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О журнале. Его цели и области исследований

«Вестник международного коммерческого арбитража» – единственный российский специализированный теоретический и практический журнал, посвященный как вопросам международного коммерческого и инвестиционного арбитража в России и за рубежом, так и связанным с ними вопросам.

Журнал выпускается с 2010 г. и является прямым преемником журнала «Международный коммерческий арбитраж», издававшегося в период с 2004 по 2008 г. и завоевавшего заслуженный авторитет среди российских и иностранных специалистов.

«Вестник международного коммерческого арбитража» выходит два раза в год на русском языке. Некоторые статьи и материалы публикуются в нем на английском языке.

Все статьи и материалы, публикуемые в «Вестнике», подлежат анонимному (двойному слепому) рецензированию и профессиональному редактированию.

Миссия журнала – быть надежным и независимым профессиональным источником интересной и полезной информации о тенденциях, событиях и нюансах современного международного коммерческого и инвестиционного арбитража в России и за рубежом, способствовать развитию арбитража как альтернативной формы разрешения международных коммерческих и инвестиционных споров посредством опубликования теоретических статей и практических материалов известных российских и иностранных исследователей и арбитров.

«Вестник международного коммерческого арбитража» является независимым от каких-либо государственных, муниципальных или коммерческих структур. Он выступает профессиональной платформой для всех специалистов, интересующихся международным коммерческим и инвестиционным арбитражем в России и за рубежом, созданной частным образом без финансовой поддержки со стороны государственных или муниципальных властей.

С 2017 г. «Вестник международного коммерческого арбитража» включен в авторитетную базу данных *Kluwer Arbitration* (http://www.kluwerarbitration.com). Всего в этой базе на сегодня – 12 журналов из различных юрисдикций. «Вестник» – единственное среди них российское издание.

С 2018 г. «Вестник международного коммерческого арбитража» индексируется в Российском индексе научного цитирования (РИНЦ) (www.elibrary.ru).

Электронные версии всех номеров журнала размещаются в бесплатном доступе на его Интернет-сайте в формате *pdf* с возможностью поиска внутри них (http://arbitrationreview.ru/soderzhanie-nomerov).

Требования к материалам, представляемым для публикации в журнале, правила, руководства и процедуры, которые применяются в деятельности журнала, размещены на его Интернет-сайте: http://arbitrationreview.ru.

About the Journal. Its Aims and Scope

International Commercial Arbitration Review is the only Russian specialized journal focused both academically and practically on the issues of international commercial and investment arbitration in Russia and abroad, as well as on the matters connected with them.

The journal has been issued since 2010 being the successor of *International Commercial Arbitration* journal which was published in 2004—08 and was highly esteemed by Russian and foreign specialists.

International Commercial Arbitration Review is published biannually in Russian. Some articles and materials are published in the journal in English.

All articles and materials published in *Review* are subject to anonymous (double-blind) peer review and professional editing.

The mission of the journal is to be a reliable and independent professional source of interesting and helpful information about the tendencies, events and nuances of the modern international commercial and investment arbitration in Russia and abroad, to contribute to development of arbitration as an alternative form of resolving of the international commercial and investment disputes by publishing academic articles and practical materials of Russian and foreign researchers and arbitrators.

International Commercial Arbitration Review is independent from any governmental, municipal or commercial establishments. It is a professional platform for all specialists interested in international commercial and investment arbitration both in Russia and abroad, initiated privately without any financial support from governmental or municipal authorities.

Since 2017 *International Commercial Arbitration Review* is included into the authoritative database *Kluwer Arbitration* (http://www.kluwerarbitration.com). Presently *Kluwer Arbitration* encompasses 12 journals from various jurisdictions, with *Review* being the only Russian edition.

Since 2018 *International Commercial Arbitration Review* was added to the Russian Science Citations Index (RSCI) (www.elibrary.ru, the Russian scholar bibliographic and reference database).

All issues of the journal in electronic form are available free of charge on its website in *pdf* searchable format (http://arbitrationreview.ru/soderzhanie-nomerov).

Requirements to materials for publication in the journal, rules, guidelines and procedures applicable in the journal's activity may be found on its website: http://arbitrationreview.ru.

От редакции

Этот номер «Вестника международного коммерческого арбитража» – особенный.

Во-первых, он выходит после 1 ноября 2017 г. – дня, знаменующего начало нового этапа в российской третейской сфере. С этой даты осуществлять третейскую деятельность в России на постоянной основе могут не все, а только те, кто получил от Правительства РФ право на осуществление функций постоянно действующего арбитражного учреждения, или те, кому указанное право предоставлено в силу закона. На сегодня такое право есть только у трех организаций: АНО «Институт современного арбитража», Российского союза промышленников и предпринимателей и ТПП РФ. Третейский ландшафт в РФ радикально изменился. При этом МКАС при ТПП РФ теперь может заниматься разрешением не только международных, но и внутренних, а также спортивных споров.

Во-вторых, в новой ситуации ТПП РФ решила публиковать свой собственный журнал по вопросам коммерческого арбитража. Ввиду этого ТПП РФ выходит из состава лиц, под эгидой которых издавался «Вестник» (но его учредителем ТПП РФ никогда не была). Практика по новым делам, администрируемым МКАС при ТПП РФ и МАК при ТПП РФ, будет теперь публиковаться в указанном новом журнале. В данной связи следует пожелать ТПП РФ всяческих успехов в деле создания нового периодического издания и популяризации третейских идей в Российской Федерации. Теперь, видимо, в РФ будет три издания, посвященных коммерческому арбитражу, что всеми отечественными поклонниками последнего может лишь приветствоваться и, несомненно, послужит дальнейшему развитию третейского разбирательства в рамках российской правовой действительности.

В-третьих, в этом номере «Вестника» впервые публикуются решения третейских судов, вынесенные под эгидой иных российских арбитражных центров, нежели МКАС при ТПП РФ и МАК при ТПП РФ: окончательное арбитражное решение Третейского суда при Санкт-Петербургской торгово-промышленной палате от 30 июня 2013 г. (дело № 13-03-66) и решение Арбитража при Московской торгово-промышленной палате от 30 октября 2017 г. (дело № А-2017/30). Первое из них является особенно интересным.

В данном номере публикуются и иные материалы, способные вызвать у профессионалов (и не только) интерес как с практической, так и с научной точки зрения.

Прошедший 2017-й год был для «Вестника международного коммерческого арбитража» успешным хотя бы потому, что все его выпуски были включены в базу данных *Kluwer Arbitration* (http://www.kluwerarbitration.com) – ведущий международный онлайн-ресурс, посвященный вопросам международного коммерческого и инвестиционного арбитража и содержащий эксклюзивные материалы и исследования, книги и статьи, комментарии ведущих экспертов. Всего в этой базе – 12 журналов из различных юрисдикций. «Вестник международного коммерческого арбитража» – единственное среди них российское издание.

У «Вестника» много планов на будущее.

Так, уже идет работа по включению всех статей из него в научную электронную библиотеку *eLIBRARY.RU* – крупнейшую в РФ электронная базу научных публикаций, обладающую богатыми возможностями поиска и анализа научной информации. Эта библиотека интегрирована с Российским индексом научного цитирования (РИНЦ) – созданным по заказу Минобрнауки РФ бесплатным общедоступным инструментом измерения публикационной активности ученых и организаций (библиографической базой данных научного цитирования).

Кроме того, в числе первоочередных – задача включения «Вестника» в *Scopus* – библиографическую и реферативную базу данных, выступающую инструментом для отслеживания цитируемости статей, опубликованных в научных изданиях. Эта задача крайне непростая.

С данного номера «Вестник» публикуется с учетом требований к изданиям, уже входящим и индексируемым в *Scopus*: любой читатель легко это заметит.

В связи с этим потребуются также и соответствующие изменения Интернет-сайта «Вестника», равно как и дальнейшее улучшение внутренних редакционных процедур, включая рецензирование поступающих статей.

Мы уверены, что все эти задачи можно успешно решить.

А.Н. Жильцов,
А.И. Муранов

SUMMARY
International Commercial Arbitration Review Issue No. 2 for 2017

Articles

Anna G. Arkhipova. **Participant-Related Difficulties of Referring Insurance Disputes to Arbitration (Based on the Practice of the Maritime Arbitration Commission at the Russian Chamber of Commerce and Industry)**

Parties referring their insurance disputes to arbitration may face a number of problems related to improper definition of persons participating in insurance relations. Even the insurers, despite their professional status, may experience some deficiencies, for example, in the case of double insurance.

Participant-related mistakes are most often made in relation to those insured. Where a party who does not have an insurable interest, cannot bear damages resulting from the insured event, or cannot carry the insured liability, is appointed in the quality of an insured, there is little practical opportunity to enforce the insurance contract. This result is legally correct but not fair. Arbitrators tend to rectify it by interpreting insurance contracts, piercing the corporate veil or applying the good faith doctrine. All these efforts are however of limited effect; and any effect is possible only if all interested persons or entities are parties to the relevant arbitration agreements. Therefore, it is by proper drafting of the arbitration agreements that most of these problems can be avoided.

According to a recent position held up by the Supreme Court of Russia, third parties to insurance contracts do not become parties to the arbitration clauses embedded in such contracts. This approach is more than arguable. Besides, it leads to a necessity of signing separate arbitration agreements with all beneficiaries and assured persons both when they are appointed primarily and when they are replaced during the term of the insurance contract.

Natalia I. Gaidaenko Schaer, Natalia G. Doronina, Natalia G. Semilyutina. **The New Federal Law "On Arbitration (Arbitral Proceedings) in the Russian Federation" and International Commercial Arbitration Perspectives**

The analysis of the Federal Law "On Arbitration (Arbitral Proceedings) in the Russian Federation" [hereinafter Federal Law on Arbitration] allowed to discover the weak points in this new legislative act. These weak points are represented by the incorrect definition of certain categories introduced in the text of the Federal Law on Arbitration. The incorrect definitions as well as the new trend towards a detailed and permissible order of creation of arbitration courts may create difficulties in the application of the Federal Law, in particular, the combined use of arbitration and other alternative dispute resolution methods seems to become problematic. The authors believe that a system of dispute resolution encompassing state and private jurisdiction would bet-

ter suit the needs of the end users. The mechanism of state control over the enforcement of arbitral awards would constitute the most appropriate means of control in such a system. This system would contribute to the creation of the new system of justice in the Russian Federation, competitive and compatible with international and foreign standards.

Yarik Kryvoi, Kaj Hobér. **Peculiarities of Law and Practice of International Arbitration in Post-Soviet Countries**

Despite the fact that over the last years European arbitration institutions show the increasing number of arbitration cases involving Russian and other former Soviet Union countries, arbitration institutions based in the CIS region consider significantly more cases compared to institutions based abroad. Additionally, many countries in the region have recently modernized their legislation to become more supportive of international arbitration. Yet legal systems of the countries of the CIS region share the same roots in the Soviet legal system and several peculiarities, compared to arbitration practices in the West. The purpose of the present article is to consider such particularities in detail.

New Textbook on International Commercial Arbitration

International Commercial Arbitration textbook (Oleg Yu. Skvortsov, Mikhail Yu. Savranskiy & Gleb V. Sevastyanov, eds.), Second Edition, at the time of preparation of the current issue is being finalized for publication in Spring 2018. This textbook is dedicated to the memory of Valery A. Musin – a distinguished Russian scholar, teacher and lawyer, corresponding member of the Russian Academy of Sciences, Doctor of Law, Professor and Head of the Civil Process Department of the St. Petersburg State University. It is a revised and supplemented edition of the International Commercial Arbitration textbook (Valery A. Musin & Oleg Yu. Skvortsov, eds., St. Petersburg: *Arbitration Court* Journal Editorial Board (NPO); Moscow: Infotropic Media 2012; Library of the *Arbitration Court* Journal, issue 5).

This book provides an overview of the legal and regulatory framework for international commercial arbitration, examines distinctions of international commercial arbitration from related legal institutions, considers the main theoretical problems related thereto, issues of arbitration agreement and arbitrability, provisions on arbitration procedure, as well as contains reviews of selected and most interesting awards rendered by international arbitration courts. It is comprehensive in its coverage of the basic regulatory norms, including the most recent changes in arbitration laws, rules and guidelines.

The present edition of the textbook is supplemented with a comprehensive overview of history of international commercial arbitration, a summary of the basic principles of arbitration and of the peculiarities of certain categories of disputes. It provides the reader with detailed information about the status of arbitration institution and parties to international arbitration, the peculiarities of *ad hoc* arbitration, the features of evidence in international arbitration. It also examines the problem of arbitration costs, the regulation of international arbitration in some foreign jurisdictions, problems and trends in the development of modern international commercial arbitration.

The distinguished scholars, arbitrators and practitioners with considerable experience in international commercial arbitration from Russia and other countries have contributed to the new textbook.

As the publication of the new edition of the textbook will definitely constitute an important event in the Russian academic life, on consent with the authors and editors of the textbook the selected articles therefrom are published below.

Oleg Yu. Skvortsov. **Discussions on the Legal Nature of Arbitration**

Despite the fact that the phenomenon of arbitration is in existence for many centuries, discussions on its legal nature do not seem to have ended even today. Yet the lack of undisputed and universally accepted approaches to the legal nature of arbitration is not only a theoretical problem, but has directed consequences in practice. The author argues that such consequences are: 1) the lack of certainty in the models of legislative regulation of arbitration; 2) existing contradictions between the practice of state courts and commercial arbitrations regarding issues of enforcement and setting aside of arbitral awards rendered in both, domestic and international arbitration proceedings. This situation results in the need for working out and adopting the most modern and objective approach to understanding the legal nature of arbitration. In his article the author provides detailed description of all the existing approaches to understanding the legal nature of arbitration allowing the reader to judge for himself which of the approaches is to be preferred.

Aleksander I. Muranov. **Seat (Legal Place) of International Commercial Arbitration. The Peculiarities of This Notion under the Russian Law**

Seat (legal place) of arbitration is one of the key concepts in arbitration both on domestic and international levels.

The article discusses the essence of that concept and reasons for its formation and consolidation in Art. 20 of the UNCITRAL Model Law on International Commercial Arbitration as well as in the law of the developed countries.

Author exposes why the Russian state courts in the light of peculiarities of the Russian law:

do not intend to recognize the conditional and legally fictional nature of the notion "seat (legal place) of arbitration" which prevails in modern international and Western regulations;

distort its nature by demanding existence of physical connections between arbitration and a seat (legal place) of arbitration.

Author also explains which consequences such an attitude will trigger for particular arbitral proceedings connected with the Russian law, including in the context of a place of arbitral award making as well as from the perspective of possibilities to relocate a seat (legal place) of arbitration from Russia to abroad by Russian parties to a dispute out of relations not involving any foreign element.

The article underlines the importance of distinguishing between a seat (legal place) of arbitration and a seat of arbitration administration, explains connections between a seat (legal place) of arbitration and the governing law of a seat (legal place) of arbitration (*lex arbitri*), analyzes technical legal aspects with regard to a seat (legal place) of arbitration, including factors for choosing it, formalities for such choosing, determination of a seat (legal place) of arbitration by an arbitral tribunal.

Author pays special attention to the concept of "delocalized" arbitration. At the end of the article he provides and analyzes information on the practice of the Russian state courts and arbitral tribunals regarding seat of arbitration.

Mikhail Yu. Savranskiy. **Legal Regulation of Arbitration Proceedings**

One of the distinctive features of arbitral proceedings as compared to the proceedings in the state courts is the multiplicity of levels of regulation of the former stemming from

the preponderance of contractual methods of regulation which are typical for private law in general. It thus follows that on the basis of particularly drafted arbitration agreements and arbitration rules of particular arbitration institutions selected by the parties, it is possible to achieve a more flexible and convenient set of rules regulating the proceedings as compared to the rules applied in the context of judicial proceedings. This flexibility in framing the arbitral proceedings is the primary focus of this article, the author analyzing in detail the sources of and limitations on such powers on the basis of legislative provisions and rules of various instruments of international nature.

Gleb V. Sevastyanov. **Succession and Arbitration Agreements**

In this article the author analyzes the issue of an arbitration agreement extending its effect on persons that did not take part in concluding the respective arbitration agreement, this often being the case in situations of successions. This issue is considered on the basis of the provisions of the new Federal Law "On Arbitration (Arbitral Proceedings) in the Russian Federation" as well as on most recent doctrinal writings on the subject.

Sergey A. Abesadze, Leonid G. Kropotov. **Challenging the Competence of an Arbitral Tribunal**

The authors of this article consider various issues related to challenging the competence of an arbitral tribunal. They particularly focus their attention on such issues as the procedure for challenging the competence of an arbitral tribunal, challenging the competence at an initial stage of the proceedings, in the course of the proceedings and after the rendition of an arbitral award. The choice of various mechanisms for challenging the competence of an arbitral tribunal and the consequences thereof are also considered by the authors.

Markus Schaer, Natalia I. Gaidaenko Schaer. **Arbitration Agreement under Swiss Law and the Forthcoming Reforms of the Switzerland's Federal Code on Private International Law (CPIL) in the Light of One Arbitral Award**

Starting to consider any case, arbitrators determine whether the arbitration agreement was concluded and decide whether they are competent to resolve the case. Compliance with legal requirements towards the form and the contents of the arbitration agreement is a key issue to ensure the enforceability of the award abroad. In the case analyzed in this article arbitration agreement was subject to the Swiss law and the respondent refused to acknowledge this agreement referring to violation of requirements towards its form and to the lack of mutual consent of the parties as to its conclusion. Analyzing the Swiss arbitral award, authors consider the provisions of the laws of Switzerland and those of the Switzerland's Federal Code on Private International Law (CPIL) on the requirements as to the form of arbitration agreement and the preliminary draft of amendments thereto, as well as the case law of the Swiss Federal Tribunal on issues of recognition and enforcement of foreign arbitral awards. Authors come to the conclusion that, should the arbitrators apply the amended version of the CPIL, this would not have affected the conclusions of the arbitral tribunal.

Victoria Barausova. **The Law Governing Arbitrability: Problems and Proposals**

This article contributes to the discussion about the law to govern the issue of nonarbitrability if it arises before state courts. The traditional approach has been that state courts mechanically apply the nonarbitrability rules of the forum, even where there is little or no connection between the forum and the underlying dispute. This article builds on the criticism raised in scholarly works

and, in the first part, argues that the most appropriate solution is to allow a state court to apply the nonarbitrability rules only in cases where it would be capable of substituting the arbitral tribunal's jurisdiction over a specific dispute with its own.

Furthermore, the author critically examines proposals to reconsider the nature of the concept of arbitrability as such and concludes that arbitrability must continue to be considered as a concept related to public policy. A restricted application of the forum's nonarbitrability rules even reinforces this conclusion.

Finally, it is argued that in certain situations it is appropriate for state courts to apply foreign nonarbitrability rules (for instance, if parties attempt to circumvent certain prohibitions by a combination of an arbitration agreement and a choice of law clause). In this regard, the article analyzes specific tools providing for the application of foreign nonarbitrability rules both in common and civil law jurisdictions. This article is published in the English language.

Interview with Professor Mark M. Boguslavskiy, Zakon-TV (Transcript of the TV-Program from the Series of Programs "About Personal Matters" Produced by "Zakon-TV" [Law-TV] Channel, 2008)

In this interview, which was taken by Zakon-TV in 2008, professor Mark Moiseyevich Boguslavskiy, who was a prominent Russian expert in private international law, intellectual property law and civil law in general, an active arbitrator of the International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry, Doctor honoris causa of the Kiel University (Christian-Albrechts-Universität zu Kiel), author of the most popular Russian textbook on private international law, speaks about his childhood, youth, professional experience and an uneasy way to becoming an internationally renowned expert in private law.

Anastasiya A. Rogozina. **Most-Favoured Nation (MFN) Clause in International Investment Disputes Against Russia**

The most-favoured nation (MFN) clause is one of the most controversial provisions of modern bilateral investment treaties. This article provides an overview of arbitrations commenced by foreign investors against Russia, where the claimants referred to the MFN clause. The primary target of this paper is to discuss the possible recourse to such clauses by claimants, limitations on their scope and the relevant principles of interpretation.

Arbitral Awards

Award of the Arbitration Court at the Moscow Chamber of Commerce and Industry dated 30 October 2017. Case No. A-2017/30

The present case is a standard example of a dispute arising out of the foreign trade contract for supply of goods regulated by the UN Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980).

At the same time the arbitral tribunal in consideration of this dispute had to resolve a number of procedural issues in connection with, *inter alia*, the legal succession in the arbitration proceedings.

Upon filing of a claim by the German seller for recovery of the unpaid purchase price for the supplied goods against the Russian buyer – the limited liability company, the latter underwent a reorganization whereby two new legal entities were formed. In light of this the arbitral tribunal

seeking to justify its competence to consider the case indicated that a reorganization constituted a type of a universal legal succession under which all rights and obligations of the company-legal predecessor were passing to the company-legal successor. And though the legal successor did not directly sign the arbitration agreement in respect of a specific obligation, upon passing of such an obligation to the legal successor the latter is deemed to be bound by the arbitration agreement in the context of such an obligation.

It should be noted that in order to justify such conclusion the arbitral tribunal, among other things, referred to the practice formed by the state commercial (arbitrazh) courts in respect of the legal succession under an arbitration agreement which was reflected, *inter alia*, in the Decree of Presidium of the High Arbitrazh (Commercial) Court of the Russian Federation dated 3 November 2009 No. 8879/09.

At the same time it appears that, as long as the defendant's reorganization was carried out already after the filing of the statement of claim and, accordingly, the claimant requested to replace the party in the case, the arbitral tribunal could have easily applied by analogy the Russian procedural law rules on the procedural legal succession, *i.e*. Art. 48 of the Arbitrazh Procedural Code of the Russian Federation (if the tribunal found it to be justified).

As a matter of fact, neither the Law of the Russian Federation dated 7 July 1993 No. 5838-I "On International Commercial Arbitration" [hereinafter Law on International Commercial Arbitration], nor the Rules of the Arbitration Center at the Moscow Chamber of Commerce and Industry [hereinafter Rules] contain any provisions on the procedural legal succession; at the same time pursuant to Art. 1(2) of the Rules the arbitration is to be held in accordance with the Law on International Commercial Arbitration where, in turn, it is stated (in Art. 19(2)) that failing parties' agreement on the procedure to be followed by the arbitral tribunal in conducting the proceedings, the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate. Therefore, the arbitral tribunal could have applied at its discretion, *e.g*., by analogy the rules of the Arbitrazh Procedural Code of the Russian Federation on the procedural legal succession.

In light of the request of the claimant's representative to hear the dispute in the absence of the defendants' representatives the arbitral tribunal paid detailed attention to the issue of their proper notification in the context of Arts. 7, 37 and 46 of the Rules and the applicable law (Russian). Among other things, the arbitral tribunal took into account the explanation from the Decree of Plenum of the Supreme Court of the Russian Federation dated 23 June 2015 No. 25 (para. 68) stating that subparagraph two of Art. 165.1(1) of the Civil Code of the Russian Federation on legally significant communications shall also be applied to court notifications and summons unless the civil procedure or commercial procedure laws state otherwise. The panel of arbitrators noted that all risks in connection with non-receipt or untimely receipt of the correspondence shall be borne by its recipient. A different conclusion could have led to the abuse of right by bad faith participants of the arbitration proceedings who could have brought the arbitration proceedings to a stalemate position by avoiding the receipt of the correspondence. Proceeding from this fact and applying, in particular, Art. 46(1) of the Rules, the arbitral tribunal found it possible to consider the case in the absence of the defendants' representatives.

Another interesting aspect is that, in light of the reform of the legislation on the arbitration, the arbitral tribunal faced a problem with selection of the applicable version of the Law on International Commercial Arbitration. Having applied the provisions of the Federal Law dated 29 December 2015 No. 409-FZ which came into effect on 1 September 2016 (Art. 13(18)), the panel of arbitrators concluded that this case was to be heard on the basis of the Law on International Com-

mercial Arbitration as amended on 1 September 2016 given that it was commenced by virtue of the claim submitted on 2 August 2017.

Upon consideration of this case the arbitral tribunal recognized the legal successors of the original defendant to be joint and several debtors, sustained the claimant's demand to recover from them the full amount of the principal debt, also ordering them to pay the arbitration fee.

The date of making of the award is also worth attention: 30 October 2017. Pursuant to Art. 52(13) "Final Provisions" of the Federal Law dated 29 December 2015 No. 382-FZ "On Arbitration (Arbitral Proceedings) in the Russian Federation," "[u]pon expiry of one year since the date of introduction by the Government of the Russian Federation of the procedure envisaged by parts 4–7 of Article 44 of the present Federal Law, the permanent arbitration institutions, permanent arbitral centers which do not meet the requirements of Article 44 of the present Federal Law and which did not receive the right to perform the functions of a permanent arbitration institution (except the International Commercial Arbitration Court and the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation), shall not be allowed to conduct activity for administration of arbitration."

The said time period of one year expired on 1 November 2017 and the Russian arbitral sphere that existed earlier became past history.

Final Arbitral Award of the Arbitration Court at the St. Petersburg Chamber of Commerce and Industry dated 30 June 2013. Case No. 13-03-66

The final arbitral award of the Court of Arbitration at the St. Petersburg Chamber of Commerce and Industry [hereinafter SPb CCI] dated 30 June 2013 (case No. 13-03-66) presented below deserves one's attention for several reasons.

Firstly, the disputes on providing of legal services (and, all the more so, these disputes involving namely Russian attorneys) can be met in the international commercial arbitration not often because the provision by them of such services is a sphere of fiduciary relations which is practically impenetrable for all others.

Secondly, a lot of complicated issues concerning the international trade in legal services, including those regulated by the General Agreement on Trade in Services (GATS) of the WTO, have been revealed in that case decided by the Court of Arbitration at the SPb CCI. Curiously enough, while searching for answers to them the parties in a dispute became rather confused themselves.

Here are some examples of such issues.

Taking into consideration the serious inaccuracies and ambiguity in the documents submitted to the arbitral tribunal, who was to be considered a party to the agreement for providing of legal services in this trans-border case, bearing in mind the foreign status of the client: the Russian attorneys or their Russian law firm as a legal entity? Did that agreement constitute a foreign trade transaction? How should the provisions of the Federal Law dated 31 May 2002 No. 63-FZ "On the Attorneys' Activity and the Bar in the Russian Federation," intended for domestic activities, have been applied to the trans-border attorneys' services? What was the significance of the actions of the sole executive body of the law firm, at the same time being the managing partner of that firm, for the firm's attorneys and for the foreign client? How should the burden of proof have been allocated between the parties in the context of the question of whether or not the services were provided to the foreign client in a proper manner? Were any prohibitions in respect of "success fee" in this trans-border dispute effective? How should the *contra proferentem* rule have been applied in resolving this dispute?

Thirdly, these challenging issues coupled with the specific features of the international commercial arbitration and for this reason acquired a certain new "sound." Here are several examples.

Could the dispute arising out of the agreement on providing of attorney's services be considered exactly within the framework of the international commercial arbitration given that the attorney's activity is not a commercial one under Russian law? Could the arbitration tribunal in resolving that dispute apply the UNIDROIT Principles of International Commercial Contracts? To what extent the tribunal could rely on Art. 4 "Waiver of Right to Object" of the Law of the Russian Federation dated 7 July 1993 No. 5338-I "On International Commercial Arbitration" with regard to substantive law issues?

Fourthly, all these issues were analyzed and clarified in the award in a systematic and comprehensive manner which, *inter alia*, explains its quite considerable volume and the necessity for specific attention to details to completely understand the conclusions in that award.[1]

Fifthly, it is the first arbitral award published in the "International Commercial Arbitration Review" indicating the surnames and initials of arbitrators who made it. The absence of any references to specific arbitrators has been that journal's approach determined by traditions of the Soviet times. As is known, in the 30s – 60s of the XX century in the USSR the awards of the Foreign Trade Arbitration Commission at the Soviet Chamber of Commerce and Industry were often published in full in order to popularize that Commission, with indications of parties, dates, amounts, *etc*. However, no information as to who made such awards was ever given: in the USSR, where the collectivism was promoted and majority followed the principle "Lay low!", references to the names of specific arbitrators were avoided. The format for publishing the awards of the International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry used from the 90s of the XX century by M.G. Rozenberg did not presuppose any details as well, so there was no sense in specifying the arbitrators' names in the resumes of awards prepared by him.

Meanwhile this Soviet approach which migrated into the present days greatly differs from the one used in developed countries where the arbitrators' names are often mentioned in the publications of anonymized arbitral awards. It is believed there that such references contribute to the development of arbitration and this approach is logical: "Knowing who the arbitrator is, is important: the arbitrator is a professional chosen by a selection process that is much more personal than for a judge. When an arbitrator is appointed, consideration is given to his specialisation in the area concerned in the dispute and his personal reputation. Therefore, there is a much more direct link between arbitrator and award than there is between judge and judgment. And it is good to know that the award one is studying as a possible precedent for a decision of one's own has been made by experts in the field.

The building of an arbitral case law should not be deprived of the added value of knowing the names and the professional reputations of the arbitrators who are creating it – who, conscious that their names will be disclosed, will exercise greater care when drafting their awards."[2]

In light of this the publication of the award presented below constitutes an attempt to engage that quite reasonable standard in the Russian arbitration.

One also cannot fail to mention with regret that because of arbitration reform in Russia since 1 November 2017 the Court of Arbitration at the SPb CCI has not been functioning. But it is yet

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[1] This, at the same time, is characteristic for all meticulously and thoroughly written acts of arbitration tribunals, which are distinguished for due attention to all circumstances and significant details of the cases submitted to them.

[2] Rinaldo Sali, *Chapter 4. Transparency and Confidentiality: How and Why to Publish Arbitration Decisions*, in The Rise of Transparency in International Arbitration. The Case for the Anonymous Publication of Arbitral Awards 73, 83 (Alberto Malatesta & Rinaldo Sali, eds.) (Juris Pub. 2013).

another reason to remind of its successful activity in the previous years when the complicated cases of trans-border nature were also resolved by that Court and not only by the International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry.

Certainly the published award was thoroughly anonymized, including with respect not only to names, titles, geographical places but also in relation to various figures and some dates. The unaltered elements in the award are the names of the arbitrators, its date and number as well as the reference to the Court of Arbitration at the SPb CCI and documents of that Court.

It should be noted that this award is published in the unabridged form, as it was made including its title page, headings and table of contents (but the page numbers were surely changed there). However a few paragraphs were divided into two or three smaller paragraphs for convenience of reading.

During consideration of this award one should keep in mind that the legal regulations applied by the arbitral tribunal in 2013 have already been amended.

The Federal Law dated 24 July 2002 No. 102-FZ "On Courts of Arbitration in the Russian Federation" is no more in force: it was replaced by the Federal Law dated 29 December 2015 No. 382-FZ "On Arbitration (Arbitral Proceedings) in the Russian Federation" [hereinafter Federal Law on Arbitration]. Serious amendments were made to the Law of the Russian Federation dated 7 July 1993 No. 5338-I "On International Commercial Arbitration." Though, had the arbitral tribunal in case No. 13-03-66 applied the said Law in 2013 in its present version, its conclusions would have remained the same.

However certain wording in the award would have changed. For example, the term "*sostav arbitrazha*" ("members of arbitration") is used there (as well as the expression "members of the arbitral tribunal." One can believe that greater consistency would only be of benefit for the award). But presently the use of this term has already become incorrect because according to Art. 2(2) "Basic Notions Used in the Present Federal Law" of the Federal Law on Arbitration, "the arbitration (arbitral proceedings) shall mean a process of resolving a dispute by arbitral tribunal and making of a decision by arbitral tribunal (arbitral award)." There can be no "members of a process."

Besides, on the title page of the award there is a reference to its being final one. But a "final arbitral award" in Russia in 2013 is not the same as the "final arbitral award" in Russia in 2018. In 2013 these words testified the ultimate and decisive nature of an act made by arbitral tribunal. Nowadays Art. 40 "The Procedure of Arbitral Award Challenging" of the Federal Law on Arbitration sets out: "In arbitration agreement providing for administration of arbitration by a permanent arbitral establishment the parties may by their direct consent stipulate that arbitral award shall be final for the parties. Final arbitral award may not be set aside. Unless arbitral agreement provides that such award is final, such award may be set aside on the grounds established by the procedural legislation of the Russian Federation."

The published award has been not only anonymized but also slightly edited, including to the extent required by such anonymization. Besides, some misprints were removed and certain refinements were introduced which in no way distort the meaning of the respective provisions in the award.

All amendments in the text are given in square brackets.

Clearly, the award presented below is not free from some omissions. For example, the issue of correlation between the claims to recover unjust enrichment and the existence of contractual relations between the parties is not quite sufficiently analyzed in that award.

Book Review

Aleksey A. Kostin, Dmitriy L. Davydenko. **On the New Compendium of International Commercial Arbitration Forms**

The article represents a review of Compendium of International Commercial Arbitration Forms by Sigvard Jarvin and Corinne Nguyen (Wolters Kluwer 2017). These forms may be of interest to a great number of participants in international arbitral proceedings from Russia and other CIS countries. Their use can improve the effectiveness of arbitration and reduce the costs of drafting procedural documents. They also help to standardize international arbitration, which in turn might improve the quality of the arbitral procedure.

The forms cover a wide range of issues with regards to different arbitration rules. Most of the forms included in the compendium, however, are based on the practice of arbitration under the Rules of the International Chamber of Commerce.

The compendium covers all the main stages of arbitral proceedings: from the claimant's request for arbitration up to the arbitral tribunal's final award. The book also contains options of resolving typical questions that arise in the course of arbitration.

Such materials largely complement the provisions of arbitration rules, introducing additional certainty into the procedure.

The relevant sections of the compendium can be used in those international arbitrations that are conducted in English. However, its content can be useful in arbitration (both institutional and *ad hoc*), which is conducted in one of the other languages, including in Russian (through translation and adaptation).

Many of the materials of the compendium are intended, first of all, for use in sufficiently large and complex international arbitral proceedings. Its materials can be useful for proceedings under the rules of various arbitration institutions, including the International Commercial Arbitration Court and the Maritime Arbitration Commission at the Russian Chamber of Commerce and Industry.

At the same time, the forms are supposed to be adapted to the needs of a particular case. Their use will require their careful analysis in the light of the applicable procedural law and arbitration rules. This requires reflection and must be accompanied by a balanced and creative approach.

The materials of the compendium can be applied both in current arbitral proceedings (according to the rules of permanent arbitral institutions and in *ad hoc* arbitrations, *e.g.* under the UNCITRAL Arbitration Rules), and for further improvement of the institutional rules and practices of arbitration.

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