition the case involved other issues relating to determining the governing substantive law in the absence of the parties' respective choice.

Book Review

Zhiltsov A.N. The First Commentary to the New Legislation on Commercial Arbitration: Review of the Book "Commentary to the Federal Law 'On Arbitration (Arbitral Proceedings) in the Russian Federation'" (Prof. O.U. Skvortsov, Prof. M.U. Savransky (eds.), Moscow, Statut Pub., 2016. 352 p.)