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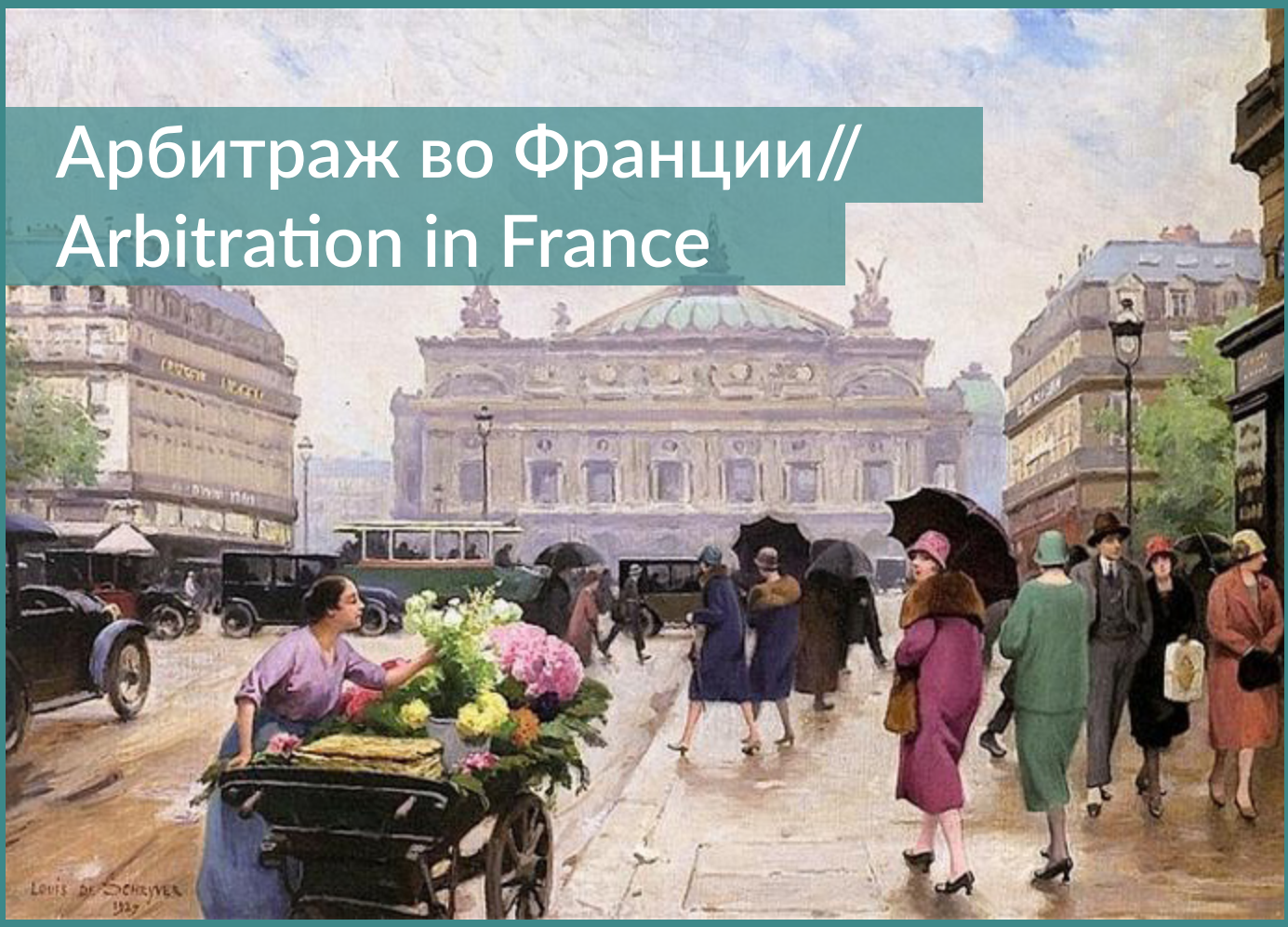
Издание о международном арбитраже



Арбитраж во Франции// Arbitration in France

Аналитика

Толкование арбитражных соглашений французскими судами

Новости

- Решение ВС Украины по делу «Эверест Истейт»
- Конкурс Emoji Arbitration

English Section

- ICC: a century of business
- Arbitration in France
- Arbitration.ru meets Canadian arbitration

В 2018 году исполнилось 60 лет Нью-Йоркской конвенции о признании и приведении в исполнение иностранных арбитражных решений.

Арбитражная Ассоциация готовит к изданию книгу, посвященную вопросам признания и привидения в исполнение иностранных решений, оспаривания и исполнения внутренних арбитражных решений в России и странах бывшего СССР. В издание включен постатейный комментарий к Нью-Йоркской конвенции, Европейской конвенции о внешнеторговом арбитраже 1961, АПК, ГПК и Закону о международном коммерческом арбитраже. В книге будут также подробно освещены особенности правового регулирования в странах бывшего СССР.

Уникальной особенностью издания является подробный статистический анализ российских судебных актов об оспаривании, признании и приведении в исполнение арбитражных решений за последние 10 лет.

Твердый переплет, 800 страниц, тираж 1000 экз. В 2019 планируется издание книги на английском языке.

Не упустите рекламные возможности в книге.

The New York Convention celebrates its 60-year anniversary this year.

To celebrate this occasion, the RAA is preparing a commentary to the New York Convention and related Russian and CIS laws.

The book will offer a detailed analysis of the Russian case law on the Convention for the past 10 years.

Hardcover, 800 pages, 1000 copies, Russian language. An English language version will be released in 2019.

Advertise in the book.

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Учредитель и издатель:
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Адрес учредителя и издателя:
115191, Москва, Россия,
Духовской переулок 17, стр. 12, этаж 4
+7 (495) 201-29-59

Главный редактор:
Дмитрий Артюхов
editor@arbitrations.ru

Корректор:
Татьяна Левицкая
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English section

ОТ РЕДАКЦИИ

Vladimir Khvalei
Russian Arbitration Association,
Chairman of the Board

Dear colleagues,

It has become fashionable in recent years to hold various "arbitration weeks". Indeed, it is a nice opportunity to hear the latest arbitration news, to see fellow arbitration practitioners and promote oneself. On the other hand, if one attempts to attend all such "arbitration weeks" scheduled around the world, there would hardly remain any time for doing other work.

However, there is one arbitration week which is certainly worth attending - the Paris Arbitration Week ("PAW"). The PAW was launched only several years ago and in the short time became a major arbitration event not only for Europe, but for the whole arbitration world. This is why this edition of the Arbitration.ru journal is devoted to France and the ICC as the leading arbitration institution.

Please read it with pleasure and, of course, do not miss the presentation of ICC Russia [link]!

Дмитрий Артюхов
главный редактор Arbitration.ru

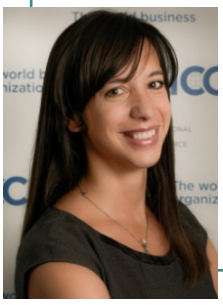
Уважаемые читатели!

Выход мартовского номера журнала приурочен к Парижской арбитражной неделе и потому посвящен Франции как месту арбитража. И дает неожиданно много поводов и возможностей для сравнения. Так, прочитав статьи нашего нового выпуска, вы сможете сравнить практику толкования арбитражных соглашений российскими и французскими судами. Изучить аргументацию французских судов в инвестиционных спорах против государств и узнать позицию Верховного суда Украины по делу «Эверест Истейт», где ответчиком выступает Россия. Наконец, будет небезынтересно сопоставить систему третейского разбирательства в Канаде с отечественной практикой.

И еще один аспект, о котором я задумался, садясь читать материалы номера в Международный женский день. Всего сто лет назад женщин не допускали ни к юридическому образованию, ни тем более к юридической практике – а сегодня женщины работают адвокатами, судьями, арбитрами и даже следователями. Семь статей в этом номере написаны представительницами прекрасной половины человечества, две – смешанным коллективом авторов и две – мужчинами. Так что по крайней мере в нашем журнале проблема доступа женщин к профессии юриста решена!

Благодарим всех дам, участвовавших в подготовке мартовского выпуска. Отдельное спасибо – Екатерине Гривновой, при содействии которой мы получили материалы об арбитраже во Франции. Надеюсь, что и коллеги-мужчины теперь станут чаще заявлять о себе в нашем журнале.

INTERNATIONAL CHAMBER OF COMMERCE: A CENTURY OF BUSINESS



Živa Filipič
Managing Counsel of the ICC Court

Maria Hauser-Morel
PhD, Case management team focusing on the CEE and CIS region, Counsel in charge

With the help of ***Veronika Pavlovskaya***

ICC Court is a part of the International Chamber of Commerce or ICC, the world business organization. ICC promotes international trade and investment through resolution of commercial disputes, policy advocacy, development of rules and guidelines, training courses and other practical tools. This year marks the 100th anniversary of ICC and this article takes advantage of this occasion to describe the history of the ICC Court and highlights the recent developments in its rules and practices.

ICC at a glance

This year International Chamber of Commerce (ICC) celebrates its 100-year anniversary[1]. Although established in Paris, ICC was created in 1919 in Atlantic City, New Jersey[2] after the First World War in order to set the rules for peaceful development of business, trade and commercial relations between the companies. The founders of the ICC were a handful of businessmen from Belgium, France, Italy, the UK and the USA who called themselves "the merchants of peace", an idea that still very much felt and lived by ICC today.

Throughout its history, ICC has pioneered the development of international business: from the first rules for the Uniform Customs and Practice for documentary Credits (UCP) in 1933, to the first edition of the Incoterms

[1] *Full list of the ICC@100 celebrations in different countries: https://100.iccwbo.org/.*
[2] *B. Reinalda, Routledge History of International Organizations: From 1815 to the Present Day, p. 145.*

rules featuring six trade terms in 1936, representing business at the Bretton Woods Conference in 1944 or still the issuing of the first anti-corruption rules in 1977.

The ICC Court was created in 1923 in order to provide an effective dispute resolution mechanism for companies located in different countries. The number of the pending cases dealt with by the ICC Court has been constantly growing and tripled from 580 cases pending at the end of 1982 to 1,578 cases pending at the end of 2017[3]. To date, the ICC Court has registered over 24,000 arbitration cases[4].

The ICC Court is composed of the President, 17 Vice-Presidents, and 176 members representing 104 countries. Gender balance has been one of the priorities of the current President of the ICC Court, Mr Alexis Mourre, and the Court members now they include 88 women and 88 men[5].

The Court is assisted by the Secretariat headed by Mr Alexander G. Fessas as Secretary General. Currently the Secretariat consists of 11 case management teams, 7 of which are located in Paris, with New York, Sao Paulo, Hong Kong and Singapore hosting one case management team each. Each case management team is headed by a Counsel and assists the parties and arbitral tribunals and the parties at each stage of ICC arbitration: from processing and notification the Request for Arbitration to notification of the final award. The other important aspect of a case management team's assist the ICC Court with respect to its decisions, such as fixing the place of arbitration, appointing arbitrators and scrutinizing arbitral awards.

Among the 11 case management teams also the team which focuses in cases from Central and Eastern Europe and the CIS. This team was established in 2008 in light of the rapid growth of arbitration in the region and increase of the number of disputes in the CEE and CIS region being referred to ICC arbitration.

In 1995, 89 cases involved parties the CEE and CIS, whereas this number rose to 105 in 2000 and to 261 in 2010.

In the period between 2007 and 2017, Romania, Poland and Russia were the leading countries of origin of CEE and CIS parties (Chart 1).

[3] https://cdn.iccwbo.org/content/uploads/sites/3/2018/07/2017-icc-dispute-resolution-statistics.pdf
[4] *Ibid.*
[5] https://iccwbo.org/media-wall/news-speeches/2018-10-key-moments-iccs-dispute-resolution-year/

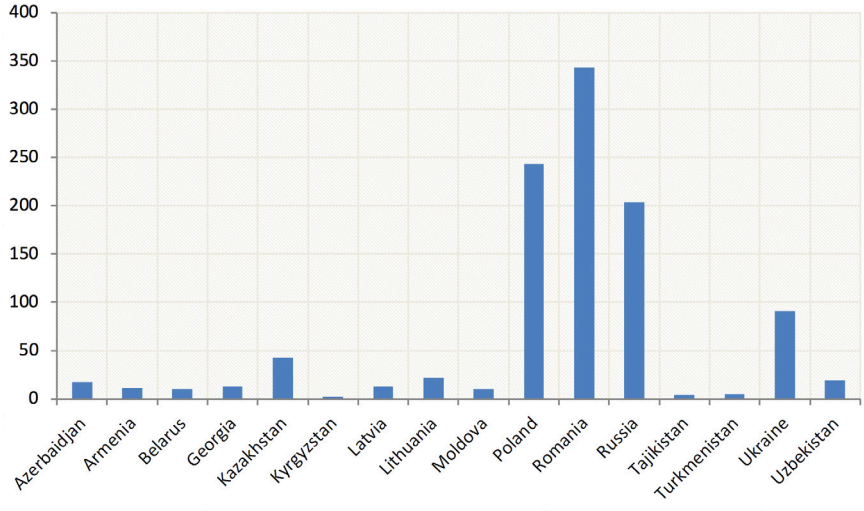


Chart 1. Parties from the Eastern Europe and CIS (2007-2017).

Similarly, Polish, Romanian and Russian were the leading nationalities among arbitrators from the CEE and the CIS (Chart 2).

However, regarding the place of arbitration, the parties more rarely chose a seat in the CEE region, with the leading places being in Romania, Poland and Russia (Chart 3).

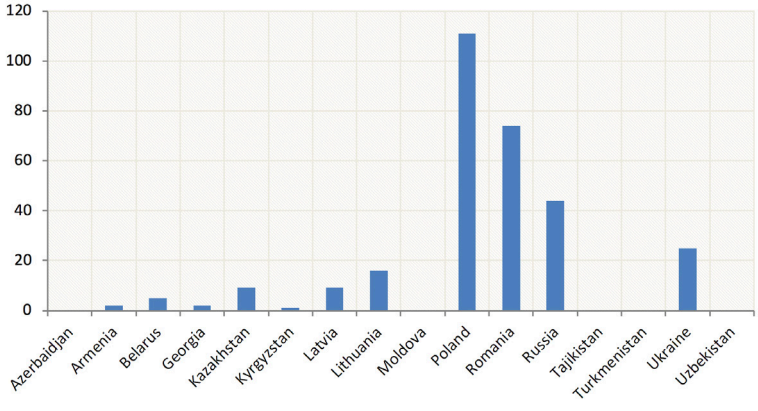


Chart 2. Arbitrators from the Eastern Europe and CIS (2007-2017).

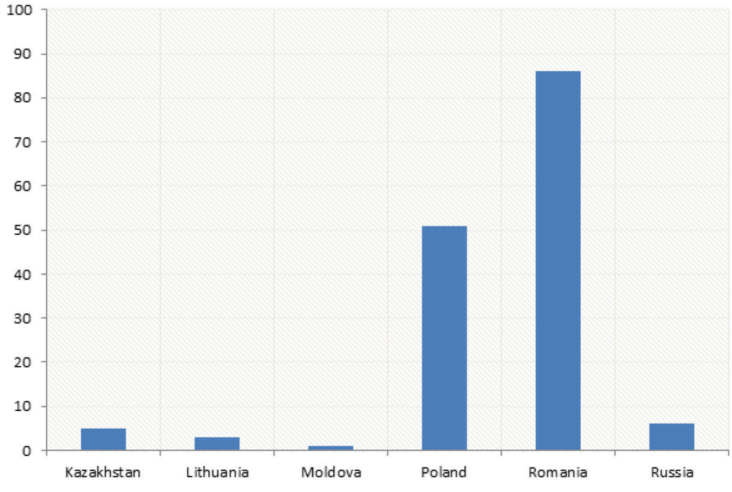


Chart 3. Arbitration places from the CIS and Eastern Europe (2007-2017).

New Rules and new developments of the ICC

On 1 March 2017, a new edition of the ICC Rules came entered into force, further enhancing the efficiency and transparency in the resolution of disputes referred to ICC arbitration

Efficiency

ICC Court attaches particular attention to efficiency, as reflected in its Rules (Article 22 introduced already in the 2012 version of the Rules). It is notable that the obligation to "make every effort to conduct the arbitration in an expeditious and cost-effective manner" applies to both arbitrators and the parties. The arbitral tribunal can then take into account whether the parties conducted the arbitration in an expeditious and cost-effective manner (see Article 38(5), which was introduced in the 2012 version of the Rules). Annex IV of the Rules contains examples of case management technics that can be used to control time and costs. More detailed recommendations can be found in the ICC Commission's report "Controlling Time and Costs in Arbitration"[6] published in 2007.

As early as 1990, ICC introduced the Pre-Arbitral Referee rules, which were the first to offer urgent arbitral relief for before the constitution of the arbitral tribunal. While the Pre-Arbitral Referee relief was available on an opt-in basis, the Emergency Arbitrator procedure included in Appendix V of the 2012 Rules were made applicable to all cases where the arbitration agreement was entered into after 1 January 2012, unless the parties exclude their application. The ICC Emergency Arbitrator rules became the most widely used emergency arbitration rules, with almost 100 Emergency Arbitrator orders rendered by end of 2018.

One of key amendments of the 2017 Rules was the introduction of an expedited procedure providing for a streamlined arbitration with a reduced scale of fees. The Expedited Procedure is automatically applicable in cases where the amount in dispute does not exceed US$ 2 million, unless the parties de-

[6] https://iccwbo.org/publication/icc-arbitration-commission-report-on-techniques-for-controlling-time-and-costs-in-arbitration/

Case management team, CEE and CIS region, in the order from the left: Veronika Pavlovskaya, Sergii Melnyk, Jennifer Debruyne, Ivana Blagojevic, Maria Hauser-Morel and Tomasch Kubiak

cide to opt out. It will apply only to arbitration agreements concluded after 1 March 2017. At any stage, the Court may decide that the Expedited Procedure does not apply, for instance where this is no longer appropriate in light of the developments in the case. One of the important features of the Expedited Procedure Rules is that the ICC Court may appoint a sole arbitrator, even if the arbitration agreement provides otherwise.

In this procedure some steps were and the arbitral tribunal has more power to limit the number of submissions and decide on the need to hold a hearing. Moreover, there are no Terms of Reference.

This procedure is automatically applicable in cases where the amount in dispute does not exceed US$ 2 million, unless the parties decide to opt out. It applies to arbitration agreements concluded after 1 March 2017. The expedited procedure is also available on an opt-in basis for higher-value cases.

These provisions became popular quickly after their introduction in March 2017 and by end of 2018, more than 160 requests to opt-in were received by the ICC, with 35 of these resulting in an agreement to opt-in. Moreover, in 17 cases the provisions applied by virtue of the Rules. Together, more than 50 cases were administered as ICC Expedited Provisions procedures before end of 2018 involving around involving 90 parties from 41 countries, including Central and Eastern Europe. 18 final awards were rendered in the timeframe of 6 months with the exception of 2 cases with delays of 1 and 3 weeks respectively, and the Case Management Conference prescribed to be held within 15 days was held on average within 16 days, taking into account the parties' agreement to suspend it in a couple of cases.

Finally, the Court takes into account the tribunal's efficiency when fixing the fees of arbitrators. Similar to Article 38(5) referred to above, which gives the arbitral tribunal the possibility to take into account whether the parties contributed to the expeditious and cost-effective resolution of the matter when deciding on the costs, when setting the arbitrators' fees, the Court shall take into consideration the efficiency of the arbitral tribunal and the timeliness of the submission of the draft award[7].

The Court has applied the policy of fee reduc-

[7] *See para. 118 et seq. of the Note to the parties and arbitral tribunals on the conduct of Arbitration under the ICC Rules of Arbitration (hereunder the "Note"), https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf*

tion in case of delays for many years. However, this practice has been formalized in 2016[8], when the ICC set clear information as to the costs consequences of unjustified delays in submitting draft awards to the ICC. For instance, if a draft award is submitted more than 10 months after the last substantive hearing or written submissions, the fees could be reduced by 20% and more. The Court has been consistent in reducing arbitrators' fees in case of delays. As a result of this practice, there have been significantly less long delays in submitting draft awards to the ICC.

Transparency

In order to increase the transparency now the Court shall provide reasoning for a number of its decisions upon the request of the parties: (i) a decision made on the challenge of an arbitrator pursuant to Article 14; (ii) a decision to initiate replacement proceedings and subsequently to replace an arbitrator pursuant to Article 15(2); and (iii) decisions pursuant to Articles 6(4) and 10. 15.

Any request for the communication of reasons must be made in advance of the decision in respect of which reasons are sought[9]. While the Court has full discretion to accept or reject a request for communication of reasons, so far, it has never refused to provide reasons.

Also in the spirit of transparency, the Court publishes on the ICC website the following information: (i) the names of the arbitrators, (ii) their nationality, (iii) their role within a tribunal, (iv) the method of their appointment, and (v) whether the arbitration is pending or closed. The arbitration reference number and the names of the parties and of their counsel will not be published. The parties may object to the publication of this information.

For arbitrations registered as from 1 July 2019, the Court will also publish the sector of industry involved and counsel representing the parties in the case.[10]

Gender balance and diversity

Another landmark in the last few years of ICC has been the increase of diversity within arbitral tribunals: diversity in terms of nationality, gender and age representation.

The same diversity may be observed within the parties: the number of the party nationalities reached 142 in 2017.

Arbitrators appointed and confirmed by the Court in 2017 represented 85 different nationalities. The number of female arbitrators rose from 7.2% in 2010 to 16,7% in 2017. The percentage of female arbitrators is considerably higher when the ICC Court makes (for the Court appointments: in 2017 the percentage was 30% of all appointments made. The number of appointments of arbitrators from the CEE region has also risen from 12.2% in 2010 to 31% in 2017[11].

The average age of arbitrators confirmed or appointed in 2017 was 56 years, while arbitrators appointed by the Court (directly or following a proposal by a National Committee) were, in average, five years younger. In addition, 8 % of the arbitrators confirmed or appointed by the Court were below 40.

These numbers show the work done by the ICC for promotion and support diversity in arbitration. In this regard, ICC Young Arbitrators Forum (ICC YAF) plays an important role in promoting diversity in arbitration, by organizing numerous educational and professional events all over the world, where young practitioners can share their experience. YAF events took place in Bratislava, Budapest, Cracow, Kiev, Moscow, Prague or Warsaw. New YAF events in Vilnius and Minsk are scheduled to take place soon. Activity of the ICC YAF allows young practitioners to become visible and known in their jurisdictions.

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[8] *https://iccwbo.org/media-wall/news-speeches/icc-court-announces-new-policies-to-foster-transparency-and-ensure-greater-efficiency/*

[9] *See para. 14 – 16 of the Note, op.cit.*

[10] *See para. 36 of the Note, op.cit.*

[11] *https://cdn.iccwbo.org/content/uploads/sites/3/2018/07/2017-icc-dispute-resolution-statistics.pdf*

ICC expertise for quality of awards

The distinctive feature of the ICC arbitration is scrutiny of the draft awards, i.e., their review before they are signed by arbitrators and notified to the parties. Scrutiny of the awards was provided already in 1927 version of the Rules in relation to the form and extended to the merits in 1933[12].

Scrutiny of the award is aimed to enhance the quality and enforceability of awards. Pursuant to Art. 34 of the Rules, "the Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to the points of substance"[13].

Within the scrutiny the ICC Court makes the (i) formal, (ii) quasi/possibly substantial, and (iii) substantial comments[14]. For example, formal comments relate to citation of the arbitration and applicable law clauses, description of the procedural history, spelling, dates and syntax. Quasi substantial comments are connected, inter alia, with the facts whether award deals with all issues in Terms of Reference, whether the reasoning is sufficient, whether the interest claims are addressed, reasoned and decided. And substantial comments relate to the application of the correct provisions of law, quality and completeness of legal analysis, consistency between factual findings and application of the law.

When scrutinizing awards, the Court also makes sure that they comply with any local regulations or relevant public policy rules. For instance, a tribunal seated in Russia deciding on jurisdictional objections in an M&A dispute was invited to consider the specific legal regulations in this regard and case law regarding the arbitrability of corporate disputes. The Secretariat's and the Court's knowledge of the local regulations and public policy in the region allow the Court to draw the attention of the tribunal to these peculiarities and to reflect them in the award. These actions can sometimes "save" an award before it has been rendered and maintain its enforceability under the national legislation.

The ICC's centenary is a good moment to celebrate past achievements and remind us that that, as ICC has done, any leading arbitral institution has to constantly evolve and innovate in order to remain able to remain to high quality services responding to its users' needs.

ICC Centre for ADR

The International Centre for ADR is a special division at the ICC which deals with these procedures, each of them has its own set of procedural rules. All ICC Mediations are administered by the ICC Centre for ADR according to the 2014 ICC Mediation Rules[15]. Just as the Court is the only body empowered to administer proceedings under the ICC Rules of Arbitration, the Centre is the only body entitled to administer proceedings under the ICC Mediation Rules.

ICC ADR Centre can also administer and supervise expert proceedings starting from proposal of an expert and their appointment to scrutiny of the draft expert report. In these proceedings ICC is guided by 2015 ICC Expert Rules[16]. Parties might wish to obtain an expert opinion on an issue of importance in the ordinary course of business or in the arbitration, or they might want to call upon a neutral to facilitate their negotiations and act as a mediator or member of the dispute resolution board. The ADR Centre has a large pole of experts from different regions with expertise in the very specific spheres, and communicates with the National Committees on day-to-day basis looking for new experts.

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[12] *M. Hauser-Morel, Duty to Provide Reasoning under the ICC Rules – Recent Experience (pp. 355-364) – The Challenges and the Future of Commercial and Investment Arbitration. – Court of Arbitration LEWIATAN. - Warsaw, 2015.*

[13] *2017 Rules, Art. 34.*

[14] *S. Greenberg, Arbitral Award Scrutiny under Scrutiny: An Assessment – Chapter 6 – Arbitral Institutions Under Scrutiny: ASA Special Series No. 40.*

[15] https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf

[16] https://cdn.iccwbo.org/content/uploads/sites/3/2015/01/2015-ICC-Expert-Rules-ENGLISH-version-1.pdf

FRANCE

Eric Borysewicz ***Karim Boulmelh*** ***Marlena Harutyunyan***

This article includes material from the Baker McKenzie International Arbitration Yearbook 2017-2018 and update for the corresponding Yearbook in 2019. The text for 2019 was drafted with the assistance of Maxime Chabin, who is currently a trainee in the International arbitration and Litigation practice group in Paris.

Legislation

France has enacted a new statute named "Justice of the 21st Century," reforming many provisions of French legislation, among which a redrafting of the provisions of Article 2061 of the French Civil Code which defines the regime applicable to the validity and enforceability of arbitration clauses in the domestic legal order. The reform has introduced two main changes related to (i) the notion of acceptance of arbitration clauses and (ii) the unenforceability of arbitration clauses against consumers.

The new provisions of Article 2061 provide that an *"arbitration clause must be accepted by the party against whom it is opposed, unless the latter was subrogated in the rights and obligations of the party who initially accepted it."*

The former requirement of validity in contracts entered between professionals, which was applicable under the previous version of Article 2061, is therefore now substituted with the notion of acceptance of the arbitration clause. This semantic shift means that, like any other contractual clauses, acceptance of the arbitration clause by the party against whom it is opposed is the criteria to be considered and verified. The new wording also implies that the validity of the arbitration clause as a matter of principle — regardless of whether it was entered into *"in the context of a professional activity,"* as provided by the former Article 2061 — is *"so significant that it is no longer useful to affirm it."* From now on, judges and practitioners are therefore invited to verify that the arbitration clause was duly accepted by the parties to an agreement.

The scope of the arbitration clause in domestic law is thus extended; in other words, recourse to domestic arbitration is no longer limited to commercial agreements and can now be stipulated in civil contracts and agreements which have a dual nature (civil and commercial). The parliamentary discussions that led to the adoption of the new Statute mention, as examples, various types of contracts for which the arbitrability of the disputes are now admitted by virtue of law: lease and insurance agreements, co-ownership regulations and joint ownership agreements and articles of associations of non-trading property companies may now be submitted to arbitration under the new regime of the revised Article 2061. More broadly, any contract entered into between two individuals can include an arbitration clause, provided this clause was accepted by the party to whom it is opposed. However, to be enforceable, it must be agreed as part of a professional activity.

Indeed, the second paragraph of the revised Article 2061 specifies that: *"When a party did not enter*

into the contract in the context of its professional activity, the clause is unenforceable against it."

Here again, the French legislature has replaced the notion of validity with the condition of enforceability of the arbitration clause. This change suggests that when the clause has not been agreed in the framework of a professional activity, namely a consumer contract, the professional cannot enforce the arbitration clause against a non- professional or a consumer. The overview of the amendment which led to the final adoption of the text confirms this interpretation. In particular, the amendment specifies that the arbitration clause should be optional for a consumer and that the consumer should have the choice, either to appear before the arbitrator, or before the national courts.

Therefore, the consumer will benefit from an "option of jurisdiction:" either by initiating arbitration proceedings, or filing a claim before the national courts. However, this option is available in domestic arbitration only, since the former Article 2061 has been considered by the French courts as inapplicable to international arbitration due to the restrictions it used to institute on the arbitrability of certain types of agreements (consumer agreements, employment agreements, etc.), despite the fact that Article 2061 does not specifically distinguish between domestic and international arbitration.

The new wording of Article 2061 constitutes a substantial alignment in domestic arbitration of solutions that have been applied for a long time now in international arbitration. For instance, an arbitration clause in an international employment agreement is ruled as valid in principle but unenforceable against the employee, unless the employee opts for an arbitration proceeding to settle her/his dispute with the employer after the dispute arises. Some scholars believe that this solution can similarly be applied in domestic arbitration, thanks to the new wording of Article 2061.

This new Article 2061 of the Civil Code will apply to arbitration clauses entered into as from its entry into force, ie, 19 November 2016. Future French case law will provide an answer as to whether or not the new provision will apply domestically as liberally as the applicable rules in French international arbitration law.

Institutions, rules and infrastructure

The ICC Rules of Arbitration have been amended with the aim of further increasing the efficiency of ICC arbitration procedures. The amended Rules entered into force on 1 March 2017.

The expedited procedure (or fast-track procedure) appears to be the most substantial innovation in the revised ICC Rules of Arbitration.

All ICC arbitrations with a disputed amount up to USD 2 million will automatically be governed by the fast-track procedure, unless the parties decide to opt out of this provision in their arbitration agreement. The accelerated procedure can also be used when the amount in dispute is above the USD 2 million limit if the parties reach a mutual agreement to follow this provision.

Faster, as its name indicates, and more cost-efficient; this procedure does not lack audacity. The arbitrator is to issue the award within six

months of the date of signature of the terms of reference or of the notification being sent to the arbitral tribunal of the approval of the terms of reference by the Court (this mechanism is designed to prevent dilatory tactics from parties to delay the beginning of the proceedings by deliberately refraining from signing the terms of reference). The six-month time limit can be extended by the ICC International Court of Arbitration (the "ICC Court") only if it considers such extension is justified. The fast-track procedure costs are approximately 20% less than the standard procedure.

Finally, the ICC Court is empowered, notwithstanding the terms of the arbitration clause agreed upon by the parties, to appoint a sole arbitrator. Moreover, after the constitution of the arbitral tribunal, the parties cannot make any additional claims unless expressly allowed by the tribunal itself. In addition, the arbitral tribunal can adopt any procedural measures it considers appropriate and decide to issue the award based on documents submitted by the parties, without a hearing. When a hearing is held, the tribunal can conduct it through audio or video-conference.

A few other provisions were also introduced concerning the standard procedure. For instance, the time limit for setting the terms of reference is now reduced from two to one month. In addition, after the signature of the terms of reference or the Court's approval, no additional request can be formed.

Last but not least, registration fees of the arbitration, which are to be paid by a party filing a request for arbitration, have been increased to USD 5,000.

CASES

The obligation on arbitrators to disclose: the exception not to disclose a "notorious fact" applies only to facts which occurred before the beginning of arbitral proceedings.

In a decision dated 27 March 2018[1], the Paris Court of Appeal held that the arbitral tribunal was wrongly constituted on the ground that one of the arbitrators failed to disclose after the arbitral proceedings have been initiated, a fact that he considered as "notorious".

In the case at hand, ICC arbitration proceedings were brought by Saad Buzwair Automotive ("SBA"), a distribution company incorporated under Qatari law against Audi Volkswagen Middle East Fze ("Volkswagen"), a company incorporated under Emirati law, when the latter terminated two commercial agreements entered into between the parties. Paris was elected as the seat of arbitration by the parties.

The arbitral tribunal, composed of a panel of three arbitrators, ruled in favor of Volkswagen in 2016.

SBA brought an action to set aside the award before the Paris Court of Appeal, alleging that the arbitral tribunal was wrongfully constituted since one of the arbitrators failed to disclose all the circumstances likely to affect his independence and impartiality. The reasoning was based on the following arguments:

Before accepting his appointment, the arbitrator in question indicated to the ICC in 2013 that to his knowledge and after having duly inquired, there were no facts or circumstances, past or present, likely to affect his independence in the mind of one of the parties.

However, the arbitrator in question was a partner in a law firm which, according to the 2010/2011 edition of a famous German lawyers' directory, had represented a company of the Volkswagen group in another dispute (namely, the Porsche company).

Moreover, the same client, Porsche, was also mentioned as a client of the same firm in which the arbitrator was still a partner according to the 2015/2016 edition of the above-mentioned directory.

Volkswagen argued in its turn that the mention made to Porsche in the 2015/2016 edition was made by mistake; however, the Paris court of appeal considered that Volkswagen failed to establish said mistake.

This decision attracted a lot of attention amongst arbitration practitioners because the Paris court of appeal has provided a valuable guide as to the methodology under which a *"notorious"* fact should be disclosed by the arbitrators.

Before the beginning of arbitral proceedings, the parties must inquire about the arbitrators, who have no obligation to disclose "notorious". This was the case with regard to the representation of Porsche by the arbitrator's law firm as displayed in the 2010/2011 edition of the German lawyers' directory.

However, and this is the particular interest of this decision, the Court of Appeal considered that the arbitrator had to reveal the fact that Porsche had become again a major client of the law firm in which he was a partner, as indicated in the 2015/2016 edition of the directory. Although this fact could be considered as a "notorious" fact, the Paris court of appeal held that the parties no longer had an obligation to continue inquiring about the arbitrators once the arbitration proceedings had been initiated. The award was consequently set aside.

Indeed, under French law[2], the arbitrators are required to disclose any circumstances which are likely to affect their independence and impartiality. However, French case law traditionally considers that the arbitrators do not have to disclose any information that is publicly available to the parties, which is

[1] *Paris Court of Appeal, 27 March 2018, 16/09386*

[2] *Article 1456 paragraph 2 of the French code of civil proceedings applicable to international arbitration under article 1506 of the same code*

known as the exception of "notorious facts" (*"faits notoires"* in French).

In its decision of 27 March 2018, the Paris Court of Appeal appears to provide an exception to the exception : the **"notorious facts"** must be disclosed by the arbitrators if they occur after the beginning of the arbitration proceedings.

This decision could be the first of a new line of case law. Particular attention should, therefore, be paid to the future decisions regarding the obligation of the arbitrators to disclose notorious facts. In particular, the position of the French Supreme Court is awaited.

The French mechanism of a repurchase of disputed debts applicable to international arbitral awards

By two decisions rendered on the same day[3], which have drawn considerable comment, the French Supreme Court held that the mechanism known as "repurchase of a disputed debt" ("retrait litigieux") applies to international arbitral awards, whether rendered in France or abroad.

A "Retrait litiguex" is a mechanism whereby a debtor repurchases his/her disputed debt at the price at which the initial creditor sold it to a third party

In the case at hand, two contracts were entered into between the Democratic Republic of Congo and a company named SNEL for the construction and financing of a high-voltage power line. A dispute arose and two ICC arbitral tribunals were constituted, one in Paris and the other one in Zurich. The two awards ordered the Democratic Republic of Congo to pay to SNEL an amount of USD 11,725,844.96 and an amount of USD 18,430,555.47.

However, in the meantime, while both arbitrations were still ongoing, SNEL had assigned its two disputed claims to a third company, Energoinvest, for a total amount of USD 3,618,232.28.

The Democratic Republic of Congo brought an action to set aside the award rendered in Paris and appealed against the enforcement order of the award rendered in Zurich. It has also requested the Paris court of appeal to apply Article 1699 of the Civil code allowing to repurchase its disputed claim at the amount of USD 3,618,232.28, i.e. a total amount of USD 30,156,400.30 under both awards.

In what is thought to be the first decision of its kind, the Paris Court of Appeal had to rule on the application of the repurchase of a disputed debt in the course of an action to set aside an international arbitration award. The Court of Appeal dismissed the claim of the Democratic Republic of Congo on the grounds that it did not have the power to apply the mechanism of "retrait litigieux" in the course of an action to set aside the arbitral award.

According to the court of appeal, only five cases allow the award to be set aside and the "retrait litigieux" is not among them. In addition, an action to set aside the award does not allow the court to review the arbitral award on its merits.

The French Supreme Court, however, disagreed with the Court of Appeal and considered that application of the repurchase of a disputed debts does not imply a review of the arbitral award but its enforcement and should, therefore, be allowed.

The implications of this decision are quite important:

As a consequence of the application of the repurchase of the disputed debt, the awards rendered by the two arbitral tribunals will never be applied. Indeed, the Democratic Republic of Congo may buy back its debt from EnergoInvest for an amount of USD 3,618,232.28. i.e. the purchase price of the disputed claim from SNEL, rather than paying a total amount of USD 30,156,400.30 under the two arbitral awards.

Moreover, the decision raises questions regarding the international scope of its consequences. Indeed, the French Supreme Court issued the decision although the second award was rendered in Zurich and the dispute governed by Swiss law, which does not include such a specific mechanism. As one author points out[4], the mechanism could thus be used as a means to hinder enforcement of arbitral awards abroad by simply enforcing the French decision allowing the mechanism of the "retrait litigieux".

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[3] *Cour de Cassation, 28 February 2018, n° 16-22.112 and n° 16-22.126*

[4] *Philippe PINSOLLE, Journal du droit international (Clunet) n° 4, October 2018, 19.*

The consideration of foreign police laws in the judicial review of an arbitral award

A decision rendered by the Paris Court of Appeal on 16 January 2018[5] has been one of the noteworthy decisions of the past year in France, particularly with regards to the possibility to set aside an arbitral award rendered in contradiction with foreign public policy laws.

In the case at hand, a Laotian company, Dao Lao had been constituted between a Russian company, MK group, owner of 70% of capital and another Laotian company, Lao Geo Consultant, owner of the remaining 30% of shares in order to operate a gold mine in Laos.

In 2010, MK group assigned 60% of the shares of Dao Lao to Onix,a Ukrainian company. In 2011, a memorandum of understanding was signed between MK Group, Onyx, Lao Geo Consultant and the Laotian Ministry of Natural Resources confirming the assignment previously agreed between by MK Group and Onyx.

In 2014, MK Group initiated ICC arbitration proceedings considering that the shares in Dao Lao that it detained have not been effectively transferred to Onyx since the latter failed to provide the agreed financing. The issue in dispute was thus concerned to determine whether or not the financing to be provided by Onyx was considered by the parties as a condition precedent. Indeed, a discrepancy existed between the Laotian and the English versions of the 2011 Memorandum of Understanding: according to the Laotian version, the financing was a condition precedent to the transfer of the shares, whereas the English version did not mention it.

In its award rendered in Paris, the arbitral tribunal ruled that, since the 2010 shareholder agreement did not provide for any condition precedent, the Ukrainian company did own the disputed shares of the Laotian company.

An action to set aside the arbitral award was filed by MK Group with the Paris Court of Appeal. The court considered that there had been a violation of international public order in the present case, since the difference between the Laotian and English versions was intended to mislead the Laotian Ministry of Natural Resources in order to obtain administrative authorization for the transfer of shares in the Laotian company. Indeed, the Laotian legislation provided for the exploitation of its natural resources to be subject to specific prior administrative authorization. To take into account this foreign legislation, the Court of Appeal relied on the existence of a Resolution of the General Assembly of the United Nations dated 14 December 1962 expressing an international consensus on the right of States to make the exploitation of natural resources located on national territory subject to prior authorizations. The court concluded that there was, therefore, a violation of international public policy, which is one of the five cases of Article 1520 of the French code of civil proceedings[6] entitling the court of appeal to set aside the arbitral award.

With this ruling, the court of appeal provided a full review of the compliance of the award with the international public policy rules, whereas previously, it only applied a "minimalist" control of this requirement.

In addition, while controlling the compliance of the award to international public policy rules, the Paris court of appeal takes into account for the first time to our knowledge a foreign public policy law.

It should be noted that under French case law, an award may not be set aside on the grounds of a mere violation of foreign public policy law. It may, however, be the case if the foreign law is part of the international public policy, as reflected here by the 1962 United Nations General Assembly resolution on the exploitation of natural resources.

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[5] Paris Court of Appeal, 16 January 2018, 15/21703

[6] Article 1520 of the French Code of Civil Procedure:
"The action for annulment is only available if:
1° The arbitral tribunal has wrongly declared itself competent or incompetent; or
2° The arbitral tribunal was improperly constituted; or
3° The arbitral tribunal has ruled without complying with the mission entrusted to it; or
4° The principle of contradiction has not been respected; or
5° The recognition or enforcement of the award is contrary to international public policy."
Translated from French (emphasis added)

PARIS

France

Year:	Area:	Population:	The highest point:
III century B.C.	*105,4 km²*	*2 206 488 people*	*Eiffel Tower, height 324 m*

Sight

The Louvre

The Louvre is considered to be one of the largest, oldest and most famous art museums in the world. For the first time visits were allowed on November 8th, 1793, when the French Revolution was held. Then visitors could see the exposition, consisting of 537 paintings. Active replenishment of the exposition took place during the reign of Napoleon.

Today the collections number more than 300 thousand exhibits, but only 35 thousand are shown in the halls.

Arbitration Institute

International Court of Arbitration at the International Chamber of Commerce (ICC)

FRENCH CASE LAW ON ARBITRATION: IN-DEPTH REVIEW

Alice Clavière-Schiele

Edwige Nathan

Paola Damé

Ekaterina Grivnova

Justine Touzet

Paris is one of the major centres and safest seats for international arbitration. Arbitration-friendly French law stems from the progressive legal framework in place since 2011. Local courts support the development of arbitration by their valuable pro-arbitration case law.

Paris Baby Arbitration is therefore delighted to share with the readers of Arbitration.ru its selection of the recent remarkable decisions of French courts prepared by volunteer students and young professionals.

The selection presents the multi-facet approach of French State courts towards arbitration. First and foremost, it is the approach of the minimal interference. In presence of an arbitration clause, French courts will decline their jurisdiction unless the clause is manifestly void and inapplicable (Cour de cassation, 4 July 2018, Banque Delubac et Cie v. Agrarhandel GmbH and Banque Delubac et Cie v. Werner Tiernahrung GmbH, nos 17-13067 and 17-13069). One of the rare examples of such inapplicability concerns a dispute about the reimbursement of legal costs incurred during enforcement proceedings of an arbitration award (Paris Court of Appeal, 13 November 2018, Shackleton and associated Limited v. brothers Al Shamsi, no. 16-16608).

On the other hand, French courts will prevent the abuse of right to access to arbitration by applying the estoppel principle (Cour de cassation, 28 February 2018, First Smart Asia Ltd v. Cosfidel premium, no. 16-27823), holding arbitrators liable for the misuse of their powers (Cour de Cassation, 28 March 2018, Mr. Y. v. Jean-François X., no. 15-16909) or declaring inadmissible the appeals against decisions of arbitration institutions (Paris Court of Appeal, 13 November 2018, Heli-Union v. Airbus Helicopters, no. 16-25942).

In the same way, during annulment or enforcement proceedings, French courts do not hesitate to reject motions to set aside the award if the motion at stake concerns only admissibility of the claims and not the jurisdiction of the arbitral tribunal (Paris Court of Appeal, 16 January 2018, Republic of Iraq v. Fincantieri Cantieri Navali Italian, no. 16/05996 and Cour de cassation, 10 January 2018, Shell, Jnah Development v. Marriott, no. 16-21391).

The courts will pay close attention to the parties' agreement (Paris Court of Appeal, 11 September 2018, Mr. D. B. v. Subway International BV, no. 16/19913), including as to how it describes the mission of arbitrators (Cour de cassation, 24 May 2018, Mr. and Mrs. X v. Toulouse Investment Company Leroux, no. 17-18796). Such a detailed analysis of the parties' consent is equally applied when annulment proceedings concern international investment awards (Paris Court of Appeal, 29 January 2019, Venezuela v. Rusoro Mining Limited, no. 16/20822 and Cour de cassation, 13 February 2019, Venezuela v. Mr. Serafin G. Armas et Mrs Karina Garcia G., no. 17-25851).

COUR DE CASSATION

Cour de cassation, 10 January 2018, Shell, Jnah Development v. Marriott, no. 16-21391

On 10 January 2018, the Cour de cassation confirms that the power of the representative of the company to initiate arbitration concerns admissibility of claims and not the jurisdiction of the tribunal.

Jnah entered into a hotel operating agreement with Marriott. The agreement contained an ICC arbitration clause. The dispute arose. Jnah applied for arbitration.

During the arbitration proceedings, a change of ownership of the claimant (Jnah) took place. The former shareholders gave the transferee a power of attorney to act on behalf of the company in the ongoing proceedings.

Subsequently, the same representative brought another arbitration under the same power of attorney. The tribunal declined its jurisdiction because the power of attorney was only limited to the first arbitration. The representative brought an action for annulment of the award.

The court of appeal dismissed the appeal. It concluded that the arbitral tribunal had ruled on a question relating not to the scope of its jurisdiction, but to the admissibility of the request for arbitration, which could not be challenged in the context of an action for annulment.

The Cour de cassation confirms the previous judgement.

Cour de cassation, 28 February 2018, First Smart Asia Ltd v. Cosfidel premium, no. 16-27823

On 28 February 2018, the Cour de cassation rules that a party who adopted a contradictory behaviour throughout proceedings can be considered as having waived its rights under arbitration clause.

Cosfidel ordered goods from Fang's Bag who, for reasons of urgency, shipped them by air freight. Refusing to cover this additional cost, Cosfidel deducted the amount of these transport costs from the invoices issued by First Smart Asia, on behalf of the supplier, for other orders.

A dispute linked to these invoices arose and Cosfidel sued First Smart Asia before the Commercial Court. The suit, due to lack of due diligence by Cosfidel, was canceled.

Cosfidel the applied to the ICC Court on the basis of the arbitration clause stipulated in the general conditions of purchase. The arbitration procedure was withdrawn for non-payment of fees by First Smart Asia and Fang's Bag.

Smart Asia then restarted the suit to obtain the payment of the balance of the invoices. Cosfidel challenged the Court's jurisdiction based on the arbitration clause.

The Court of Appeal held that Cosfidel did not show any disloyalty or contradictory behaviour by first seizing the state judge, changing its mind by failing to comply with the due diligence requirement and then seizing the arbitral institution. The Court accepted the jurisdictional plea. Smart Asia appealed before the Cour de cassation, invoking the principle of estoppel.

The Cour de cassation upholds the appeal. It states that, in view of the facts, Cosfidel had adopted a contradictory behaviour to the detriment of First Asia and Fang's Bag. Hence, the Court of Appeal, which did not find the behaviour contradictory despite the facts, violated the principle of estoppel.

Cour de Cassation, 28 March 2018, Mr. Y. v. Jean-François X., no. 15-16909

On 28 March 2018, the Cour de cassation confirms that the arbitrator can be held liable for a misuse of the arbitrator's power if his/her fault caused damage.

Royal Annecy and Elitec entered into an agreement stating that any disputes would be submitted to the mediation of Mr. Y. In case of disagreement over the mediation, the parties were supposed to constitute a "college arbitral", chaired by Mr. Y.

Following a dispute, the clause was enforced and Mr. Y. rendered five awards. The awards were subsequently quashed on the ground that the clause at stake were not an arbitration clause.

Royal Annecy brought a liability action against Mr. Y. and a representative of the opposing party. It pretended, inter alia, that Mr. Y. misused its arbitrator's power in order to allocate to the opposing party an overwhelming sum of money.

The court of appeal upheld the judgment ordering Mr. Y. to pay various sums and rejected Mr. Y.'s claims as for the payment of his arbitrator's fees.

It also found that Mr. Y. could not be unaware that it was impossible for him to render new awards after the annulment of his decisions based on an inexistent arbitration clause. His behaviour forced Royal Annecy to initiate various expensive procedures.

Mr. Y. appealed. He argued that the arbitrator's personal liability can only be incurred for deceit, fraud or gross negligence. In this case, these omissions were allegedly not established. He also claimed that annulled awards, because they were unenforceable, did not cause any losses. Thus, neither the fault nor the link has been established.

The Cour de Cassation dismisses the appeal. It finds that the conclusions of the court of appeal are sufficient to establish the fault and the causal link between that fault and prejudice. It therefore correctly deduced that the tortious liability of the arbitrator must be established on the basis of the Civil Code.

Cour de cassation, 24 May 2018, Mr. and Mrs. X v. Toulouse Investment Company Leroux, no. 17-18796

On 24 May 2018, the Cour de cassation rules that the arbitral tribunal that received amiable compositeur powers cannot rule in law without any further explication.

By an agreement, containing an arbitration clause, Mr. and Mrs. X undertook to sell to Toulouse Investment Company Leroux 100% of the shares of the Carrosserie peinture system company. The agreement contained an arbitration clause providing for the amiable compositeur powers of the arbitral tribunal.

A dispute arose over the execution of this agreement. The arbitral award was rendered and subsequently annulled by a court of appeal which found that the arbitral tribunal had only ruled in law despite the obligation to rule as an amiable compositeur.

The Cour de cassation upholds the judgment. It states that, notwithstanding the reference to amiable composition in the operative part of the award, its reasoning reveals that, even in the absence of any textual reference to a legal provision, the arbitral tribunal ruled in law. The Court of Appeal therefore correctly deduced that the arbitral tribunal had not complied with its mission.

Consequently, the Court dismisses the appeal.

Cour de cassation, 4 July 2018, Banque Delubac et Cie v. Agrarhandel GmbH and Banque Delubac et Cie v. Werner Tiernahrung GmbH, nos 17-13067 and 17-13069

On 4 July 2018, by two decisions, the Cour de Cassation confirms that the tort nature of a claim does not render the invoked arbitration clause manifestly void or inapplicable.

In both cases, the French companies Tiwy and Etablissements Laboulet traded with German companies, Agrarhandel GmbH and Werner Tiernahrung GmbH respectively. Each sales contract contained an arbitration clause.

The French companies transferred invoices issued to each German company to the Delubac and

Cie bank ("Bank") under factoring agreements. These invoices remained unpaid. The Bank therefore sued the German companies for damages pretending their disloyal behaviour [tort action under French law]. Each company raised a jurisdictional plea, invoking the arbitration clauses inserted in the sales contracts.

The Court of Appeal held that the commercial court had no jurisdiction. The Bank consequently appealed to the Cour de Cassation. The Bank claimed that the arbitration clauses were inapplicable to the tort action based on the disloyal behaviour of the debtor.

The Cour de Cassation upholds the judgement. It rules that the transfer of invoices constitutes a sufficient link between the sales and the factoring agreements. It therefore dismisses the Bank's appeal, deciding that the tortious character of the action is not sufficient, in itself, for the arbitration clause to be manifestly inapplicable.

Cour de cassation, 19 December 2018, J&P Avax v. Tecnimont, no. 16-18349

On 19 December 2018, the Cour de cassation rules that the information accessible on the Internet could have been found within the time limit provided for a challenge. Consequently, there is no reason to extend this time limit.

On 23 November 1998, the Italian company Tecnimont concluded a subcontract with the Greek company J & P Avax ("Avax") for the construction of a propylene plant in Thessaloniki, which included an arbitration clause. A dispute arose between the parties and Tecnimont initiated arbitration proceedings under the auspices of ICC. ICC Arbitration Rules provide that for a challenge to be admissible, it must be submitted by a party within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based.

Avax's challenge against the president of the arbitral tribunal was dismissed as time-barred. Avax brought an action seeking the annulment of the award, claiming that the president of the tribunal had breached his obligation to disclose and his duty of independence. The Court of Appeal upheld the award. Avax appealed.

The Cour de cassation dismisses the appeal. It notes that the facts upon which the challenge is based are taken from a website. They are therefore public and easily accessible. This research could have been carried out on the day when the arbitrator accepted his mission. Accordingly, the challenge was late because it was filed more than a month after Avax had received the information that would have altered its confidence in the president of the arbitral tribunal. Consequently, Avax was no longer entitled to invoke, in support of the action for annulment of the award, the facts on which the challenge was based.

Cour de cassation, 13 February 2019, Venezuela v. Mr. Serafin G. Armas and Mrs Karina Garcia G., no. 17-25851

On 13 February 2019, the Cour de cassation rules that the international investment award cannot be annulled only partially, if the applicable BIT requires that criteria of nationality of the investor and of the existence of an investment to be met cumulatively.

Mr. G. Armas and his daughter, Ms. Garcia G. ("Family G.") acquired, in 2001 and 2006, the shares of two Venezuelan companies, Transporte Dole and Alimentos Frisa.

In 2012, the Family G. initiated arbitration proceedings against the Bolivarian Republic of Venezuela on the basis of the bilateral investment treaty ("BIT") concluded between Spain and Venezuela. The award on jurisdiction rendered in Paris was partially annulled at the request of Venezuela. The Court of Appeal set aside the part of the award deciding that the disputed assets were investments within the meaning of the BIT. Venezuela appealed.

Family G. first argue that the appeal is inadmissible on the basis of the principle of estoppel, as the Bolivarian Republic of Venezuela applied to the arbitral tribunal for a new award on jurisdiction.

The Cour de cassation declares the appeal admissible. The Family G. requested the arbitral tribunal to hear them on the effects and scope of the partial annulment of the award. The Bolivarian Republic of

Venezuela replied while informing the arbitral tribunal of the existence of its appeal. It did therefore not contradict itself to the detriment of the Family G..

The Court reverses and annuls the judgment. The applicability of the BIT arbitration clause depends on the fulfilment of all the conditions required by the text, meaning the nationality of the investor and the existence of an investment. Thus, the Court of Appeal could not partially set aside the award.

COURTS OF APPEAL

Paris Court of Appeal, 16 January 2018, Republic of Iraq v. Fincantieri Cantieri Navali Italian, no. 16/05996

On 16 January 2018, the Paris Court of Appeal confirms that the embargo measures can constitute an inadmissibility ground for arbitration claims.

The Iraqi government and an Italian company concluded several ship construction and missiles delivery contracts. The execution of the contracts became impossible because of the UN sanctions imposed on the State of Iraq. The State of Iraq applied for arbitration.

The arbitral tribunal rejected the claims as inadmissible because of the embargo measures. The State of Iraq moved to set aside the award.

The Court rejects the motion. It rules that the award could not be subject to annulment as it dealt with the admissibility of the claims and not with jurisdiction.

The Court then confirms that the interpretation of UN's resolutions and EU's regulations made by the tribunal did not breach international public policy.

Paris Court of Appeal, 11 September 2018, Mr. D. B. v. Subway International BV, no. 16/19913

On 11 September 2018, the Paris Court of Appeal dismisses a motion to set aside an award rendered on the basis of an arbitration clause inserted in a standard Subway's franchise agreement.

Mr. D. B. concluded a franchise agreement with the Dutch company Subway International BV ("SIBV") to run a restaurant in Narbonne. This agreement provided for the application of Liechtenstein law and arbitration in New York.

By an award rendered in New York, the sole arbitrator declared the agreement terminated, ordered the franchisee to pay the franchisor the amount of unpaid royalties and advertising costs, ordered the return of the advertising material and prohibited the exploitation of the restaurant and of the identification elements of the Subway brand.

The President of the Paris High Court granted, by its order, the exequatur to the award. Mr. B. appealed the order.

First, Mr. B. asks the Court to stay the proceedings pending the decisions of the Marseille Commercial Court and the Paris Commercial Court. Before the Marseille Commercial Court Mr. B. asked to annul the arbitration clause laid down in the agreement. The Paris Commercial Court hears the request lodged by the Minister of the Economy and Finance to declare various clauses of the Subway franchise agreements, including the arbitration clause, null and void.

The Court dismisses this request. Regarding the proceedings brought before the Marseille Commercial Court, it rules that the question of the validity of the arbitration clause and, consequently, the one of the arbitrator's jurisdiction, can be examined a posteriori only by the Court.

On the other hand, the proceedings brought by the Minister of Economy and Finance against SIBV do not concern the validity of the arbitration clause but the choice of English as the language of arbitration. These proceedings, because of their pure domestic law nature, cannot impact the control of an award rendered abroad.

Second, Mr. B. states that the arbitration clause provides for arbitration in New York. Arbitration in New York entails excessive costs, depriving the franchisee of its right to bring an action.

Nevertheless, according to the Court, the significant inequality in the commercial relationship, assuming it is contrary to international public policy, has no effect on the validity of the arbitration clause because of its autonomy.

Then, the Court considers that the actual arbitration costs were not excessive. In addition, the procedure could have been conducted in writing without lawyers needed to go to New York. The argument of the deprivation of the right of access to the judge is dismissed as not substantiated.

Third, Mr. B. contends that the adversarial principle and the principle of equality of arms were violated as all the procedural documents notified to him had been drafted in English without translation.

The Court dismisses the plea. The fact that the arbitration was conducted in English, while it is not a party's mother tongue, cannot be regarded as an infringement of the mentioned principles, as soon as the English language was chosen by the parties to international commercial relationship and the reasonable procedural time-limits were established.

Fourth, Mr. B. contends that the principle of international public policy providing for contractual performance in good faith is violated. He alleges that the arbitration was conducted unfairly. In particular, the mediation did not take place prior to arbitration, and the debt settlement agreement was refused.

The Court rejects the plea. It rules that, under the pretext of an alleged breach of international public policy, Mr. B. seeks a review of the substance of the award, which is not allowed to the exequatur judge.

The Court thus confirms the order granting exequatur to the award.

Paris Court of Appeal, 13 November 2018, Shackleton and associated Limited v. brothers Al Shamsi (the "Consorts"), no. 16-16608

On 13 November 2018, the Paris Court of Appeal rules that the arbitration clause inserted in a legal services agreement is not applicable to the dispute about the costs incurred to the enforcement of an award rendered on the basis of this clause.

Shackleton law firm ("Shackleton") provided legal services to the Consorts on the basis of the engagement letter. The engagement letter contained an arbitration clause. An arbitral award rendered under this arbitration clause ordered the Consorts to pay the fees to Shackleton.

Shortly thereafter, Shackleton initiated a second arbitration claim under the same arbitration clause. It claimed all legal fees incurred before the French and English courts in attempt to enforce the first award. The firm considered that it had only obtained partial reimbursement of those fees pursuant to the decisions rendered by those courts. The sole arbitrator rejected its jurisdiction to rule over Shackleton's claim. Shackleton then brought an action for annulment before Paris Court of Appeal against this award.

Shackleton pretended that such an award constituted a denial of justice and violated international public policy. In particular, it considered that, by refusing to enforce the award, the Consorts committed a breach of contract and that the legal fees incurred constituted contractual compensation for damages. In addition, it advanced that the Consorts violated the letter of engagement since the arbitration clause referred to the ICC Arbitration Rules, that in turn provided for an obligation to enforce the award spontaneously.

The Court of Appeal dismisses the Shackleton's application. It holds that the legal costs incurred during enforcement stage cannot be considered as contractual compensation for damages. Consequently, the arbitrator rightly held that these costs did not arise from the arbitration clause but from the legal proceedings. He had therefore no jurisdiction to hear them.

In addition, the Court of Appeal considers that Shackleton has not been deprived of its right of access to a judge and that the principle of full compensation has been respected insofar as the State courts, before which the legal costs have been incurred, have ruled on these costs.

Paris Court of Appeal, 13 November 2018, Heli-Union v. Airbus Helicopters, no. 16-25942

On 13 November 2018, the Paris Court of Appeal rules that one is not entitled to appeal decisions of arbitral institutions interpreting their arbitration rules.

Heli-Union and Airbus Helicopters ("Airbus") concluded a sale contract for four helicopters.

The dispute arose. Heli-Union filed a request for

arbitration before the ICC Court. Airbus submitted a counterclaim. Airbus requested the ICC Court to fix separate advances on costs. The ICC Court fixed the advance on costs payable in equal shares by the claimant and the respondent but informed the parties that, if not paid, the separate advance on costs would be applicable. The deadline for payment having been expired, the Secretariat of the ICC Court requested the parties to pay separate advances on costs.

Heli-Union brought an action for the annulment of the decisions of the ICC Court before the Paris High Court. The Paris High Court rejected the request. Heli-Union appealed.

It first submitted that it was possible to bring an action against an association [ICC is a registered association under French law] concerning the application of an article of the bylaws of that association. On the merits, it considered that the advance on costs should be split equally.

The Paris Court of Appeal first considers the admissibility of the claim. In the sales agreement between the two companies, all disputes were referred to arbitration under the ICC Arbitration Rules. The arbitration clause does not express a will to be bound by the ICC's bylaws but a will to conclude a contract of organization of arbitration. The Court rules that the parties who entrust the administration of the arbitration proceedings to an institution waive the possibility to request a substitution of this institution by a State judge in the interpretation of the applicable arbitration rules. The parties may only bring an action for contractual liability against the arbitration institution once the award is rendered.

The Court decides that Heli-Union paid the advance on costs that it owed and was not deprived of justice. Therefore, its action, seeking the annulment of decisions made by the ICC Court, is inadmissible.

Paris Court of Appeal, 29 January 2019, Venezuela v. Rusoro Mining Limited, no. 16/20822

On 29 January 2019, the Paris Court of Appeal annulles an international investment award considering that the tribunal overpassed its ratione temporis jurisdiction having wrongly calculated the compensation for the expropriation.

Rusoro Mining Ltd ("Rusoro") is a Canadian company engaged in the acquisition, exploration and development of gold mines. (The chief executives of the company are Russian nationals, and the case was covered by Russian media – Pravo.ru[1], Novaya Gazeta[2] and other sources[3]). Between 2006 and 2008, Rusoro acquired 58 mining concessions in the Bolivarian Republic of Venezuela ("Venezuela").

In 2009-2010, Venezuela adopted various export and gold exchange restrictions. Subsequently, in 2011, the Venezuelan Government adopted a decree nationalizing Rusoro's gold mining activities.

In July 2012, Rusoro filed a request for arbitration with the International Centre for Settlement of Investment Disputes under the bilateral investment treaty between Canada and the Republic of Venezuela ("BIT").

By an award rendered in Paris, the arbitral tribunal ordered Venezuela to pay USD 966,500,000 for the expropriation of Rusoro's investment. Venezuela brought an action for annulment of this award.

First, Venezuela contends that the arbitral tribunal did not have jurisdiction to rule on the dispute, because amicable settlement had not been attempted.

The Court rejects the plea since it concerns the admissibility of the claims and not the jurisdiction of the tribunal. Thus, the plea cannot be considered in the framework of the action for annulment of the award, according to Article 1520 of the French Code of Civil Procedure.

Second, Venezuela argues that the tribunal did not have jurisdiction because the harm claimed by Rusoro was unrelated to an alleged violation of the

[1] https://pravo.ru/interpravo/news/view/75253/
[2] https://www.novayagazeta.ru/articles/2016/09/02/69730-nozh-v-spinu-eto-po-nashemu
[3] https://www.rospres.com/politics/24309/

BIT. In particular, the arbitral tribunal awarded Rusoro compensation for the unlawful expropriation operated in 2011. The compensation did not reflect the value of the company at a date immediately prior to the expropriation but the one at the time of the investment. Thus, the tribunal did not take into account the collapse of the stock market that occurred after that date. However, according to Venezuela, the scope ratione temporis of the BIT excluded claims where more than three years had elapsed between the time when the investor should have been aware of them and the date on which the arbitration was initiated.

Finally, Venezuela claims that the arbitral tribunal failed to perform its duties by not complying with the parties' agreement on the standard of compensation and on the date of assessment of the damage.

The Court first points out that these pleas relate exclusively to the same subject-matter.

The Court recalls that the date to be adopted for the assessment of the jurisdiction *ratione* temporis of the arbitral tribunal is the date of the submission of the request for arbitration. Consequently, facts which date back more than 3 years before that date are excluded.

However, the tribunal neutralised the effects of the export restrictions imposed in April 2009. Therefore, the compensation for the damage resulting from the 2009 regulations is included in the compensation for the expropriation operated in 2011, although, the 2009 regulations are technically inadmissible *ratione temporis*.

As a result, the jurisdictional plea is well founded. The Court, therefore, annuls the award as it orders Venezuela to pay Rusoro Mining Ltd the sum of USD 966,500,000 for the expropriation of its investment without compensation.

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Place: Marriott Grand Hotel Moscow
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- Unexplained Wealth Orders: are they Likely to Rise?
- US Disclosure Orders under S.1782 U.S.C.
- Russian Criminal Proceedings as a Tool for collecting evidence
- Discovery in Arbitration: recent developments

2: I have a Claim! ... or I have a Dream?

- Avenues for Financing a Case
- Drafting a TPF Agreement
- Russian update on Third Party Funding
- Financing the Enforcement

3: Show me the Money!

- Assets Tracing: Do it Yourself
- Professional Assets Tracing: Case study 1
- Professional Assets Tracing: Case study 2
- Cybercrime Investigations

4: Cross-border Bankruptcy involving Russian parties

- Avoiding restitution in Russian Insolvency cases
- Cross-border Insolvency
- Enforcement of Russian insolvency judgments abroad: UNCITRAL framework and other Tools
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FRANCE IN THE WORLD OF INVESTOR-STATE DISPUTE SETTLEMENT

Izabella Prusskaya
New York Bar Attorney
(currently located in Paris)

France has always played an important role in promoting the global development of international investments. Since the middle of the twentieth century, France has expanded its regional investment outreach to all of the world's continents. Currently, France is a party to 115 Bilateral Investment Treaties ("BITs") with 94 of them in force and 56 Treaties with Investment Provisions ("TIPs"). [1] It is also a party to a number of multilateral agreements containing provisions on investment protection and Investor-State Dispute Resolution, including the Energy Charter Treaty ("ECT"). These agreements encompass a diverse variety of states and serve as effective investment protection tools.

France is quite open to foreign investors and has a stable economic climate that attracts investments from around the globe. Main sectors with key investment opportunities are traditionally healthcare, food, robotics, automotive, aerospace, IT, financial services, logistics and chemicals. [2]

The French government commits significant resources to attract foreign investments through overseas trade promotion initiatives and investor support mechanisms. Those efforts seem to have been effective in return if we assume a correlation with the following statistics: France was the ninth largest global market with a year-on-year increase of 16% for foreign direct investments ("FDIs") inflow in 2017. [3] Currently, there are approximately 30,000 foreign-owned companies conducting business in France and it is the home state of 29 of the world's 500 largest companies. [4]

In addition, based on the 2018 World Investment Report published by UNC-

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[1] *Data retrieved from the Investment Policy Hub portal of the United Nations Conference on Trade and Development available at: https://investmentpolicyhub.unctad.org*

[2] *Information retrieved from the Business France website (national agency supporting the international development of the French economy and fostering export growth by French businesses) available at: https://www.businessfrance.fr/en/invest-in-France-key-industries*

[3] *Ibid.*

[4] *Ibid.*

TAD, France has recently been attracting a large amount of FDIs while FDIs amounts have experienced an overall decline globally. Notably, FDIs flows into France increased by 42% (from USD 35 billion to approximately 50 billion)[5] in 2018.

Bearing these numbers in mind, this brief overview purports to summarily answer the following: (1) what shall investors know about France and its investor-state dispute resolution framework; and (2) why shall investors feel safe in choosing France as the host state for their investments?

FRANCE AS A HOST STATE

The end of the BIT era for France?

Historically, France has been among the first states to support investment development through intergovernmental agreements for the protection and promotion of direct investment. It signed the first treaty of this kind on 25 November 1959. This was the Convention of Establishment entered into with the United States, the preamble of which contained language on the encouragement of a closer economic relationship between the countries. [6]

The next important period of development for French investment policy was the 1960s-1970s, when it concluded the majority of the BITs it is a party to, the first one being the France-Tunisia BIT of 1963. [7] The main purpose of those first BITs was to create some sort of legal framework for the protection of investments as the economic relations between the countries started to flourish again.

BITs have long served France as an effective tool for fostering investments. The structure of the majority of the French BITs is largely similar to many of other European analogues, namely: a short preamble followed by a section on definitions (defining protected investments and investors), substantive provisions including the fair and equitable treatment standard ("FET"), provisions on national and most favored nation treatment ("MFN"), protection against expropriation and nationalization, and rules on protection of investments and transfer of capitals.

Dispute resolution clauses in BITs with France are commonly multi-tier (amicable solution followed by arbitration). The majority of BITs follow the Model BIT, which does not provide for any other option beyond ICSID Convention arbitration.

The majority of BITs signed by France are based on its Model BIT, which has been modified on a number of occasions. Although the official publication of the French Model BIT was postponed up until 2006, *"French treaty practice clearly shows the trends and consistency achieved over the years by the French negotiators"*. [8]

Notwithstanding the fact that BITs have been quite an effective tool for investor-state dispute resolution, the situation of their applicability in France and other European Union Member States has recently changed. Since in 2009 the European Union enforced the Treaty of Lisbon, [9] the EU Member States, including France, are no longer in a position to sign investment agreements on their own as such treaties can only be entered into by the European Union.

Moreover, the Lisbon Treaty provides that the European Commission, which would ensure their compatibility with the laws of the European Union, must approve all the treaties on promotion and protection of investments that are binding upon Member States. France notified 94 treaties to the European Commission, which were approved by the Europe-

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[5] *Data retrieved from the World Investment Report 2018 of UNCTAD p. 4 available at https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf*

[6] *Convention of Establishment between the United States of American and France, full text available at: https://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005341.asp*

[7] *Decree No. 65-797 of 15 September 1965, available at: https://investmentpolicyhub.unctad.org/Download/TreatyFile/3496*

[8] *Commentaries on Selected Model Investment Treaties (Chapter on France), Yas Banifatemi and Andre von Walter, p. 245. available at: https://www.shearman.com/~/media/Files/NewsInsights/Publications/2013/01/IA-011713-YB--Book-Commentaries-on-Selected-Model-Investment-Treaties.pdf*

[9] *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12007L%2FTXT*

an Commission in May 2013 and are still binding on France until the European Union enters into replacement agreements. [10]

Further, in March 2018, the Court of Justice of the European Union decided in Achmea v. Slovak Republic (Case C-284/16, Achmea, EU:C:2018:158) that investment arbitration based on intra-EU BITs (in this case Netherlands-Slovakia BIT) is incompatible with EU law, in particular Articles 267 and 344 of the Treaty on the Functioning of the European Union (TFEU).[11]

Long debates and other cases based on Achmea lead Member States of the European Union to issue in January 2019 declarations stating their position regarding intra-EU BITs.

On 15 January 2019, EU Member States filed 3 separate declarations: one signed by 5 States (Finland, Luxembourg, Malta, Slovenia and Sweden), another one by Hungary alone, and the third one by the majority of the Member States (22 out of 28, including France).[12]

The main takeaways of January declarations are the following:

- Intra-EU investment arbitration is no longer possible after Achmea (with a debate between Member States whether arbitrations between Member States are still possible under the ECT);
- Intra-EU BITs should be reported (multilaterally or bilaterally, whichever is more appropriate);
- National courts (including those in third countries) must not enforce awards issued pursuant to intra-EU BITs;
- The ongoing arbitrations under such BITs must be stopped and no new arbitrations of that kind should be commenced; and
- The answer to the question of an enforcement of final awards (no possibility to set aside or review) issued prior to the official publication of those declarations seems to be unclear.

Notably, the majority declaration provided that "[b]y the present declaration, Member States inform investment arbitration tribunals about the legal consequences of the Achmea judgment". It also provides that "[i]n cooperation with a defending Member State, the Member State, in which an investor that has brought such an action is established, will take the necessary measures to inform the investment arbitration tribunals concerned of those consequences". This Declaration does not indicate whether the requirement to inform an arbitral tribunal is obligatory. However, from the plain language of the Declaration it seems that the undersigned states are taking an obligation to inform the tribunals of the Achmea outcomes, preventing them from further determination of the on-going arbitrations.

Thus, before investing into France, foreign investors shall bear in mind that the dispute resolution mechanism provided by certain BITs might no longer be legally binding on France. Notwithstanding the fact that BITs have long served a purpose of promoting international investment in France, the situation might substantially change in the nearest future in connection with intra-EU BITs. This is especially important for companies structuring their investments into France through third countries located in the EU. Notably, France is a party to a number of BITs with the other EU Member States, including Bulgaria, Hungary, Latvia and Malta.

Moreover, it still remains to see if the scope of the Achmea extends to the ECT. The varying approaches of the EU Member States in their January declarations as to Achmea applicability to arbitrations under ECT shows that the debate on the future of arbitrations under multilateral agreements is still open. One

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[10] List of the bilateral investment agreements referred to in Article 4(1) of Regulation (EU) No 1219/2012 of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:131:0002:0098:EN:PDF

[11] The case, its development and influence on the investment arbitration in the European Union are discussed in the previous issues of the Journal available here: https://journal.arbitration.ru/upload/iblock/b11/Arbitration.ru_N1_5_January2019_2.pdf and https://journal.arbitration.ru/upload/iblock/9eb/Arbitration.ru_N4_4_December2018_web.pdf

[12] Declaration of the representatives of the governments of the member states of 15 January 2019 on the legal consequences of the judgment of the Court of Justice in Achmea and on investment protection in the European Union, available at: https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf

of such multilateral treaties is the ICSID Convention and arbitrations under this instrument with France/ French investors as a party are to continue unquestionably.

Long Live the ICSID Convention!

France has been a signatory of the ICSID Convention since 22 December 1965. [13] France is a party to 192 BITs and TIPs, the majority of which provides for arbitration under the ICSID Convention as one of the dispute resolution options. In total, there have been 48 cases with French investors involved, 29 of which filed with ICSID.

Moreover, in conformity with Article 54(2) of the ICSID Convention, [14] France authorized its courts of first instance (Tribunaux de Grande Instance) as competent courts for the purpose of enforcing investment arbitration awards rendered pursuant to the Convention. [15] In general, the recognition and enforcement of investment arbitral awards does not differ from the recognition and enforcement of commercial arbitration awards. The process is described in detail in the article "Interpretation of arbitration clauses by the French courts" by Ekaterina Grivnova in the Russian section of this issue, with a review of corresponding case law by *Clavière-Schiele* et al. in the English section of the magazine.

The ICSID Convention seems to have brought clarity and stability to investor-state relations and have helped the French capital to become a leader

of investment arbitration development. Notwithstanding the fact that ICSID hearings can be held worldwide at any venue agreed upon by the parties, disputing parties elect to hold hearings and sessions in Paris in roughly half of all the cases under the ICSID Convention. The World Bank Centre has three hearing rooms and has recently renovated the main hearing room (Room A) at the World Bank Group Conference Centre in Paris. According to the ICSID, the hearing facility in Paris can now accommodate complex hearings in terms of size and technicity. [16]

Paris is also quite a popular place for arbitration in Additional Facility cases. For example, 13 out of the 47 cases currently managed by ICSID will be heard in Paris. [17] Moreover, France is one of the leading states for the nationality of arbitrators appointed in ICSID arbitrations: there were more than 30 arbitrators of French nationality appointed in 2018. [18]

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[13] *France ratified the ICSID on 21 August 1967 (entered into force on 20 September 1967) through Loi No. 67-551 du 8 juillet 1967 autorisant la ratification de la Convention pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats, du 18 mars 1965. (Off. Gaz. July 11, 1967, p. 6931) available at: https://icsid.worldbank.org/en/Pages/about/MembershipStateDetails.aspx?state=ST49*

[14] *Article 54(2) of the ICSID Convention reads as follows: "A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation."*

[15] *There are 173 courts of first instance (at least one per department), including 164 in mainland France, 2 in Corsica and 7 in the overseas departments.*

[16] *Paris ICSID Hearing Facility Reopens After Renovation, available at: https://icsid.worldbank.org/en/Pages/resources/ICSID%20NewsLetter/January%2017/Paris-ICSID-Hearing-Facility-Reopens-After-Renovation.aspx*

[17] *Place of Arbitration in Additional Facility Cases, available at: https://icsid.worldbank.org/en/Pages/process/Place-of-Arbitration-in-Additional-Facility-Cases.aspx*

[18] *ICSID 2018 Annual Report, p. 33. available at: https://icsid.worldbank.org/en/Documents/resources/2018ICSIDAnnualReport.ENG.pdf#search=France*

Interpretation of investment treaties by the French judiciary

Prospective investors should also be aware of the following development in French jurisprudence. Although case law previously suggested multiple possible outcomes, a recent decision under the ECT by the Court de Cassation (France's highest court) indicates a return to a *"literal interpretation by the French courts of international treaties"*. [19]

The dispute at issue arose under the Ukraine-Moldova BIT of 1996 and ECT. In the proceedings (the seat was in Paris) the tribunal concluded that Moldova was at breach of the ECT's FET standard, declined the jurisdiction under the BIT and awarded the investor compensation in the amount of USD 49,000,000.

Two years after the award against Moldova was set aside by the Paris Court of Appeal on jurisdictional grounds, the Court de Cassation reinstated the award indicating that, in case a host state wishes to limit the treaty's application, it shall do so by explicitly defining the type of investments to be protected.

Russian Investment in France

Notwithstanding the rapid Achmea developments in the sphere of investment arbitration, France is still an attractive place for foreign investors from the EU Member States. But how attractive is France for the third countries outside of the EU? This question can be answered by using the example of Russian investors in France.

Right before the EU's imposition of economic sanctions on Russia and Russian retaliatory measures, France had been a growing destination for Russian investors. According to the Banque de France, the reserve of Russian investment in France rapidly developed, increasing from €342 million in 2011 to €745 million in 2014. [20] According to Business France's annual report on the state of foreign investment in France, there were 40 Russian companies with a presence in France in 2014. The same year, a total of 8 new Russian investments were established.

Surprisingly, sanctions do not seem to be a big obstacle to Russian-French economic relations as trade between Russia and France has increased significantly in the last year and the first three months of 2018, according to Alexei Mehkov, Russian ambassador to France. *"Currently, we are at a fairly favorable stage of development of our bilateral relations (...). Moscow's development dynamics regarding relations with France follow the general trend. Our trade increased by 16.5% last year and by 25% in the first three months of 2018. In principle, this index is higher than our economic relations with the countries of the European Union."* said the ambassador. [21]

Nowadays, Russian companies are investing more broadly in the real estate sector – new investment sector for investors from the CIS. For example, Hermitage (the French subsidiary of the Russian real estate group Stroymontazh) is currently supplying 300 residential homes in Montévrain (Seine-et-Marne), [22] and even intends to "take a major position on the French market, alongside Nexity and Kaufman & Broad".[23]

Still, modern investment relations between France and Russia are the result of a number of factors that have emerged over the last years and are predominantly negative in nature, namely: economic crisis and mutual sanctions. Otherwise, the situation with Russian FDI in France is still developing.

Among the largest Russian investors in the French economy are some 40 companies whose ac-

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[19] *French court upholds literal interpretation of investment treaty, Pinsent Masons, available at: https://www.out-law.com/en/articles/2018/april/french-court-upholds-literal-interpretation-of-investment-treaty/*

[20] *Russian Investment in France: the stakes for the winners, Rusina Shikhatova, The Moscow Times #8 (61) 2015 P. 19: http://old.themoscowtimes.com/upload/005/RuFr_eng_2015.pdf*

[21] *Russie-France: les échanges commerciaux se portent bien, Sputnik France, available at: https://fr.sputniknews.com/economie/201806111036752655-russie-france-echanges/*

[22] *Russian developer bets on "Manhattan sur Seine", Reuters, available at: https://www.reuters.com/article/us-france-property-towers/russian-developer-bets-on-manhattan-sur-seine-idUSBRE8A305520121104*

[23] *Avocats Picovschi. Investissements russes en France. Available at: https://www.avocats-picovschi.com/investissements-russes-en-france_article_435.html*

tivities were somehow affected by the sanctions imposed. At the same time, only one Russian investor with French assets - Uralvagonzavod[24] - was included in the sanctions lists.

The French assets of Russian companies are covered by a bilateral agreement on investment promotion and protection concluded in 1989 between the USSR and France[25]. This BIT was, for example, invoked in the recent investment arbitration case initiated by a Russian investor (*Roscosmos v. France, 2016*).

FRANCE AND THE FUTURE OF INVESTOR STATE DISPUTE SETTLEMENT

In November 2015, the EU decided to reform its investment dispute settlement mechanism by, inter alia, potentially creating the Investment Court System. The overall objective for creating such a court is to set up a permanent body for investment disputes. The main idea is that the Multilateral Investment Court would replace the BIT signed by EU Member States and arbitration agreements would be included in EU trade and investment agreements. At the moment, however, only the EU-Canada Comprehensive Economic Trade Agreement (CETA) and the EU-Vietnam Free Trade Agreement mention the setting up of such a court.

The European Commission suggests that such a court will modernize the approach to investment dispute resolution. [26] The Court would have a court of first instance and an appeal tribunal acting as a permanent body. It would have jurisdiction only in case there is already an investment treaty explicitly allowing an investor to commence a dispute against a State. It would be opened to all the countries interested in joining and would provide for rules on ethics and transparency.

In August of 2016, the EU launched an impact assessment process to review the various options that could help reform the current of investment dispute settlement framework. One of the options identified was to establish a permanent investment court[27]. France had a big role in the process and Paris became the place for academic conferences organized by the OECD in October 2016. Following discussions, on 20 March 2018 the Council of the European Union adopted and published negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes. [28]

Moreover, on 5 March 2019 the Council of the EU approved a new framework to screen foreign direct investments coming into the EU, [29] which would come into force in April. [30] This new framework is aimed to, among others, (i) create a cooperation mechanism where Member States and the Commission will be able to exchange information and raise concerns related to specific investments; (ii) allow the Commission to issue opinions when an investment poses a threat to the security or public order of more than one Member State; (iii) set certain requirements for Member States who wish to maintain or adopt a screening mechanism at national level.

France is among the first fourteen EU Member States that have already implemented the investment screening rules, so that it does not seem that the new framework will affect the country substantially. However, it will give the other EU Member States and the European Commission a power to influence investment-making process in the territory of France.

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[24] *A timeline of all Russia-related sanctions, available at: https://www.rferl.org/a/russia-sanctions-timeline/29477179.html*

[25] *Available at: https://investmentpolicyhub.unctad.org/Download/TreatyFile/3412*

[26] *The Multilateral Investment Court Project, available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608*

[27] *Impact assessment on the Establishment of a Multilateral Investment Court for investment dispute resolution: http://trade.ec.europa.eu/doclib/docs/2016/october/tradoc_154997.pdf*

[28] *Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, available at: http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf*

[29] *Foreign Investment Screening: new European framework to enter into force in April 2019, available at: http://europa.eu/rapid/press-release_IP-19-1532_en.htm*

[30] *The framework will enter into force 20 days after publication in the Official Journal. Member States and the Commission will subsequently have 18 months to make the necessary arrangements for the application of the new rules.*

THE SAPIN 2 LAW: FRANCE'S NEW VESSEL IN THE TREACHEROUS WATERS OF ENFORCEMENT IMMUNITY

Anastasia Medvedskaya
qualified lawyer at the Paris Bar

Paul-Raphael Shehadeh
BA in jurisprudence, Oxford

The French law No. 2016-1691 on transparency, anti-corruption and the modernisation of the economic life (hereafter "the Sapin 2 law")[1] was primarily aimed at reforming French anti-corruption laws. Some important alterations relating to measures of constraint available over State assets were included in the raft of reforms. This article looks at State immunity, measures of constraint under the old regime, and the changes brought under the Sapin 2 law.

It is a pragmatic principle[2] of customary international law that one State cannot be subjected to proceedings by the court of another State. This principle, known as State immunity, encompasses both jurisdiction and enforcement and, as a corollary of the sovereign equality of States, is part of the warp and weft of the contemporary international politico-legal order.[3]

State immunity has been divided into jurisdictional immunity (or immunity from suit) and enforcement immunity. Jurisdictional immunity precludes the adjudication of a claim brought against the foreign State, while immunity from enforcement precludes the recognition of a foreign judgement or arbitral award for the purposes of issuing an order or injunction to enforce this against a foreign State. Another distinction is between *personal* and *property* immunities. The Sapin 2 law addresses State immunity in respect of *enforcement* and as against *property*.

Whereas the principle of State immunity is derived from international law, the law of State immunity is given force by the provisions of instruments of

[1] *Loi n° 2016-1691 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, 9 December 2016.*

[2] *J. Finke, "Sovereign Immunity: Rule, Comity or Something Else? The European Journal of International Law", Vol 21, no. 4, 2001, p. 880.*

[3] *Jurisdictional Immunities of the State (Germany v. Italy), Judgment of 3 February 2012, at paragraph 57: "State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which... is one of the fundamental principles of the international legal order".*

national laws of States[4]. Predictably, different States understand and approach State immunity in different ways[5]. Two doctrines exist: the absolute doctrine and the restrictive doctrine.

The absolute doctrine holds that State immunity applies to a foreign State under all circumstances, save for by express waiver. The restrictive doctrine recognises a distinction between public and private acts. Immunity only applies to the former. The prevailing trend[6], is towards the restrictive approach, whereby immunity remains the *"default rule... subject to a number of stated exceptions."*[7]

Accompanying the entry of States into the commercial world has been a broad adoption of the restrictive approach to State immunity. This allows commercial parties to enforce their rights against States where States are essentially commercial actors.[8]

Enforcement of foreign judgments and arbitral awards is a sensitive area for all jurisdictions: each instance brings with it the renewed threat of a political squall. Before the Sapin 2 law, France had gained a reputation as a pro-enforcement jurisdiction, as will be explored with the aid of a few well-known examples in the next section. It is safe to assume that the legislator had such political fracases in mind in the drafting of the Sapin 2 law.

One factor which commits States to continue the trend towards the restrictive approach, is the almost universally adopted the New York Convention[9]: States which are party to the New York Convention have signed up to an obligation to recognise and enforce valid[10] foreign arbitral awards,[11] subject to an ordre public exception[12]. Despite this clear premise, in practice, the enforcement of an arbitral award against a State can be, "the most difficult, lengthy, and expensive phase of an investor-state arbitration"[13] if a State attempts to prevent such enforcement.

The 2004 United Nations Convention on Jurisdictional Immunities of States and Their Prop-

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[4] At the time of writing, the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property is two signatures short of the thirty required for entry into force (as set out in article 30 of the Convention). Even in this state, the Convention has made an important contribution to clarifying the law in this area. Furthermore, it has served as a convenient model for many countries seeking to reform their laws, and will only grow in importance as this area of law develops further. We will draw direct links between the provisions of the Convention and the Sapin 2 law throughout. The 1976 European Convention on State Immunities (or the "Basel Treaty") also made an important contribution to developing consensus as to the direction of travel of this area of law, though only ratified by eight States.

[5] The heterodoxy which results from this begs the question whether the principle has crystalized into a settled rule. For a discussion of one of the many unsettled areas of the international law of State immunity, see A. Dickinson, "State Immunity and State-Owned Enterprises", Business Law International, Issue 10(2), at p. 97.

[6] This is reflected in the US Foreign Sovereign Immunities Act (1976), the English State Immunity Act (1978), the 2004 UN Convention, the Russian law on Jurisdictional Immunities of Foreign States (2015), as well as in the Sapin 2 law (2016). A notable exception to this trend is Hong Kong. Here, the UK's SIA, used to apply by means of the State Immunity (Overseas Territories) Order 1979, giving effect to the restrictive doctrine. Since 1 July 1997, Hong Kong has been a special administrative region of China, Hong Kong and by virtue of this, it now adopts the absolute approach, in application of the Chinese Basic Law (article 158(3)). This was settled in Democratic Republic of the Congo v FG Hemisphere Associates [2011] HKCFA 41 (See discussion in paragraphs 225-231).

[7] Males, LJ, General Dynamics UK Ltd v Libya, [2019] EWHC 64 (Comm), at paragraph 12.

[8] See Denning J, Trendtex Trading Corp v Central Bank of Nigeria Court of Appeal (Civil Division), [1977] Q.B. 529, at p.555: "In the last 50 years there has been a complete transformation in the functions of a sovereign state. Nearly every country now engages in commercial activities. It has its departments of state - or creates its own legal entities - which go into the market places of the world... This transformation has changed the rules of international law relating to sovereign immunity".

[9] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958.

[10] New York Convention, Article V(1), V(2)(a).

[11] New York Convention, Articles III, V.

[12] New York Convention, Article V(2)(b).

[13] F. Dugan, Christopher; D. Wallace; N. Rubins, B. Sabahi, "Enforcement of Awards", in Investor-State Arbitration, Oxford University Press, 2008, p.700.

erty (hereafter, "the 2004 UN Convention")[14] has a "second life" under the municipal laws of Russia and France: both the Russian law on Jurisdictional Immunities of a Foreign State and Property of a Foreign State, and the French Sapin 2 law draw on the 2004 United Nations Convention for at least some of their provisions. Both laws (French and Russian) were promulgated soon after the issuance of the French exequatur order in the Yukos Saga[15], and the slew of attachment orders which remained in place during the appeal process.

So then, against a tumultuous political backdrop, the passage of the Sapin 2 law was surely intended to signal a sea-change for France: an opportunity to rehabilitate its diplomatic image and to promulgate a new, better-balanced, more certain framework for enforcement proceedings.

The rules governing State immunity must be flexible enough to give effect to State immunity (else risk the opprobrium of the international community), yet clear enough to allow both the foreign State and the private party seeking enforcement to know in advance what assets are protected under what circumstances. This balance between flexibility and certainty is desirable in the drafting of any rule. This is, all the more, important in the present context of enforcement against a foreign State, where we observe the judge forced to navigate the narrow straits between the rule of law and international politics. To avoid shipwreck in such treacherous waters, procedure must be robust, and must be applied rigorously. The French Sapin 2 law certainly recognises these exigencies. Does it, however, deliver the effective solutions needed?

The old regime for imposing measures of constraint on sovereign assets

In the last decade, France has become one of the major playgrounds for the recovery of sovereign assets. Two distinctive factors explain this pattern: a lenient interpretation of rules on sovereign immunity by French courts on the one hand, and a permissive regime for the recognition and enforcement of international arbitral awards on the other.

Paris is notorious for being an "arbitration-friendly" jurisdiction. The recognition and enforcement of arbitral awards is fully in step with the Article 5 of the New York Convention.[16] Furthermore, according to the Hilmarton[17] and Putrabali[18] cases, French courts promote the recognition and allow the enforcement of international awards that have been set aside in their country of origin.[19]

In the Hilmarton case, for example, the dispute arose between a French corporation OTV and an English company over the payment of a commission for securing a contract in Algeria. The sole arbitrator seated in Geneva held that the commission was not due under Algerian law. In fact, Algerian law, governing the contract prohibited payments to intermediaries.[20] OTV applied for enforcement in France and Hilmarton filed an application to set aside the award in Geneva.

Under these conditions, the French judge had to contend with two conflicting outcomes and focus on the prospect of recognising in France an award which had been set aside in its country of origin. How is a judge to reconcile two such contradictory rulings?

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[14] United Nations Convention on Jurisdictional Immunities of States and Their Property, Adopted by the General Assembly of the United Nations on 2 December 2004, Records of the General Assembly, Fifty-Ninth Session, Supplement No. 49(A/59/49).

[15] See descriptions of the attempted seizures against Russian Federation by the Yukos shareholders: https://www.yukoscase.com/court-actions/attempted-asset-seizures/ (last consulted on 18 March 2019).

[16] Article 1520 of the French Civil Procedure Code.

[17] French Cassation Court, 1st Civil Chamber, 23 March 1994, no. 92-15137.

[18] French Cassation Court, 1st Civil Chamber, 29 June 2007, no. 05-18.053.

[19] E. Gaillard, "Enforcement of Awards Set Aside in the Country of Origin: The French Experience", Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention, 1999, pp. 505-527.

[20] ICC Award No. 5622, Revue de l'Arbitrage, 1993, p. 327; A. J. van den Berg, ed., ICCA Yearbook Commercial Arbitration XIX, 1994, p. 105.

At the appeal stage, the Paris Court held that "the judge may not refuse to enforce unless the national law so authorises". The court observed that Article 1502 of the Civil Procedure Code does not include as one of the grounds for refusal to enforce the award, the fact that it has been set aside in its country of origin and that it wouldn't contradict the French conception of international public policy.[21]

The French *Cour de Cassation endorsed this reasoning and stated that "[the] existence [of the international award] continued in spite of its being set aside and that its recognition in France was not contrary to international public policy."*[22] The *Hilmarton* principle was further refined and rigorously applied in the 2007 *Putrabali* case, further buttressing the image of France as the venue of choice for enforcing awards under fraught conditions.

Until 2016, French legislation on sovereign immunities and measures of constraint imposed on State assets left much to be desired. According to commentators, international conventions aside, France had no comprehensive set of statutory rules governing sovereign enforcement immunity.[23] Only two articles, namely Article L.153-1.1 of the French Monetary and Financial Code[24] and Article L.111-1 of the French Code of Civil Enforcement Procedures[25] would explicitly grant such protection to the sovereigns against pre-judgement and post-judgement measures of constraint. France has left the task of developing the relevant rules to domestic judges.[26] In line with prevailing trends worldwide, the early cases considered enforcement immunity as being absolute, unless under exceptional circumstances, or by explicit waiver.[27]

One of the major questions that the French judges dealt with was whether the incorporation of an arbitration agreement could be regarded as a waiver of enforcement immunity in its own justifying measures of constraint imposed on State assets.

In the *Creighton case*[28], the French *Cour de Cassation* established that by the conclusion of an arbitration agreement, the State does expressly waive its immunity from measures of constraint. Notably, this decision seems to be in line with the 2004 UN Convention on Jurisdictional Immunities of States.[29] Under Articles 18[30] (State immunity from pre-judgment measures of constraint) and 19[31] (State immunity from post-judgment measures of constraint), the existence of an arbitration agreement is accorded the status of express consent to waive enforcement immunities in respect of arbitral awards arising therefrom.

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[21] E. Gaillard, "Enforcement of Awards Set Aside in the Country of Origin: The French Experience", Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention, 1999, pp. 505-527.

[22] French Cassation Court, 1st Civil Chamber, 23 March 1994, no. 92-15137.

[23] F. Malet-Deraedt, "The New French Legislation on State Immunities from Enforcement", ASA Bulletin, 2018, pp. 332-333.

[24] Assets held by foreign central banks or foreign monetary authorities or managed for their own account or on behalf of foreign States cannot be seized to the exception that these were used for a commercial activity.

[25] According to this article, judicial enforcement and provisional measures are prohibited against public entities benefiting from immunity to the exception that the entity had acted de jure gestionis or when it had explicitly waived the benefit of immunity.

[26] A. Atallah, "The Arbitration Clause and State Immunity under French Law", BCDR International Arbitration Review, Kluwer, 2015, pp. 389 – 408.

[27] Poitiers Court of Appeal, 20 December 1937, Sté Cementos Resola v. Larrasquitu et État espagnol, Journal du Droit International 1938, p. 288.

[28] French Cassation Court, 1st Civil Chamber, Petition No. 98-19068, Judgment, 6 July 2000.

[29] United Nations Convention on Jurisdictional Immunities of States and Their Property, Adopted by the General Assembly of the United Nations on 2 December 2004, Records of the General Assembly, Fifty-Ninth Session, Supplement No. 49(A/59/49).

[30] The UN Convention, Article 18 "No pre-judgment measures of constraint, such as attachment or arrest, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that (a) the State has expressly consented to the taking of such measures as indicated: […] (ii) by an arbitration agreement".

[31] The UN Convention, Article 19 "No post-judgement measures of constraint, such as attachment or arrest, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that (a) the State has expressly consented to the taking of such measures as indicated: […] (ii) by an arbitration agreement".

In the 2013 *NML Capital*[32] case, the dispute arose between an investment fund and Argentina following its default on sovereign bonds due to the financial crisis. The investment fund won the litigation in the United States and sought enforcement before French courts. NML imposed attachments on oil receivables. The French Cour de Cassation found that the Argentine assets were protected by enforcement immunity. In fact, to overcome the State's enforcement immunity, it was held that the sovereign needed to make an express and special waiver on its assets. This decision has been the subject of vigorous criticism by commentators, some of whom see this as a patent example of a political approach to State immunity by the French courts, not founded in hard law and procedure, and best explained by a desire to insulate Argentina from being affected by the so-called vulture funds.[33]

Later in 2015 Commisimpex case[34], the French Cour de cassation departed from the NML jurisprudence by abandoning the double requirement of an express and special waiver on State's assets. In this case, the dispute arose out of unpaid public works carried out by Comissimpex in Congo. The company sought enforcement of an ICC award in France and made attachments on accounts belonging to the Congolese diplomatic mission and its UNESCO delegation. The Paris Court of Appeal lifted the attachments by requiring an express and special waiver. The French Cour de cassation however quashed the decision and only required an express waiver.

Needless to say, judicial measures of constraint imposed on a State's assets may have a heavy political impact.[35] Yukos enforcement proceedings have cooled French diplomatic relations with Russia. Following several attempts to seize Russian assets, Russia has enacted a new law largely based on the 2004 UN Convention, but also containing a section on reciprocity: "[t]he law envisages the possibility for a Russian Federation court to limit the jurisdictional immunity of a foreign State if it finds that the State in question offers the Russian Federation limited jurisdictional immunity."[36]

Against this background, France has put in place a new regulatory framework with a robust dispositif concerning sovereign enforcement immunities and the conditions under which measures of constraint can be exercised against State's assets. How far does it go in remedying the problem?

The new enforcement system under the Sapin 2 Law

On 9 December 2016, the Sapin 2 law was issued, in order to, inter alia, amend the rules governing enforcement, provisional measures, and State immunity in France. The entry into force of the Sapin 2 law on 1 June 2017 has brought French legislation into line with the international standard, as set down in the 2004 UN Convention, by Article 59 of law which introduced three new articles into the French Code of Civil Enforcement Procedures[37] ("the Code").

These new provisions bring an important change to French law, both from a substantive and a procedural point of view, as they clearly aim to discourage measures of constraint against State assets located in France.

The substantive changes

[32] *French Cassation Court, 1st Civil Chamber, Petition No.10-25.938, Judgement, 28 mars 2013.*
[33] *H. Muir Watt, "De la renonciation à l'immunité de juridiction des Etat", Revue critique de droit international privé, 2013, p. 671.*
[34] *French Cassation Court, 1st Civil Chamber, Petition No. 13-17751, Judgment 13 May 2015.*
[35] *French Cassation Court, 1st Civil Chamber, Petition No. 13-17751, Judgment, 13 May 2015. See also French Cassation Court, 1st Civil Chamber, Petition No. 16-22.494, Judgment, 10 January 2018. This decision ended the Comissimpex saga. The French Cour de Cassation considered that in light of the new provisions the express and special waiver were necessary.*
[36] *Law on jurisdictional immunities of a foreign state and its property in Russia, 4 November 2015, available at: http://en.kremlin.ru/acts/news/50624 (last consulted on 18 March 2019).*
[37] *Art. L.111-1-1 to L. 111-1-3 of the French Code of Civil Enforcement Procedures.*

The new Article L. 111-1-2 of the Code sets out three alternative scenarios in which State assets located in France can be subjected to provisional or enforcement measures:

1. "If the State has expressly consented to the application of such a measure;

2. If the State concerned has reserved or affected the property to the satisfaction of the claim which is the object of the proceedings;

3. Where a foreign judgment or arbitral award has been issued against the State and the property in question is specifically used – or intended for use – by that State otherwise than for the purposes of public service and is linked to the entity against which the proceedings are initiated."

In short, the new criteria set out by this provision distinguish between assets depending on whether they have been assigned to public (sovereign), or to commercial activities. Such assignment is express in the first and second of these limbs.

Furthermore, the first two paragraphs of this Article 59 mirror Article 18 of the 2004 UN Convention[38] as far as pre-judgment measures are concerned, and paragraphs a) and b) of Article 19 of the same Convention[39] which tackles post-judgment measures. These provisions should be taken into account when negotiating State immunity waiver clauses, since the specific assignment of a State asset to the satisfaction of a claim (as provided by Article L. 111-1-2, 2° of the Code) could go some way to guaranteeing certainty as to future enforcement.

The third limb matches paragraph c) of Article 19 of the 2004 UN Convention[40] concerning the specific case of post-judgment measures affecting State assets allocated to noncommercial purposes.

Importantly, the Sapin 2 law goes a step further than the Convention in listing examples of assets that should be considered as *"specifically used or intended for use by the State for public service purposes"*. These include diplomatic property (such as bank accounts), military property, cultural heritage of the State, property that is part of a scientific, cultural or historical exhibition, as well as tax or social revenues of the State.

The French legislator was also careful to set out specific rules for the attachment of diplomatic property. The new article L. 11113 of the Code requires a State's waiver of immunity over property related

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[38] *Art. 18 – State immunity from pre-judgment measures of constraint:*
"No pre-judgment measures of constraint, such as attachment or arrest, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:
(a) the State has expressly consented to the taking of such measures as indicated; (i) by international agreement; (ii) by an arbitration agreement or in a written contract; or (iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or
(b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding."

[39] *Article 19 – State immunity from post-judgment measures of constraint*
"No post-judgment measures of constraints, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:
(a) The State has expressly consented to the taking of such measures as indicated: (i) by international agreement; (ii) by an arbitration agreement or in a written contract; or (iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or
(b) The State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; […]"
+"[…] (c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraints may only be taken against property that has a connection with the entity against which the proceeding was directed."

to diplomatic activities to be both express and special.[41] This accords recognition of the special status of diplomatic activities as being at the heart of sovereign activity, justifying the more stringent standard for a waiver of such immunity. A recent decision from the French *Cour de Cassation* had only required the waiver to be *express*.[42] Under the Sapin 2 regime, this is no longer sufficient: the new standard is more stringent.

The procedural changes

As far as procedural innovation is concerned, the Sapin 2 law goes further than the 2004 UN Convention by introducing a new authorisation mechanism[43]. Pursuant to the new article L. 111-1-1 of the Code, prior authorisation of the court is now required for all provisional or enforcement measures against property of a foreign State located in France. Although this mechanism does not exist in the 2004 UN Convention, France is not the only forum requiring prior court authorisation, as Belgium introduced a similar mechanism in 2015.[44]

This prior request may be sought *ex parte* in a *procedure sur requête*. Because this procedure is ex parte (i.e. non-adversarial), Article L. 111-1-1 of the Code gives the creditor a strategic advantage, as the debtor State will not be given notice of the measure of constraint at the time the creditor introduces its motion. The element of surprise granted by this procedure prevents the concealment of property, a risk commonly associated with enforcement. This might appear (in its specific and limited scope of application) to see practicality trumping the rule of law. However, subsequent procedural steps allow the foreign State some recourse, compensating this initial imbalance.

The process becomes adversarial once the order is issued, whether it grants the measure or not. First, if the order grants the attachment, the debtor State can form a circular appeal asking the same judge who issued the order to withdraw it. Secondly, if the order denies the request, the creditor seeking enforcement can form an appeal, which will be adversarial.[45]

At first glance, the prior authorisation procedure does not have a revolutionary effect as it merely establishes a filtering system by contributing an additional step in enforcement proceedings. In practice, though, this mechanism could make it rather difficult for creditors to obtain provisional or enforcement measures against State assets located in France. The bottleneck will most often be the evidentiary burden placed on the party seeking the order.

Before the Sapin 2 law, a creditor was able to obtain an attachment order, and then set about proving the legality of this order. This, as events proved, was a rather blunt instrument to solve the problem outlined above. The procedure has been rebalanced: placed in the same situation, the same creditor must now prove that the property is suitable for seizure before being authorised by the judge to place it under a measure of constraint.

By placing this burden of proof on the creditor at an earlier stage of the proceedings, the Sapin 2 law requires that the creditor prove that the property exists, and that it is suitable for seizure. As mentioned before, the criterion set out by the new article L. 111-1-2 of the Code mostly relies on the distinction between public or commercial property. While the distinction seems clear cut in theory, in practice, this holds the potential of becoming a fiercely disputed point between the parties. After all, such assets rarely come labelled and fall under one or other category: One can imagine how difficult it will be to prove, in advance, that money held in a bank account would be allocated to a commercial activity, and thus suitable for measures of constraint.

Against this background, what is the true effect of introducing this additional step in already lengthy enforcement proceedings? Has this made a positive contribution to legal certainty, or has the French

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[41] Compare this with the language selected by the Court in French Cassation Court, 1st Civil Chamber, Petition No.10-25.938, Judgement, 28 mars 2013 discussed above.

[42] French Cassation Court, 1st Civil Chamber, Petition n° 13-17.751, Judgement, 13 May 2015.

[43] For a more detailed review of this mechanism: C. Boulanger, "La consecration de l'autorisation préalable à la saisie en France des biens d'un État étranger", RDIA, 2019, n°1 p. 257 et seq.

[44] Article 1412quinquies of the Belgian Judicial Code, introduced by the 23 August 2015 law.

[45] Article R. 111-6 of the Code.

legislator chosen to show deference to the principle of State immunity, and left the commercial parties to foot the bill for this truncation of procedure?

The answers to these questions are yet to be determined definitively while the reform is relatively new, and in the absence of rigorous application. Questions about the effectiveness of the changes to French enforcement immunity brought about by Sapin 2 remain open. While comment and punditry are sure to continue as to the actual effect of the Sapin 2 law, it is clear that the reforms intend to plug the holes exposed by the Yukos enforcement Saga. They set the tiller towards a more comprehensive framework for such enforcement proceedings.

Yukos shareholders have made significant efforts to enforce the $50 billion award against Russia all over the world. Since 2014, France has grown in importance as a venue for the enforcement of the awards. At the time of writing, proceedings are still on-going.[46] On 12 May 2017 a hearing was held at Paris Court of Appeal with respect to the six freezing orders applied to the payments due by Eutelsat to the Russian Satellite Communications Company, and by VTB Bank (France) to RIA Novosti obtained by Yukos shareholders against Russian Federation.[47] The freezing orders were made before the entry into force of the Sapin 2 law. Yet it remains to be seen whether the reforms of the Sapin 2 law will have a discernible impact on the reasoning of the Paris Court of Appeal, in its hotly anticipated decision.

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[46] *See descriptions of the attempted seizures against Russian Federation by the Yukos shareholders: https://www.yukoscase.com/court-actions/attempted-asset-seizures/ (last consulted on 18 March 2019).*

[47] *See descriptions of the attempted seizures against Russian Federation by the Yukos shareholders: https://www.yukoscase.com/court-actions/attempted-asset-seizures/ (last consulted on 18 March 2019).*

Expert's corner

HOTEL ARBITRATION: EXPERT'S PERSPECITVE

Anthony Charlton

Battine Edwards

Deloitte Forensic, Paris

Disputes may arise at any of the various stages of a hotel lifecycle, from buying or investing in land or property, in building or refurbishing a complex, and in the management and operation of the business. There are several players involved at each of these stages: investors, contractors, suppliers, management companies, to name a few. Various operating models exist, the most common being the franchise. It is now increasingly rare for a hotel to be operated by the individual or the company owning it.

There is a trend towards unbundling the risks embedded in a hotel complex: those relating to acquiring and owning the real estate, those relating to the construction or refurbishment of properties, those relating to financing, and those relating to the management of the hotel. The greater the number of players involved at each stage the greater likelihood of conflicts arising.

At a macro level, the economic conditions have been unsupportive of late and hotels have to be run in more complex environments, with increased downward pressure on average prices and against the backdrop of the globalisation of tourism. States are also facing increased ecological, geopolitical and economic pressures driving some of them to take increasingly protectionist measures.

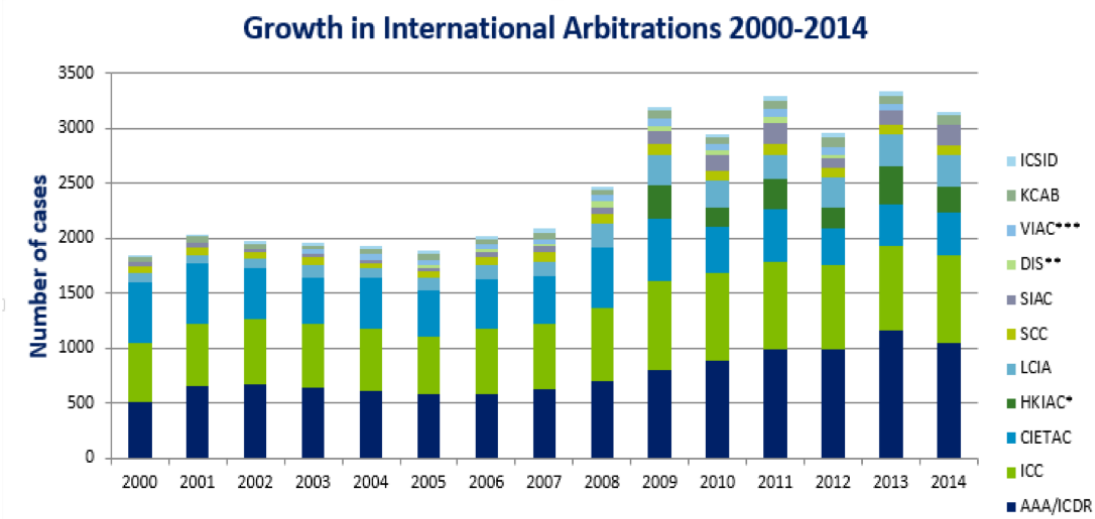
In this challenging and complex context, more and more disputes arise, the main ones being:

• Outright expropriation or unjust treatment by a host state e.g. a foreign investor acquires land for the purposes of developing a real estate project, only to subsequently discover that the host state refuses to recognise the investor's property rights or else forcibly removes the investor from the site without compensation;

• Delays in construction works e.g. a one-year refurbishment project is completed behind schedule with a six-month delay, with the owner suffering lost profits and/ or possible prolongation/ disruption costs; and

• Underperforming operating/ management contracts. E.g. despite its best efforts to operate the hotel in difficult market conditions, the operator is hit with a claim for underperformance by the owner.

There are several dispute resolution mechanisms: arbitration, court litigation, adjudication, expert determination and mediation. Whilst statistics are difficult to obtain due to its (mostly) private status, arbitration is the preferred means of resolving global business disputes, including in the THL sector.



*Data unavailable for 2000-2008
**Data unavailable for 2000-2004 and for 2013-2014
***Data unavailable for 2000-2002 and for 2014
Source: The data was collected from the institutions' statistics publications

The use of experts in the arbitration process

Due to the increasing complexity of the issues at stakes in arbitration cases, be they business, financial or accounting issues, independent experts are increasingly appointed to advise on the quantum aspects of arbitration claims. Financial experts who specialise in the quantification of economic losses are routinely instructed to provide an objective opinion about how much an injured party has lost because of the actions of the offending party. The expert may also assist a party defending against unmeritorious and/ or exaggerated claims. Experience shows that it is rarely a straight forward exercise to produce an exact estimation of the Claimant's economic losses. The independent expert draws on his knowledge and experience and makes assumptions in order to build a reliable assessment of damages. The expert further needs to explain his approach to the Arbitral Tribunal, usually made up of lawyers without specialist knowledge of financial matters, in a clear and intelligible way. Tribunals rely on credible, reasonable and well-documented claims. It is down to the expert to convince the Tribunal of the credibility of his opinions by detailing the analysis in a comprehensive, reasoned and, above all, clear report. The expert will also review and comment on the opposite party's assessment and possible counter-claim. At the hearing stage, the expert will testify in front of the arbitrators to expose the key features of the claim and respond to the Tribunal's queries.

At the heart of the quantum expert's work is understanding what the counterfactual (or 'But For') scenario would have been had the offending party not taken the measures it did take. In essence, depending on the applicable law, the expert seeks to assess the amount of compensation that should be paid to the injured party in order to place it in the position it would have occupied had it not suffered the wrong. This exercise requires not only a mastery of finance, accounting and valuation, but also a deep understanding of the relevant industry (here THL).

Three main methodologies are commonly applied by the experts when quantifying losses:[1]

• The *Market-based* approach, which derives the value of a business from an analysis of market prices for comparable public companies or market transactions. This approach relies on the substitution principle, whereby a prudent investor will not pay more for an asset than the cost of a similar asset with the same utility, and the challenge here is to convince

[1] *For more details on the expert's role and quantum methodologies, see Charlton Anthony, 2011, Valuation approaches and the financial crisis, available on the Kluwer Arbitration Blog at: http://kluwerarbitrationblog.com/author/anthony-charlton/.*

the Tribunal that the basis of comparison is reasonable.

• The *Income-based* approach (the most commonly used being the Discounted Cash Flow, DCF), which estimates the value of an asset or a business based on the future cash flows that it will generate over its remaining useful life. In an arbitration process, this methodology may be used in several ways. The expert may assess what cash flows the business would have generated in the counterfactual scenario and thus assess the value of the lost business. The expert may also contrast the profits the business would have generated in the 'But For' scenario with those actually generated in order to assess the business's lost profits. Whether the expert assesses the value of an expropriated business or lost profits, the output of a DCF model is a single number, representing the net present value of a project's or business' projected future cash flows or profits, as the case may be, discounted to take into account the time value of money and the uncertainty – both upside as well as downside – over the projected future earnings. This approach requires making basic assumptions: the relevant time-period, discount rate, and future revenues, profits and cash flows themselves.

• The *Asset-based* approach which relies on balance sheet figures for assets and liabilities as a starting point and, basically, looks at the adjusted net book value of assets. In the THL industry, in early-stage development projects where there is no track record, the *Investment-based approach*, which will look at all expenditures incurred to date, may be a suitable approach.

It is the quantum expert's role to determine which valuation approach best fits a specific case but it is best practice to apply, as and when possible, more than one approach to assess damages, whilst making sure to avoid 'double-counting'.

If the DCF approach has long been received with scepticism by arbitrators it is now more frequently accepted by them, provided that it is applied rigorously and that the assumptions on future cash inflows are reasonable and adequately justified.

Types of disputes

Delays in construction works and underperforming operating/ management contracts continue to be major sources of disputes in the THL industry and, we suspect, will continue to be so for the foreseeable future. In such types of disputes, losses which the injured party seeks to recover are fairly discrete and may include lost profits, wasted or increased costs, or else the loss of a business opportunity.

One of the other main types of dispute, which has attracted relatively little press coverage, is the case of expropriations. Given the increase in such cases in recent years, this article will now focus on certain trends we have identified in recent awards. In this type of dispute, assessing the loss sustained by the injured party may involve valuing the entire hotel business or project.

Expropriation

As Ripinsky and Williams write, *"Direct expropriations result in the transfer of title and physical possession of the property or other assets from a foreign investor to the State. Direct expropriations and nationalizations, frequent in the 20th century, have more recently given way to indirect expropriations. Indirect expropriation is deemed to occur when a measure or measures taken by a State have an effect similar or equivalent to direct expropriation even though the property is not seized and the legal title to the property is not affected."*[2]

Whether an expropriation is direct or indirect, the investor is deprived of the use and the full economic benefit of the investment. The macroeconomic environment referred to earlier has contributed to more protectionist measures being taken, including the forcible seizure of foreign investments. Expropriation is a topical issue and at the centre of investment arbitration.

Investment arbitration is primarily based on investment treaties, either multi- or bilateral, even though it sometimes relies on the host State's national investment law, which often provides for protection of foreign investors, or in certain circumstances, an investment agreement. Due to the unbundling of

[2] *Damages in International Investment Law by Sergey Ripinsky with Kevin Williams, pages 64-65.*

risks mentioned above, such disputes are especially prevalent in the hotel industry.

Most States are signatories to Bilateral Investment Treaties ("BIT") which set out the terms and conditions for private investment by nationals and companies of one state in another state, grant investments a number of guarantees, such as fair and equitable treatment, and afford foreign investors protection against expropriations. There are close to 2,300 BITs in force, involving most countries in the world.

Most BITs provide for compensation to be paid to the investor in the case of lawful expropriations, i.e. when the expropriations are for public purposes (public interest, environmental emergencies, etc.), non-discriminatory and carried out under due process of law.

When assessing damages, experts need to consider whether the expropriation is lawful or unlawful and any standard of compensation set out in the relevant BIT. Whether the expropriation is lawful or unlawful may be debated between the parties, as is the case in the *Siag and Vecchi v. Egypt (ARB/05/15)*[3] *matter.* The "Claimants submitted that this was an unlawful expropriation for which they were entitled to "full reparation" under customary international law", whilst the Respondent argued that the standard of compensation set out in the BIT did not apply in this case but that they only applied to "the so-called lawful expropriations". However, a number of arbitral tribunals have ignored the distinction between lawful and unlawful expropriations and deemed that timely and adequate compensation should be granted to the investor in either type of expropriations. In the case of unlawful expropriation, the expert needs to select and retain the relevant standard of compensation.

When selecting the relevant standard of compensation and the suitable approach to assess damages, the expert will have to consider:

- the exact role of the injured party, including whether it simply is an investor or whether it is an owner-operator of the hotel; and
- the development stage, i.e. whether the hotel is fully operational, has just been opened or is still in construction.

In *Alpha Projektholding GmbH v. Ukraine (ARB/07/16)*,[4] the Claimant was a joint venture set up for the purpose of renovating specific floors of a hotel. The Claimant's damage claim was three-fold: historical losses (outstanding payments), foregone income (expected payments under the renovation contract) and terminal value of the joint activity (half of the going concern value of the floors to be renovated). The tribunal found that "ownership of the floors was, and always has been, vested in the Hotel" and did not accept that "the entire going concern value of the floors would constitute assets for the joint activities upon termination of the contracts". In other words, the JV was found to have no claim on the refurbished floors, as it did not own them. At best, it would have had a claim on the improvements made as a result of the joint activities. It is therefore critical for the expert to gain a good understanding of the issue at stake and clearly define what the damage relates to.

In the aforementioned *Siag and Vecchi v. Egypt (ARB/05/15)*[5] case, the Tribunal sought to assess "the value of the expropriated asset in the Claimant's hands immediately prior to the expropriation". The issue was that what had been expropriated was an incomplete project. The hotel was still in the construction phase and had not yet started operating. The Claimant's loss assessment was supported by three methodologies, applied by two different firms, one of them being a commercial property adviser. Whilst the quantum expert "produced a lost business opportunity valuation", the commercial property advisor focused on the value of the asset. The Tribunal accepted the respondent's submission that "the authorities are generally against the use of a DCF analysis in circumstances such as present" and focused on the value of the Property (asset) instead of that of the Project. The expert needs to consider the advantages and likely shortcomings of the various approaches, to carefully select the most suitable one and to be prepared to address challenges raised by the other side or even

[3] *Waguih Elie George Siag and Clorinda Vecchi vs. Arab Republic of Egypt, ICSID, ARB/05/15.*
[4] *Alpha Projektholding GmbH v. Ukraine, ICSID, ARB/07/16.*
[5] *Waguih Elie George Siag and Clorinda Vecchi vs. Arab Republic of Egypt, ICSID, ARB/05/15.*

to simply explain to the Tribunal his / her rationale during the cross-examination session.

Another key feature of the expert work is selecting the relevant structuring assumptions: the assessment date, interest rates, the assumptions underpinning revenue and profit forecasts, to name a few. These will fundamentally impact the quantum assessment and therefore need to be carefully selected. They will need to be discussed with counsels and well-documented. In the Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic (ARB[AF]/06/1)[6] case where there was a lack of any track record for the business and few benchmarks for the Kyrgyz market, the Tribunal choose to rely on the latest available transaction price for the hotel, even though it occurred six years prior to the expropriation date. The Tribunal suggested expressing this value as at the expropriation date applying a risk free rate of interest. Where there is a high level of uncertainty on the assumptions underpinning the claim presented to the Tribunal, it may go back to the fundamental undisputed facts to try and define a fair assessment.

This shows that, in International Arbitration, the expert report and the expert's testimony are critical to the assessment of damages by the Tribunal. However, the expert work will only be accepted if it is a logical and clearly presented rationale supported by a strong set of carefully selected and documented data. In expropriation cases, data is often incomplete or unavailable because the project is at an early development stage or the documents have been retained by the responding State. In such cases, experts can provide a real insight and expertise in assessing and setting out the claim, and providing the Tribunal with the necessary assurances to enable them to render an award that adequately compensates the injured party.

Anthony Charlton, Battine Edwards and their dedicated team focus on the quantification of damages claims in international commercial and investment disputes, contentious valuations, post-transaction disputes, financial/fraud investigations, and other types of forensic accounting assignments.

[6] *Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic, ICSID, ARB(AF)/06/1.*

AS FAR AS IT GETS: ARBITRATION.RU MEETS CANADIAN ARBITRATION

Dmitry Artyukhov
Arbitration.ru
Editor-in-chief

This March our Moscow-based arbitration magazine literally reaches the other side of Earth. Editor-in-chief Dmitry Artyukhov speaks to Kimberley Stewart, CEO, Arbitration Place, Joel Richler, FCIArb, Bay Street Chambers, in Toronto and Tina Cicchetti, independent arbitrator, in Vancouver.

Maple syrup, hockey, and a popular domicile for mining companies...Russian-speaking arbitration professionals are not very familiar with what is happening in Canada and Canadian arbitration in general.

However, Toronto, the business capital of Canada, also called "a city that works", hosts many shareholder and partnership disputes, as well as mining and construction cases, and a good body of energy arbitration takes place in Calgary. Here's a 101 on Canadian arbitration that we discuss with Kim Stewart and Joel Richler in the spacious offices of Arbitration Place – a private arbitration hearing centre and arbitrators' chambers in the financial district of Toronto.

Firstly, In Canada, there is no single unified arbitration institution, like established institutions LCIA or the ICC. There is an ADR organization, ADR Institute of Canada (ADRIC), which also administers domestic arbitrations and mediations. The British Columbia International Commercial Arbitration Centre (BCICAC) has its own rules and administers arbitrations. The ICDR division of the American Arbitration Association administers some cases in Canada and has a set of Canadian rules. The ICC administers Canadian cases from New York, and the LCIA from London.

Arbitration centres in Canada are private initiatives. Such centres do not focus on particular types of disputes, but individual arbitrators have their own specialties.

Many of the disputes are domestic. Many of the arbitrations are ad hoc or under the UNCITRAL rules. Expedited procedure exists, not in a strict formal way, but is mostly used during ad hoc arbitrations, where a procedure is developed individually to meet the request for speedy arbitration. Joel mentions his experience as an emergency arbitrator in an expedited procedure.

Further, mediation is widespread in Canada, with a division between mediation and arbitration. Parties either mediate or arbitrate, and it is not a part of the same process, although parties often mediate disputes at some point during the course of an arbitration. When cases are tried in the courts, mediation is mandatory in some Canadian jurisdictions (including the province of Ontario). Mediation is part of the court process, the rules of the courts order it, and then private mediators come into play.

For international cases, it is not uncommon to see reference to the IBA Rules for the Taking of Evidence as part of the procedure in both ad hoc and institutional cases.

In sunny Vancouver, we discussed the role of women in arbitration with Tina Cicchetti, an independent arbitrator, and currently the Chair of the Arbitration Committee of ICC Canada. We touch upon the problem of the so-called "pipeline leak" – a top-

ic pitched by our editorial board members and arbitrators Olena Perepelinskaya and Elina Mereminskaya[1].

"The pipeline leak" is a gender equality problem meaning that while an approximately equal number of men and women start their legal career, only a fraction of women progress to partner level at a law firm and fewer women are appointed as arbitrators.

Tina Cicchetti admits this problem exists in Canada like in other countries. While a common conception is that this is caused by unequal treatment (like "the business is dominated by men"), Tina gives an interesting "internal" perspective on the issue. Work at a partner level has been increasingly demanding over the last years, says Tina, who had worked in a law firm before starting her independent arbitrator career. Not many are ready for this level of commitment, which largely demands to sacrifice time needed for other priorities in life, like family or hobbies. Only exceptional people have the energy to pursue both partner's career and their other priorities. Others, having spent some years in a law firm, decide they prefer not to make such a sacrifice. Perhaps women are those to see their priorities early on, concludes Tina.

...Canada is geographically far away from Russia and Europe, but in a globalised world it seems its arbitration scene and its problems are similar to European ones. How many years will pass before we see Russian disputes in Canada? I think about this when I walk past the Vancouver's Lions Gate Bridge and listen to the lull of the Pacific Ocean.

Ships in English bay, Vancouver

"International cases approach are more likely to be administered by an institution and refer to the IBA Rules. Domestic cases (and, possibly, "cross border" cases with US counterparties) are often ad hoc (especially if seated in Toronto or Calgary) and the procedure can more closely resemble litigation, as the parties will come from a similar/shared litigation culture".
Tina Chicchetti, Independent arbitrator

Arbitration.ru magazine in front of Toronto's skyscrapers

Arbitration Place

Arbitration Place is a privately owned arbitration venue in Toronto of about 2000 square meters of space, with a smaller hearing centre in Ottawa, and has 22 employees and 55 contractors. Court reporting is the mostly demanded service, alongside with tribunal secretary services, and administrative and translation services. English is the prevailing language of the hearings, with French occasionally used in Ottawa location.

There are two locations of Arbitration Place – one in Toronto and one in Ottawa, and there is an unrelated arbitration centre in Vancouver, Vancouver Arbitration Chambers. Centres like Arbitration Place do not administer arbitrations, but provide specialized facilities to host arbitrations. Also, Arbitration Place is an arbitration chamber.

There are over 30 arbitrators on the roster of Arbitration Place, both Canadian and international. If a party is interested in an arbitrator, Arbitration Place forward the request to the roster member or members.

Lists and CVs of Canadian arbitrators can be found on the website of Arbitration Place https://www.arbitrationplace.com/arbitrators and the website of the Canadian Chamber of Commerce, which is ICC Canada http://www.chamber.ca/arbitration/canadian-arbitrators/.

[1] *See article «Women in arbitration congress», Arbitration.ru №2 (6) 2019, pp.31-32.*

Kimberley Stewart *Joel Richler*

Dmitry Artyukhov
Arbitration.ru Editor-in-chief

Interview with Kimberley Stewart, CEO of Arbitration Place, Joel Richler, FCIArb, Bay Street Chambers, Toronto

What are the distinct features of Canadian arbitration?

J.R.: It depends on what those features are compared to. I think that Canadian party appointed arbitrators have great respect for the principle of neutrality, perhaps more so than in some other countries.

Canada is a UNCITRAL Model law state. Canadian courts are more supportive of arbitration than the courts in countries that a have not adopted the Model Law. The US courts for example can be a little bit more intrusive.

Many American lawyers don't like to use memorial process (filing written evidence), they prefer to have witnesses testified.

It would be harder to set aside an award here than in the US or in England (maybe not as much as in France). Here you have to show that the award was clearly beyond the jurisdiction of the tribunal or prove that gross procedural unfairness (like bribery or corruption) has taken place.

K.S.: Canada is officially bilingual, with many arbitrators speaking both languages, and some with a wide range of other languages because there are so many languages spoken in Canada. Some Canadian arbitrators can conduct arbitrations in more than one language, particularly English and French but also Spanish, for example.

So, one could name Canada as a pro-arbitration country?

J.R.: Absolutely!

K.S.: I agree with Joel. Also, I should add that some of the leading and most well-known arbitrators in the world have been and are Canadian. There is a strong cadre of the next two generations of Canadian international arbitrators – they are talented Canadian arbitrators who can work well both as sole arbitrators and on three-member tribunals, whether as party-appointed arbitrator or as chair/president of the tribunal.

How does a lawyer become an arbitrator in Canada?

J.R.: You call yourself an arbitrator (chuckles). There is no formal requirement or certification. There are many informal ones. At least, there is no single one in sense of a license. One can be a member of ADRIC, and they get appointments though it. Not all arbitrators are lawyers – there are accountants, property evaluators, engineers...

Do you use the title of QC in Canada?

J.R.: The title was abolished in Ontario but remains in British Columbia and several other provinces as well as at the federal level of government.

Do you have cases with Russian-speaking parties?

J.R.: I just had a case with a Russian-speaking party, but they live in Toronto. But in terms of a Russian national coming here from abroad, I don't think we've had such a case yet.

K.S.: We'd love to see more Russian arbitrations come here. They will see the attractiveness of our neutrality, among other things, our costs in Canada are substantially lower than in most of western Europe. They will find that the travel to Canada is not all that much longer too.

Do you invite foreign arbitrators?

K.S.: Yes, if a foreign arbitrator partners with us, we try to raise his or her profile in Toronto. We have also helped overseas colleagues to come to Canada. For example, we have written support letters help them obtain a visa. Russian parties should be considering – and appointing – Canadian arbitrators much more frequently than they have done historically and do today. Canada has many experienced international arbitrators, located across the country, particularly in Toronto, Montreal and Vancouver. They include many former leading Canadian judges on appellate courts (including the Supreme Court of Canada) and on first instance courts.

Do Canadian arbitration centres pay taxes on behalf of the arbitrators?

K.S.: Overseas arbitrators have to pay taxes in their home country. Canadian arbitrators have to pay taxes from their income after the proceedings, and they do it personally. Occasionally Arbitration Place does it on their behalf, using a special bank account.

What was the smallest case you've ever done? The largest?

K.S.: We had a case about 1.7 billion dollars.

J.R.: The smallest case I did was about a hundred thousand Canadian dollars, the largest – several hundreds of millions. It really depends what you call a big case: you can have a several billion-dollar claim, and it is worth nothing.

What arbitration rules are used most often? The UNCITRAL rules?

J.R.: Typically, none, as typically the arbitrations are ad hoc. But in an ad hoc context, the procedure would resemble the UNCITRAL rules very closely. All Canadian jurisdictions (10 provinces, 3 territories and federally) are Model Law jurisdictions. If an arbitration is seated here in Toronto, Ontario law on arbitration would apply. The statute in Ontario, the International Commercial Arbitration Act of 1991, which was amended in 2017, is a model one[2].

How do you see the perspectives of arbitration in Canada?

K.S.: Arbitration is becoming very common. People with a major commercial dispute increasingly will not go to court. They prefer the features that arbitration offers them.

J.R.: The number of commercial cases in courts is decreasing. For a number of reasons: Canadian government has other priorities. The court system has financial issues – there are not enough judges, not enough court houses. Also, there is a pressure in Canadian courts to prioritise criminal cases.

If a counsel was to present a case in front of Canadian arbitrators, how would you advise him/her?

K.S.: Great question!

J.R.: Canadian arbitrators will be comfortable and used to Canadian style of procedure. Before presenting your case, speak to Canadian lawyer not involved in the case early on and get advice from him (or her)!

[2] *In British Columbia the practice is different, notes Tina Cicchetti. It is common to have institutional arbitration, especially for domestic cases, which by default are conducted under the rules of the BCICAC.*

RUSSIAN ARBITRATION ASSOCIATION

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25 АПРЕЛЯ
2019

ТОЛКОВАНИЕ АРБИТРАЖНЫХ СОГЛАШЕНИЙ ФРАНЦУЗСКИМИ СУДАМИ

Екатерина Гривнова
президент Paris Baby Arbitration, Париж

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Французское право предусматривает три ситуации, позволяющие государственным судам анализировать арбитражные соглашения:

- при анализе возражения, поданного одной из сторон на основании наличия арбитражного соглашения между сторонами;
- при формировании состава арбитража содействующим арбитражу судьей[1];
- при анализе арбитражного решения в случае заявления о его отмене.

Основное отличие толкования арбитражных соглашений в первых двух ситуациях от толкования в третьей заключается в характере анализа, проводимого государственным судом: он будет поверхностным в первых двух случаях и глубинным в третьем.

Толкование соглашения при наличии возражения стороны или при формировании состава арбитража содействующим судьей

Французский закон, как и большинство других современных статутов, закрепляет принцип «компетенции – компетенции». Так, французский государственный суд оставляет исковое заявление без рассмотре-

[1] *Содействующий арбитражу судья (juge d'appui) – судья государственного суда, занимающийся вопросами арбитража и разрешающий процессуальные конфликты сторон, которые возникают в рамках арбитража и касаются, в частности, назначения арбитров или администрирующего института; обязанности содействующего арбитражу судьи выполняет президент Высокого суда (Tribunal de Grande Instance).*

ния при наличии арбитражного соглашения между сторонами, если любая из сторон заявит возражение о компетенции государственного суда не позднее первого заявления по существу дела (ст. 1448 ГПК[2]). Единственное исключение из этого принципа касается «*явно* недействительных и *явно* неприменимых» арбитражных соглашений[3]. При этом государственный суд может отказать в приведении в исполнение «явно недействительного и явно неприменимого» арбитражного соглашения только в случае, если состав арбитража еще не был сформирован. В противном случае даже при наличии «явно недействительного и явно неприменимого» арбитражного соглашения право определения компетенции по рассмотрению спора принадлежит составу арбитража. Это правило также применяется, если одна или несколько сторон спора находятся в стадии ликвидации[4].

Для сравнения: пп. 5 п. 1 ст. 148 АПК РФ позволяет российскому государственному суду не применять арбитражное соглашение, если оно «недействительно, утратило силу или не может быть исполнено».

Принцип «компетенции – компетенции» также находит свое отражение в процессе формирования состава арбитража. Так, в случае когда в арбитражной оговорке сторонами не предусмотрено наличие арбитражного центра или иного третьего лица, занимающегося организацией арбитража, и стороны не могут прийти к соглашению относительно формирования состава арбитража, содействующий арбитражу судья будет исполнять функции назначающего органа. Если арбитражное соглашение «явно недействительно и явно неприменимо», содействующий арбитражу судья отказывает в формировании состава арбитража (ст. 1455 ГПК)[5]. В отличие от решения по назначению арбитров, решение об отказе в формировании состава арбитража может быть обжаловано в апелляционном порядке (ст. 1460 ГПК)[6].

Необходимость наличия *явного* характера недействительности или неприменимости сильно сужает возможности интерпретации арбитражного соглашения государственными судами[7]. Такая формулировка французского закона запрещает судам прибегать к глубинному анализу арбитражного соглашения, договорных обязательств и фактов дела[8]. Подразумевается, что явная недействительность или неприменимость арбитражного соглашения должны сразу бросаться в глаза, а малейшее сомнение должно интерпретироваться в пользу компетенции состава арбитража[9]. Задача государственного суда при анализе возражения по компетенции или при формировании состава арбитража – проанализировать волю сторон при заключении соглашения[10]. Воля сторон прибегнуть к арбитражу не может быть исключена только по причине того, что стороны не обсуждали арбитражное соглашение в рамках преддоговорных обсуждений[11].

При этом отказ государственного суда

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[2] Здесь ГПК – Гражданский процессуальный кодекс Франции (Code de Procédure Civile). Приведенная формулировка почти идентична формулировке в российском АПК и довольно распространена.

[3] Manifestement nulle ou manifestement inapplicable.

[4] Кассационный суд, 25 ноября 2008 года, Les Pains du Sud c/ Tagliavini, № 07-21.888; Кассационный суд, 3 февраля 2010 года, Dipeyre et X. c/ SNDA et Groupe Le Duff, № 09-12.669.

[5] Апелляционный суд Парижа, 21 марта 2017 года, M. Laurent X. et autres c/ Mme Estelle Z. et autres, № 16/11169.

[6] Laura Weiller, Les recours contre les décisions du juge d'appui, Revue de l'Arbitrage, Comité Français de l'Arbitrage, Volume 2018 Issue 1, 15–35, §§9 и 16.

[7] Vincent Chantebout, L'excès de pouvoir du juge d'appui, Revue de l'Arbitrage, Comité Français de l'Arbitrage, Volume 2017 Issue 2, 550–565, §21.

[8] Кассационный суд, 11 октября 2017 года, Fédération Internationale de Ski c/ Gras Savoye Rhône-Alpes Auvergne, № 16-24.590; Кассационный суд, 13 сентября 2017 года, Oc'Via c/ Groupement solidaire Guintoli/EHTP/NGE génie civil et autre, № 16-22.326.

[9] Jean-Pierre Ancel, La Cour de cassation et les principes fondateurs de l'arbitrage international, Dalloz, 165.

[10] Кассационный суд, 26 ноября 1997 года, Brigif c/ ITM-Entreprises et autre, № 95-12.686.

Кассационный суд, 21 сентября 2016 года, BK Medical APS et Analogic Corporation c/ X., № 15-28.941.

в признании арбитражного соглашения «явно недействительным или явно неприменимым» не презюмирует компетенцию состава арбитража, а лишь отдает ему приоритет в определении собственной компетенции.

Обширная практика французских судов по толкованию действительности или применимости арбитражных соглашений позволяет сделать вывод о либеральности французского подхода: за последние 20 лет ни одно арбитражное соглашение не было признано французскими судами явно недействительным[12]. С другой стороны, количество решений, признающих арбитражные соглашения явно неприменимыми, минимально (по данным 2017 года, их было всего десять[13]). Остановимся на этих двух категориях подробнее.

Явно недействительные арбитражные соглашения

Явная недействительность арбитражного соглашения касается его формулировки. Статьи 1188–1192 Гражданского кодекса Франции содержат общие правила интерпретации договоров. Среди общих принципов присутствуют приоритет воли сторон перед буквальной формулировкой и *effet utile* – принцип практического значения. На их основании многие патологические арбитражные соглашения могут быть «спасены» государственным судом[14]. Считается, что наличия слова «арбитраж» в договоре достаточно для того, чтобы государственный суд отклонил свою юрисдикцию[15]. Так, в одном деле[16] Парижский апелляционный суд отказался признавать явно недействительным пункт договора «Другие положения и арбитраж: данный договор регулируется английским правом»[17].

Также арбитражное соглашение не является явно недействительным, если в документе, содержащем арбитражную оговорку, либо в договорах, связанных с этим документом, одновременно присутствует и пророгационное соглашение[18]. В частности, Апелляционный суд Парижа счел, что арбитражное соглашение, как отказ от компетенции государственных судов в целом, имеет приоритет перед пророгационным соглашением, выражающимся лишь в изменении территориальной подсудности, – даже если арбитражное соглашение содержится в рамочном договоре, а пророгационные оговорки включены в договоры исполнения и спор возник в связи с расторжением одного из таких договоров[19].

Не являются явно недействительными и неполные арбитражные соглашения – например, соглашения, не регулирующие или противоречиво регулирующие порядок формирования состава арбитража. Требование о том, чтобы арбитражное соглашение содержало такие указания, было отменено декретом от 13 января 2011 года. Кассационный суд решил, что, если воля сторон обратиться в арбитраж установлена, арбитражная оговорка, указывающая сразу на несколько арбитражных центров одновременно, может

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[12] *Clay T. Arbitrage et modes alternatifs de règlement des litiges, ноябрь 2017 года – декабрь 2018 года, Dalloz, 2448.*
[13] *Ibid.*
[14] *Pignarre L.-F. Convention d'arbitrage, декабрь 2013 года (обновление от февраля 2017 года), Répertoire de droit civil, Dalloz.*
[15] *Thomas Clay, Arbitrage et modes alternatifs de règlement des litiges, ноябрь 2017 года – декабрь 2018 года, Dalloz, 2448.*
[16] *Апелляционный суд Парижа, 27 марта 2018 года, Cross Continental Trading Limited c/ The International Bankiing Corporation BSC, № 17/08354.*
[17] *Autres dispositions et Arbitrage: ce contrat est régi par le droit anglais.*
[18] *Кассационный суд, 18 декабря 2003 года, La Chartreuse c/ Viadix, № 02-13.410; Кассационный суд, 14 ноября 2007 года, SIAL c/ Vinexpo, № 06-21629.*
[19] *Апелляционный суд Парижа, 29 ноября 1991 года, Distribution Chardonnet c/ Fiat Auto France, Revue de l'Arbitrage, Comité Français de l'Arbitrage, 1993, 617.*

быть приведена в исполнение с помощью содействующего арбитражу судьи[20].

Судебной практикой было также определено, что государственный суд не компетентен в признании арбитражной оговорки явно недействительной по таким основаниям, как ошибка, обман или насилие при ее заключении[21] (во французском праве согласие является одним из трех элементов действительности договора; согласие отсутствует в случае ошибки, обмана или насилия). Так, не является недействительной оговорка, содержащаяся в договоре, в случае если иск заявлен на основании манипуляций при его заключении[22].

Также не являются явно недействительными:

- оговорка, выраженная в отсылке на другой документ[23];
- оговорка, предусматривающая, что арбитры не связаны нормами и сроками, установленными ГПК[24];
- оговорка, содержащаяся в уставе компании, при добровольной ликвидации этой компании[25];
- опционная или асимметричная арбитражная оговорка, предоставляющая право выбора между обращением в арбитраж или государственный суд только одной стороне[26].

Явно неприменимые арбитражные соглашения

Явная неприменимость арбитражного соглашения всегда рассматривается с точки зрения конкретного спора: она касается либо сторон, участвующих в споре, либо предмета спора, на который не распространяется арбитражная оговорка. Арбитражное соглашение может быть действительным по всем параметрам, но неприменимым к стороне, против которой подано возражение, или к предмету иска.

Неприменимость соглашения к сторонам спора

В силу своей договорной природы арбитражные соглашения не имеют юридической силы в отношении третьих лиц. По этому правилу третьи лица не могут быть принудительно привлечены в арбитражный процесс.

Тем не менее при определенных обстоятельствах арбитражная оговорка может распространяться на третьи лица (если они участвовали в обсуждении, подписании, исполнении или расторжении договора) или следовать за договорными правами (например, в случае цессии или суброгации). Задача государственного суда – определить очевидное несоответствие между сторонами арбитражного соглашения и спора, не анализируя при этом возможность распространения арбитражного соглашения на лиц, участвующих в деле.

Например, в одном деле апелляционный суд признал оговорку неприменимой к спору между субподрядчиком и заказчиком в связи с тем, что субподрядчик не был связан договором с заказчиком и договор подряда содержал пророгационное соглашение. Суд отказался распространить оговорку, содержащуюся в договоре субподряда, на отношения между субподрядчиком и заказчиком. Кассационный суд отменил

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[20] Кассационный суд, 20 февраля 2007 года, UOP NV c/ BP France, Innovene France, Innovene Manufacturing France, Total Petrochemicals France, Naphtachimie, № 06-14.107.

[21] Апелляционный суд Парижа, 4 мая 1988 года, Revue de l'Arbitrage, Comit Fran ais de l'Arbitrage, 1988, 657.

[22] Кассационный суд, 10 ноября 2009 года, Valle c/ Y. et ASJB, № 07-21.866.

[23] Апелляционный суд Парижа, 15 октября 2009 года, Revue de l'Arbitrage, Comit Fran ais de l'Arbitrage, 2009, 923.

[24] Апелляционный суд Парижа, 6 ноября 2003 года, Revue de l'Arbitrage, Comité Français de l'Arbitrage, 2004, 439, 934; Кассационный суд, 12 февраля 2004 года, A. c/ X., № 02-10.987; Кассационный суд, 6 июля 2005 года, X. c/ Gouvernement de la République islamique d'Iran, № 01-15.912.

[25] Кассационный суд, 27 февраля 2013 года, Groupe Investimo c/ Alstom transport et la Caisse des d p ts et consignations, № 12-16.328.

[26] По аналогии с асимметричными пророгационными оговорками: Кассационный суд, 7 октября 2015 года, eBizcuss c/ Apple Sales international, Apple Inc et Apple Retail France, № 14-16.898.

постановление, так как апелляционный суд превысил свои полномочия при анализе арбитражного соглашения и приведенные им аргументы не направлены на установление явной неприменимости арбитражного соглашения[27].

В другом деле президент суда первой инстанции признал арбитражную оговорку неприменимой, так как сторона, против которой было заявлено возражение, не являлась подписантом этой оговорки. Апелляционный суд отменил решение, посчитав, что президент суда первой инстанции превысил свои полномочия. Апелляционный суд отметил, что анализ наличия или отсутствия подписи стороны на договоре, содержащем арбитражную оговорку, выходит за рамки анализа явной неприменимости арбитражной оговорки[28].

В целом не является явно неприменимой оговорка, если иск заявлен стороной, не подписывавшей договор, на основании которого заявлен иск[29], или правопреемником изначального подписанта договора[30].

Анализ применимости арбитражных соглашений также проводится в отношении привлеченных сторон. Так, в одном деле[31] субсубподрядчик подал иск против субподрядчика. Договор субсубподряда не содержал арбитражного соглашения. Субподрядчик привлек в процесс генерального подрядчика и заказчика. Суд отклонил свою компетенцию в отношении заказчика и генерального подрядчика, так как договоры генерального подряда и субподряда содержали арбитражные соглашения.

Неприменимость соглашения к предмету спора

Арбитражное соглашение признается явно неприменимым, когда оно либо не распространяется на конкретный спор (например, спор касается гарантии по договору купли-продажи, а арбитражная оговорка находится в несвязанном договоре поставки), либо пересекается с другим соглашением, имеющим приоритет (в последующем договоре). Так, являются явно неприменимыми:

- оговорка, включенная в общие условия после подписания конкретного договора[32];
- две арбитражные оговорки, включенные в общие условия продажи и общие условия гарантии и противоречащие друг другу (одна оговорка предусматривала арбитраж ICC в Хельсинки в соответствии с финским правом, а другая – арбитраж AAA в Остине в соответствии с правом штата Иллинойс)[33];
- оговорка, содержащаяся в предварительном соглашении, если заключенный впоследствии основной договор содержит пророгационное соглашение[34];
- оговорка в несвязанном договоре. При наличии двух контрактов с разным объектом (договор поставки и договор залога), один из которых содержал арбитражную оговорку, а другой – пророгационное соглашение, суд решил, что компетенция арбитров распространялась только на договор с арбитражной оговоркой[35]. Следовательно, арбитражная оговорка является явно неприменимой к спору, вытекающему из второ-

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[27] *Кассационный суд, 13 сентября 2017 года, Oc'Via c/ Groupement solidaire Guintoli/EHTP/NGE génie civil et autre, № 16-22.326.*

[28] *Кассационный суд, 11 октября 2017 года, AW2 c/ Elemata Maddalena et Virtus finance, № 16/02577.*

[29] *Кассационный суд, 12 ноября 2009 года, Trioplast AB c/ Sainte Germaine, № 09-10.575; Апелляционный суд Парижа, 26 февраля 2013 года, № 12/12953, Revue de l'Arbitrage, Comité Français de l'Arbitrage, 2013, 527.*

[30] *Кассационный суд, 6 марта 2007 года, Euroluz c/ Saint-Louis sucre, № 04-16.204.*

[31] *Апелляционный суд Экс-ан-Прованса, 31 мая 2018 года, IREM France c/ Total Raffinage France et Tecnicas Reunidas, № 17/23118, 17/23115, 17/23114.*

[32] *Кассационный суд, 27 апреля 2004 года, Silja Oyj ABP c/ Bureau Véritas, № 01-13.831, 01-15.974.*

[33] *Апелляционный суд Гренобля, 15 марта 2016 года, Etablissement Lindgren Oy c/ SARL Euro MC, № 15/02519.*

[34] *Кассационный суд, 11 июля 2006 года, PT Andhika Lines c/ corporate solutions assurance, № 03-19.838; Cachard O. Le contrôle de la nullité ou de l'inapplicabilité manifeste de la clause compromissoire, Revue de l'Arbitrage, Comité Français de l'Arbitrage, 2006, 93.*

[35] *Кассационный суд, 4 июля 2006 года, Recape c/ CSF, № 05-11.591.*

го договора. К такому же решению пришел суд, рассматривавший спор из договора партнерства, который включал пророгационное соглашение, тогда как отдельный договор купли-продажи акций содержал арбитражную оговорку[36]. В обоих решениях суды подчеркивали, что стороны хотели разделить договоры и споры, вытекающие из них, путем включения разных оговорок по разрешению споров;

• оговорка, содержащаяся в договорах, относительно которых была проведена новация. Так, в одном деле трехсторонний договор был заключен с целью новации обязательств по двум предыдущим договорам (первые два договора были заключены между продавцом акций и двумя разными покупателями). Два первых договора содержали арбитражные оговорки, а в трехсторонний договор было включено пророгационное соглашение. Суд постановил, что арбитражные оговорки были явно неприменимыми к спору, вытекающему из трехстороннего соглашения, в том числе потому, что каждый из первых двух договоров касался только двух сторон[37];

• оговорка, если стороны отказались от арбитража. Так, в одном деле договоры франчайзинга и поставки содержали арбитражную оговорку. Франчайзер и поставщик подали иск в государственный коммерческий суд на франчайзи. Франчайзи не заявляет возражение, основанное на арбитражной оговорке. Впоследствии франчайзи предъявляет иск к франчайзеру в этот же суд на основании договора аренды предприятия, не содержащего арбитражной оговорки. Франчайзер и поставщик заявили возражение на основании арбитражной оговорки, содержащейся в договорах франчайзинга и поставки. Суд определил, что стороны отказались от права прибегнуть к арбитражу по этой оговорке в первом процессе, и признал оговорку, содержащуюся в договорах франчайзинга и поставки, явно неприменимой к иску франчайзи[38];

• оговорка, содержащаяся в акте, который является объектом заявления об аннулировании в рамках ликвидационного процесса[39];

• оговорка, содержащаяся в договоре технического обслуживания, заключенном между двумя компаниями, – к иску директора одной из компаний к другой компании о неоплате услуг, оказанных директором лично и не включенных в договор технического обслуживания[40].

В других случаях государственные суды отказывают в признании явной неприменимости соглашения.

Так, арбитражное соглашение, включенное в договор франчайзинга, подразумевало, что обеспечительные и срочные меры могут быть приняты государственным судом. Франчайзи подали иск в суд с целью признать недействительными положения внутреннего регламента франчайзера касательно преимущественного права покупки. Помимо прочего, франчайзи отмечали, что данная мера является срочной, так как в противном случае существует риск банкротства истцов. Суд признал себя некомпетентным рассматривать данный спор, так как арбитражная оговорка не является явно недействительной или явно неприменимой к данному спору даже при наличии исключения, предусмотренного арбитражным соглашением[41].

Также не является неприменимой оговорка, включенная в устав компании, в контексте иска одного участника компании к другому участнику, исполняющему обязанности исполнительного директора. Оговорка в первом параграфе подразумевала, что споры, связанные с компанией, должны быть разрешены «компетентными трибуналами» (tribunaux compétents). Второй параграф оговорки предполагал передачу этих

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[36] Кассационный суд, 12 февраля 2014 года, Markem-Imaje c/ Marquinarias Tecnifar, № 13-10.346.

[37] Кассационный суд, 1 июня 2017 года, Federal State Unitary Enterprise Russian Satellite Communications Company c/ Orion Satellite Communications and Céleste Financial Holding, № 16-11.487.

[38] Кассационный суд, 20 апреля 2017 года, Carrefour proximité France c/ Distri Dorengts, № 16-11.413.

[39] Кассационный суд, 17 ноября 2015 года, Carrefour proximité France c/ X., № 14-16.012.

[40] Апелляционный суд Версаля, 20 декабря 2018 года, VINCI c/ Y., № 18/03697.

[41] Апелляционный суд Парижа, 19 сентября 2017 года, Keralan c/ Système U Centrale Régionale Ouest, № 16/19968.

же споров в арбитраж. Суд решил, что второй параграф выражает волю сторон на передачу споров в арбитраж. Первый же параграф, как и весь устав в целом, этой воле не противоречит, так как значение слова «трибунал» является многозначным[42].

Не являются явно неприменимыми следующие оговорки:

• арбитражная оговорка в международном потребительском договоре[43];

• к квазиделиктному иску (например, заявленному на основании недобросовестной конкуренции) – оговорка, касающаяся всех споров, вытекающих из договора и возникающих в связи с ним[44];

• к иску о нарушении преддоговорных обязательств по предоставлению информации – арбитражная оговорка, содержащаяся в заключенном после контракте[45];

• к иску о признании договора недействительным – арбитражная оговорка, распространяющаяся только на споры, связанные с интерпретацией и исполнением договора[46];

• к иску работников предприятия к покупателю акций этого предприятия – арбитражная оговорка, содержащаяся в договоре купли-продажи акций[47];

• к деликтному иску, поданному финансовым агентом, действующим на основании договора факторинга, к должникам по договорам купли-продажи, – оговорки, включенные в договоры купли-продажи, в отношении платежей по которым был заключен этот договор факторинга[48];

• к заявлению о привлечении к спору о неисполнении обязательств бывшей материнской компании ответчика, продавшей компанию-ответчика во время спора, – арбитражная оговорка, содержащаяся в договоре купли-продажи акций компании-ответчика[49].

Толкование соглашения на стадии проверки арбитражного решения

В рамках производства по отмене арбитражного решения арбитражное соглашение рассматривается при определении арбитрами правильности установления своей компетенции или ее отсутствия (п. 1 ст. 1520 ГПК). Таким образом, может быть отменено арбитражное решение, не только признающее компетенцию арбитражного трибунала, но и отклоняющее ее[50]. Однако возражения на основании неправильно определенной компетенции в арбитражном процессе вправе заявить только ответчик (либо третьи лица), истец же не может ссылаться на отсут-

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[42] Апелляционный суд Парижа, 25 февраля 2016 года, Magistry c/ Chevalier. Аналогичное решение касательно термина tribunal compétent: Апелляционный суд Парижа, 13 февраля 2018 года, F2MC c/ EQUIP'FORET, № 17/07693.

[43] Апелляционный суд Парижа, 6 мая 2004 года, Carthago Films c/ Babel Productions, Revue de l'Arbitrage, Comité Français de l'Arbitrage, 2004, 726; Апелляционный суд Парижа, 23 марта 2010 года, N., Emeth Distribution c/ N., № 08/23008.

[44] Апелляционный суд Парижа, 11 декабря 1981 года, D. 1982; Кассационный суд, 14 мая 1997 года, X. c/ Promodes et Prodim, № 94-20.776; Кассационный суд, 8 ноября 2005 года, Mathieu c/ UNIC, № 02-18.512.

[45] Кассационный суд, 4 июля 2018 года, Société Banque Delubac et Cie c. Société M. Agrarhandel GmbH et Société Banque Delubac et Cie c/ Werner Tiernahrung GmbH, № 17-13.067, 17-13.069.

[46] Кассационный суд, 12 декабря 2007 года, Produm c/ Lafarge, № 07-13927.

[47] Кассационный суд, 11 апреля 2018 года, Honeywell matériaux de friction c/ 11 travailleurs, № 17-17.991, 17-17.992, 17-17.993, 17-17.994, 17-17.995, 17-17.996, 17-17.997, 17-17.998, 17-17.999, 17-18.000.

[48] Кассационный суд, 4 июля 2006 года, X. c/ Prodim, № 05-17.460.

[49] Кассационный суд, 14 ноября 2018 года, Mazroui Trading and General Services c/ Constructions mécaniques de Normandie et Financière de Rosario, № 17-10.184.

[50] Апелляционный суд Парижа, 16 июня 1988 года, Revue de l'Arbitrage, Comité Français de l'Arbitrage, 1989, 309; Апелляционный суд Парижа, 21 июня 1990 года, Revue de l'Arbitrage, Comité Français de l'Arbitrage, 1991, 96; Кассационный суд, 6 октября 2010 года, JAFF c/ X., № 08-20.563; Jean-Baptiste Racine, Les sentences d'incompétence, Revue de l'Arbitrage, Comité Français de l'Arbitrage, 2010, 729.

ствие или недействительность арбитражного соглашения[51].

Если сторона заявляет об отсутствии компетенции у состава арбитража, суд имеет право провести глубинный анализ любых правовых и фактических доводов сторон, в том числе прибегнуть к толкованию арбитражной оговорки и договора, ее содержащего[52]. Во Франции действительность международного арбитражного соглашения не определяется в соответствии с национальным правом, применимым к оговорке. Единственным критерием наличия арбитражного соглашения является воля сторон, которая, безусловно, не может противоречить международному публичному порядку[53]. В своем анализе государственный суд не связан аргументацией арбитров[54].

Так, арбитражные решения могут быть отменены из-за недействительности или неправильного применения арбитражного соглашения, связанных, например, со следующими обстоятельствами:

• арбитражное соглашение предусматривало назначение предвзятого арбитра[55];

• согласие сторон при заключении соглашения не было установлено (как отмечалось выше, во французском праве согласие является одним из трех элементов действительности договора; согласие отсутствует в случае ошибки, обмана или насилия)[56];

• спор является неарбитрабельным (хотя зачастую вопрос арбитрабельности будет рассматриваться в рамках возражения о нарушении публичного порядка)[57];

• арбитражная оговорка была незаконно включена в потребительский договор;

• арбитражное соглашение содержится во внутриевропейском инвестиционном соглашении[58];

• решение выходит за рамки согласия, выраженного государством в инвестиционном соглашении, – например, если истец в арбитражном процессе не является инвестором[59] или присужденная компенсация рассчитана с учетом стоимости инвестиций на дату, которая выходит за рамки периода применения инвестиционного соглашения[60].

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[51] Кассационный суд, 26 января 1994 года, Revue de l'Arbitrage, Comité Français de l'Arbitrage, 1995, 443; Апелляционный суд Парижа, 12 ноября 1998 года, Revue de l'Arbitrage, Comité Français de l'Arbitrage, 1999, 374.

[52] Кассационный суд, 6 января 1987 года, Revue de l'Arbitrage, Comité Français de l'Arbitrage, 1987, 469; Кассационный суд, 6 октября 2010 года, JAFF c/ X., № 08-20.563.

[53] Апелляционный суд Парижа, 9 октября 2018 года, R. c/ Baltic International Bank, № 16/18778.

[54] Апелляционный суд Парижа, 17 декабря 2013 года, Revue de l'Arbitrage, Comité Français de l'Arbitrage, 2014, 942.

[55] Апелляционный суд Парижа, 9 апреля 1992 года, D. 1992.

[56] Апелляционный суд Парижа, 8 июля 1970 года, Revue de l'Arbitrage, Comité Français de l'Arbitrage, 1970, 95.

[57] Кассационный суд, 6 января 1987 года, JDI 1987; Апелляционный суд Парижа, 26 марта 2009 года, Revue de l'Arbitrage, Comité Français de l'Arbitrage, 2010, 525; Кассационный суд, 6 октября 2010 года, JAFF c/ X., № 08-20.563; Кассационный суд, 1 июня 2011 года, Pharmethica c/ Euronda, № 10-15.199.

[58] Суд юстиции Европейского союза, 6 марта 2018 года, Slowakische Republik c/ Achmea BV, № C-284/16.

[59] Апелляционный суд Парижа, 25 апреля 2017 года, Venezuela c/ Garcia, № 15/01040; Кассационный суд, 13 февраля 2019 года, Venezuela c/ Garcia, № 17-25.851.

[60] Апелляционный суд Парижа, 29 января 2019 года, Venezuela c/ Rusoro Mining Limited, № 16/20822.

ПАРИЖ

Франция

Год:	Площадь:	Население:	Самая высокая точка:
III век до н. э.	*105,4 км²*	*2 206 488 человек*	*Эйфелева башня, высота 324 м*

Достопримечательность

Лувр

Лувр считается одним из самых крупных и посещаемых художественных музеев мира. Впервые Лувр был открыт для посещений в ходе Французской революции 8-го ноября 1793 года. Тогда посетители смогли увидеть экспозицию, состоящую из 537 картин. Активное пополнение экспозиции пришлось на время правления Наполеона.

В наши дни в залах Лувра демонстрируется 35 тысяч экспонатов, всего его коллекция насчитывает более 300 тысяч художественных ценностей.

Арбитражный институт

Международный арбитражный суд при Международной торговой палате (ICC)

ИНТЕРПРЕТАЦИЯ ПО-РУССКИ: ПРАКТИКА РОССИЙСКИХ СУДОВ В ОТНОШЕНИИ ТОЛКОВАНИЯ АРБИТРАЖНЫХ СОГЛАШЕНИЙ

Валерия Гребенькова
юрист практики разрешения споров «Бейкер МакКензи», Москва

8 февраля 2018 года Арбитражный суд города Москвы отказал в признании и приведении в исполнение арбитражного решения, вынесенного составом арбитров суда Международной торговой палаты (МТП, ICC) по спору между «Дреджин энд Мэритайм Менеджмент СА» и АО «Инжиниринговая корпорация “Трансстрой”».

Отказывая в признании и приведении в исполнение, суд в том числе указал, что арбитражная оговорка, на основании которой было вынесено арбитражное решение, является неисполнимой.

Арбитражное соглашение, заключенное сторонами спора, устанавливало следующее:

«Любой не урегулированный мирным путем спор <…> должен быть окончательно урегулирован в международном арбитраже. Если иное не согласовано сторонами, то:

а) спор должен быть окончательно урегулирован в соответствии с Правилами арбитража Международной торговой палаты;

б) спор должен быть рассмотрен тремя арбитрами, назначенными в соответствии с этими Правилами;

в) арбитражное разбирательство должно вестись на языке, указанном в пункте 1.5.

<…>

Местом проведения арбитража является Женева, Швейцария».

Данная оговорка была практически идентична типовой арбитражной оговорке суда МТП, рекомендованной в арбитражном регламенте 1998 года, который действовал в момент начала арбитражного разбирательства: *«Любые споры, возникающие из настоящего договора или в связи с ним, подлежат окончательному урегулированию в соответствии с Арбитражным регламентом Международной торговой палаты одним или несколькими арбитрами, назначенными в соответствии с этим регламентом».*

Суд посчитал, что оговорка содержит указание лишь на арбитражный регламент, но не на конкретный арбитражный институт, в который стороны договорились передать разрешение своих споров. В связи с этим суд посчитал, что компетенция суда МТП не следовала из арбитражного соглашения.

Кроме того, по мнению суда, согласованное сторонами место арбитража в Женеве также создает неопределенность в вопросе компетентного органа по разрешению споров, поскольку штаб-квартира суда МТП располагается в Париже.

Судебный акт суда первой инстанции был поддержан в кассационном суде и Верховном суде РФ. Не стал пересматривать данную позицию судов и председатель Верховного суда РФ[1].

Это решение суда вызвало панику в российском и международном арбитражном сообществе[2].

Так, некоторые публикации указывали на крайне одиозный и контрарбитражный характер решения. Эксперты пророчили неисполнимость в России арбитражных решений ведущих арбитражных институтов, поскольку типовые арбитражные оговорки многих из них также отсылают к собственным арбитражным регламентам и не содержат указания на конкретные арбитражные учреждения, администрирующие споры[3]. Кроме того, выбор места арбитража, отличного от места нахождения арбитражного института, является распространенной практикой.

Сейчас, когда эмоции утихли, самое время провести спокойный анализ ситуации.

Почему суд принял такое решение?

Как это обычно бывает, ситуация оказалась проще, чем кажется на первый взгляд.

Во-первых, стоит отметить, что все же основной причиной, по которой суд отказал в признании и приведении в исполнение решения арбитража МТП, скорее всего, являлось пресловутое «противоречие публичному порядку России». Именно этому вопросу преимущественно посвящен судебный акт, в то время как вопросы толкования арбитражного соглашения освещены кратко.

Поскольку ответчик по данному делу во время арбитражного разбирательства успел побывать в процедуре банкротства, а на момент признания арбитражного решения все еще выплачивал долги кредиторам, заключившим мировое соглашение в деле о банкротстве, суд счел, что выплата средств по арбитражному решению нарушит права кредиторов недавно банкротящегося лица и, следовательно, российский публичный порядок.

Не останавливаясь подробно на анализе данной логики суда, отметим, что в последнее время российские суды крайне осторожно подходят к вопросам признания арбитражных решений, вынесенных против лиц, находящихся в процедурах банкротства, устанавливая повышенный стандарт доказывания обоснованности требования для заявителя[4]. Все чаще в судебных актах делается акцент на публичном характере процедур банкротства, которые ограничивают право сторон обращаться к частным способам разрешения споров. В связи с описанными трендами в судебной практике отказ в признании и приведении в исполнение арбитражного решения был хоть и не совсем обоснованным, но все же ожидаемым.

Во-вторых, российские судьи испытывают трудности в понимании концепции места арбитража. Стоит отметить, что перед российскими судами ранее неоднократно вставал вопрос, связанный

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[1] История рассмотрения дела доступна по ссылке http://kad.arbitr.ru/Card/e14833d5-67ca-48a9-adff-78c46640dabe.

[2] См., в частности, Ad Yykin A., Rubins N. ICC seeks clarity after clause deemed unenforceable in Russia, available on the Kluwer Arbitration Blog at http://arbitrationblog.kluwerarbitration.com/2018/11/28/russian-courts-hold-an-icc-arbitrationclause-to-be-unenforceable/ and GAR at https://globalarbitrationreview.com/article/1177002/icc-seeks-clarityafter-clause-deemed-unenforceable-in-russia; Правосудие не переходит границы // Коммерсант, https://www.kommersant.ru/doc/3798973

[3] См., в частности, Регламент Лондонского международного третейского суда 2014 года и рекомендованную оговорку: «Любой спор, возникающий по настоящему контракту или в связи с ним, в том числе любой вопрос в отношении его существования, действительности или прекращения, подлежит передаче на рассмотрение и окончательное разрешение в арбитраж согласно Регламенту Лондонского международного арбитражного суда (the LCIA), где такой Регламент в результате ссылки на него считается частью настоящей оговорки».

А также Арбитражный регламент Арбитражного института Торговой палаты Стокгольма 2017 года и рекомендованную оговорку: «Любой спор, разногласие или претензия, вытекающие из настоящего контракта или в связи с ним, в том числе касающиеся его нарушения, прекращения или недействительности, будут окончательно разрешены путем арбитража в соответствии с Арбитражным регламентом Арбитражного института Торговой палаты города Стокгольма».

[4] Определение Судебной коллегии по экономическим спорам Верховного суда РФ от 9 октября 2015 года по делам № 305-КГ15-5805, А41-36402/12.

с определением значения и правовой природы места арбитража, однако суды, как правило, уклонялись от высказываний на этот счет[5].

Кроме того, ситуация, в которой место арбитража не совпадает с местом нахождения арбитражного института, не вполне согласуется с российскими арбитражными традициями. Так, согласно §21 Правил арбитража международных коммерческих споров, которые применяются к разрешению споров, передаваемых в Международный коммерческий арбитражный суд при Торгово-промышленной палате Российской Федерации (МКАС), местом арбитража является город Москва. Сторонам не предоставляется права выбора места арбитража по своему усмотрению.

В-третьих, к сожалению, не все судьи, рассматривающие дела в первой инстанции, обладают достаточным опытом в делах, связанных с международным арбитражем. Так, суд первой инстанции допустил очевидную ошибку, усомнившись в исполнимости типовой оговорки суда МТП. Разумеется, ссылка на арбитражный регламент МТП очевидно свидетельствует о передаче споров сторон в арбитраж МТП. Статьей 6(2) арбитражного регламента суда МТП в редакции 2012 и 2017 годов прямо предусмотрено, что, соглашаясь на арбитражное производство в соответствии с регламентом, стороны принимают, что такое производство будет администрироваться судом МТП. Соответственно, любое указание на регламент должно рассматриваться как прямое согласие сторон передать свой спор в арбитраж, администрируемый судом МТП.

Открытым остается вопрос, почему данную ошибку не поправили вышестоящие суды. Вероятно, ответ кроется в российской традиции составления судебных актов. В целом судебные акты российских судов не отличаются подробными и исчерпывающими формулировками. Суды в основном ограничиваются ссылками на нормы права и выводами по существу спора, не анализируя подробно каждый довод, заявленный сторонами. Вышестоящие суды при этом предлагают подробную мотивировку по общему правилу, только если не согласны с выводами нижестоящих судов по существу спора. Поскольку здесь вышестоящие суды оказались в целом солидарны с позицией суда первой инстанции о необходимости отказа в признании и приведении в исполнение арбитражного решения, то думается, что с большой долей вероятности суды «в целях процессуальной экономии» просто не стали предлагать альтернативный взгляд на разрешение всех возникших в деле вопросов.

Исключение или закономерность?

Стоит признать, что данное решение является скорее исключением, чем правилом. До принятия данного судебного акта российские суды признавали действительность и исполнимость арбитражных оговорок, содержащих ссылки на правила арбитража арбитражных институтов в целом[6] и суда МТП в частности[7]. Еще в 2013 году Президиум ВАС РФ сформулировал правовую позицию, согласно которой ссылка на правила арбитража суда МТП *«с очевидностью свидетельствует о наличии согласия сторон на рассмотрение их спора международным коммерческим арбитражем в соответствии с Арбитражным регламентом Международной торговой палаты»*[8].

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[5] См., в частности, дело о российско-сингапурском арбитраже. Определение Арбитражного суда города Москвы от 5 мая 2017 года по делу № А40-219464/16-52-430 поддержано постановлением Арбитражного суда Московского округа от 19 июля 2017 года и определением Верховного суда РФ от 13 ноября 2017 года

[6] Постановление ВАС РФ от 24 июня 2014 года № 1332/14. Арбитражная оговорка, содержащая ссылку на регламент Лондонского международного третейского суда, была признана действительной и исполнимой. Арбитражное решение, вынесенное на основании такой оговорки, признано в России.

[7] Определения Верховного суда РФ от 20 ноября 2014 года № 308-ЭС14-4570 и от 27 июня 2016 года № 310-ЭС16-6467, постановление Арбитражного суда Центрального округа от 24 февраля 2016 года № Ф10-42/2016 по делу № А83-2596/2012, постановление Арбитражного суда Западно-Сибирского округа от 19 января 2018 года по делу № А81-4101/2016, постановления ФАС Московского округа от 27 декабря 2012 года по делу № А40-101021/12-56-942 и от 19 ноября 2007 года № КГ-А40/11699-07 по делу № А40-20227/07-28-146, постановление Арбитражного суда Северо-Западного округа от 30 ноября 2017 года по делу № А56-92816/2016.

[8] Определение Судебной коллегии по экономическим спорам Верховного суда РФ от 9 октября 2015 года по делам № 305-КГ15-5805, А41-36402/12.

Кроме того, не вызывал у судов никаких вопросов выбор места арбитража, отличного от места нахождения суда МТП[9]. Такие арбитражные решения признавались и приводились в исполнение в России. Можно утверждать, что по данным вопросам в России сложилась устоявшаяся судебная практика, а решение по данному делу является скорее исключением, нежели правилом. Также преждевременно и неверно было бы говорить о критическом отношении российских судов к международным арбитражным решениям в целом и решениям суда МТП в частности. Согласно исследованию PAA[10], в период с 2007 по 2017 год в российские суды было подано 13 заявлений о признании и приведении в исполнение решений суда МТП. Только в трех случаях в признании и приведении в исполнение решений было отказано, при этом ни один из таких отказов не был связан с пороками арбитражного соглашения. Следует, правда, заметить, что отказы в основном приходились на арбитражные решения с достаточно высокой суммой спора.

Примечательно, что параллельно с настоящим делом аналогичные вопросы (об исполнимости типовой арбитражной оговорки суда МТП и допустимости согласования места арбитража, отличного от места нахождения суда МТП) рассматривались Арбитражным судом Западно-Сибирского округа[11]. Суд признал, что исполнимой является оговорка, содержащая ссылку на арбитражный регламент суда МТП. Не вызвало вопросов у суда и то, то что стороны выбрали Вену (а не Париж) в качестве места арбитража.

По сути, в одно и то же время в разных регионах России суды пришли к прямо противоположным выводам по аналогичным вопросам.

Будущее судебной практики по вопросам толкования арбитражных соглашений

Несмотря на то что, за исключением решения по данному делу, в целом российская судебная практика шла по пути признания типовых оговорок арбитражных институтов, в конце прошлого года Верховный суд РФ решил более четко прояснить данный вопрос.

26 декабря 2018 года вышел подготовленный Верховным судом РФ обзор практики рассмотрения судами дел, связанных с выполнением функций содействия и контроля в отношении третейских судов и международных коммерческих арбитражей. В п. 5 данного обзора Верховный суд указал следующее: *«Арбитражное соглашение сторон договора, соответствующее арбитражному соглашению, рекомендованному самим согласованным сторонами арбитражным учреждением, является исполнимым. Все сомнения в исполнимости арбитражного соглашения в соответствии с ч. 8 ст. 7 Закона об арбитраже, п. 9 ст. 7 Закона о международном коммерческом арбитраже должны толковаться в пользу его действительности и исполнимости».*

Данное разъяснение призвано окончательно разрешить вопросы толкования типовых арбитражных оговорок и защитить рекомендованные арбитражными институтами оговорки от их неправильной интерпретации.

В целом Верховный суд РФ в духе недавно внесенных поправок в Закон РФ «О международном коммерческом арбитраже» призвал суды толковать арбитражные соглашения в проарбитражной манере и при наличии любых сомнений исходить из их действительности и исполнимости, что должно позитивно сказаться на судьбе иностранных арбитражных решений в России.

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[9] См., в частности, дело о российско-сингапурском арбитраже. Определение Арбитражного суда города Москвы от 5 мая 2017 года по делу № А40-219464/16-52-430 поддержано постановлением Арбитражного суда Московского округа от 19 июля 2017 года и определением Верховного суда РФ от 13 ноября 2017 года.

[10] Определения Верховного суда РФ от 20 ноября 2014 года № 308-ЭС14-4570 и от 27 июня 2016 года № 310-ЭС16-6467, постановление Арбитражного суда Центрального округа от 24 февраля 2016 года № Ф10-42/2016 по делу № А83-2596/2012, постановление Арбитражного суда Западно-Сибирского округа от 19 января 2018 года по делу № А81-4101/2016, постановления ФАС Московского округа от 27 декабря 2012 года по делу № А40-101021/12-56-942 и от 19 ноября 2007 года № КГ-А40/11699-07 по делу № А40-20227/07-28-146, постановление Арбитражного суда Северо-Западного округа от 30 ноября 2017 года по делу № А56-92816/2016.

[11] Постановление Президиума ВАС РФ от 16 июля 2013 года № 2572/13.

KIAP | Korelskiy Ischuk Astafiev

ОБЗОР СУДЕБНЫХ РЕШЕНИЙ РФ

Валерия Пчелинцева

СТОРОНА, НЕ ЗАЯВИВШАЯ ХОДАТАЙСТВА В ТРЕТЕЙСКОМ СУДЕ, НЕ ВПРАВЕ ССЫЛАТЬСЯ НА НАРУШЕНИЕ ПРИНЦИПА БЕСПРИСТРАСТНОСТИ АРБИТРОВ

Номер дела в государственном суде:
А40-158194/18.

Стороны спора:
ООО «Велесстрой» (Россия) – заявитель в государственном суде, истец в третейском суде;
ПАО «ФСК ЕЭС» (Россия) – заинтересованное лицо в государственном суде, ответчик в третейском суде.

Разрешавший спор третейский суд:
Арбитражный центр при РСПП.

Представители сторон в третейском суде:
Н/д.

Арбитры:
М. Ю. Савранский (председатель состава арбитров), М. З. Пак, А. В. Замазий.

Представители сторон в государственном суде:
ООО «Велесстрой»: О. Н. Штригель.
ПАО «ФСК ЕЭС»: С. В. Пашков.

Судьи, вынесшие решение в государственном суде:
Первая инстанция: Т. Н. Ишанова.
Кассационная инстанция: Н. Ю. Дунаева (председательствующий судья), С. В. Краснова, Л. В. Федулова.

ООО «Велесстрой» обратилось в Арбитражный центр при РСПП с исковым заявлением о взыскании неосновательного обогащения в виде стоимости мебели, поставленной ПАО «ФСК ЕЭС» в рамках исполнения договора 2012 года, а также процентов за пользование чужими денежными средствами (всего требований на сумму около 300 тыс. руб.).

17 апреля 2018 года третейский суд в составе М. Ю. Савранского, М. З. Пак и А. В. Замазия, действуя по регламенту Арбитражного центра при Российском союзе промышленников и предпринимателей, отказал в удовлетворении требований ООО «Велесстрой» к ПАО «ФСК ЕЭС».

ООО «Велесстрой» подало заявление в Арбитражный суд города Москвы об отмене решения третейского суда. Оспаривая вынесенное третейским судом решение, ООО «Велесстрой» указало, что оно было вынесено по спору, не предусмотренному третейским соглашением, а также нарушает положения ст. 18 Федерального закона «Об арбитраже»[1] о независимости и беспристрастности арбитров, диспозитивности, состязательности и равном отношении к сторонам. Данное нарушение выразилось в том, что один из арбитров, принимавших участие в разбирательстве дела в Арбитражном центре при РСПП, представлял интересы ПАО «ФСК ЕЭС» в судебных спорах с подрядчиками.

23 октября 2018 года Арбитражный суд города Москвы отказал в заявлении об отмене решения третейского суда РСПП. Суд указал, что ООО «Велесстрой», обращаясь в третейский суд, не сомневался в наличии компетенции у третейского суда на рассмотрение спора именно в указанном порядке. Кроме того, заявитель не доказал, что один из арбитров представлял интересы ПАО «ФСК ЕЭС».

По итогам рассмотрения 8 февраля 2019 года Арбитражный суд Московского округа оставил решение суда первой инстанции в силе[2].

УКЛОНЕНИЕ ОТ ПРЕДОСТАВЛЕНИЯ ОРИГИНАЛА ДОГОВОРА ПРИЗНАНО ДОКАЗАТЕЛЬСТВОМ ОТСУТСТВИЯ ТРЕТЕЙСКОГО СОГЛАШЕНИЯ

Номер дела в государственном суде: А40-254046/17-83-1668.

Стороны спора:
ЗАО «Агропромпроект» (Россия) – заявитель в государственном суде, должник по решению третейского суда;
ООО «Содействие» (Россия) – заинтересованное лицо в государственном суде, кредитор по решению третейского суда.

Разрешавший спор третейский суд:
Постоянно действующий третейский суд «Росарбитраж».

[1] *Федеральный закон от 29 декабря 2015 года № 382-ФЗ «Об арбитраже (третейском разбирательстве) в Российской Федерации».*
[2] *Постановление Арбитражного суда Московского округа от 8 февраля 2019 года по делу № А40-158194/18*

Представители сторон в третейском суде:
Н/д.

Арбитры:
Н/д.

Представители сторон в государственном суде:
ЗАО «Агропромпроект»: А. О. Маклыгин.
ООО «Содействие»: представитель не явился.

Судья, вынесший решение в государственном суде: В. П. Сорокин.

Арбитражный суд города Москвы своим определением от 1 февраля 2019 года[1] отменил решение, вынесенное коллегией арбитров постоянно действующего третейского суда «Росарбитраж» по спору между двумя российскими обществами. Поскольку кредитор по решению третейского суда, как и третейский суд, уклонялся от предоставления оригинала договора займа и третейской оговорки, на основании которой был подан иск в «Росарбитраж», государственный суд пришел к выводу об отсутствии между сторонами надлежащим образом оформленного третейского соглашения.

ЗАО «Агропромпроект» обратилось в государственный суд с требованием об отмене решения ПДТС «Росарбитраж», в соответствии с которым с акционерного общества в пользу ООО «Содействие» были взысканы задолженность и пеня по договору займа, а также третейский сбор (всего на сумму около 1 млн руб.). О решении третейского суда заявителю стало известно из материалов оставленного без рассмотрения ранее дела о выдаче ООО «Содействие» исполнительного листа на принудительное исполнение решения.

Заявитель (ЗАО «Агропромпроект») сослался на то, что никаких договорных отношений между ним и кредитором по решению «Росарбитража» не существовало, как и взысканной с него задолженности. Представитель ЗАО «Агропромпроект» утверждал, что никаких денежных средств по договору займа не получал, а об имевшем место судебном разбирательстве в третейском суде общество не было извещено.

ЗАО «Агропромпроект» указало в ходе разбирательства дела на то, что самостоятельно затребовало в третейском суде оригинал или заверенную копию решения третейского суда, однако документы в адрес заявителя не поступили. В целях проверки доводов заявителя заинтересованным лицам было предписано представить на обозрение суда оригинал договора займа, однако ни ООО «Содействие», ни иные заинтересованные лица не исполнили требование суда. В материалах дела в третейском суде договор займа также не был обнаружен. По копии договора провести судебную экспертизу оказалось невозможным.

На основании вышеизложенного суд пришел к выводу, что доводы заявителя не были документально опровергнуты, а участвующие в деле лица уклонились от предоставления необходимых доказательств. По мнению суда, незаключение договора займа и третейского соглашения о передаче дела в третейский суд было доказано. При таких обстоятельствах решение ПДТС «Росарбитраж» подлежит отмене.

[1] *Определение Арбитражного суда города Москвы от 1 февраля 2019 года по делу № А40-254046/17-83-1668.*

СПОРЫ О ТРУДОВЫХ ОТНОШЕНИЯХ КЛУБОВ СО СПОРТСМЕНАМИ НЕ ВХОДЯТ В КОМПЕТЕНЦИЮ АРБИТРАЖНЫХ СУДОВ

Номер дела в государственном суде: А40-305330/2018-63-2542.

Стороны спора:
Некоммерческое партнерство «Спортивный клуб «Суперлига» (Россия) – заявитель в государственном суде;
ассоциация «Мужской волейбольный клуб «Белогорье» (Россия) – заинтересованное лицо в государственном суде;
общественная организация «Всероссийская федерация волейбола» (Россия) – заинтересованное лицо в государственном суде;
А. А. Семышев (Россия) – заинтересованное лицо в государственном суде.

Разрешавший спор третейский суд:
Арбитраж при Всероссийской федерации волейбола.

Представители сторон в третейском суде:
Н/д.

Арбитры:
Ю. Н. Юрьев (председатель арбитража), В. А. Березов, Е. Е. Кузнецов.

Представители сторон в государственном суде:
Некоммерческое партнерство «Спортивный клуб «Суперлига»: представитель не явился.
Ассоциация «Мужской волейбольный клуб «Белогорье»: представитель не явился.
Общественная организация «Всероссийская федерация волейбола»: З. А. Трифонова.
А. А. Семышев: представитель не явился.

Судья, вынесший решение в государственном суде:
Т. Н. Ишанова.

Спортивный клуб «Суперлига» обратился в Арбитражный суд Москвы с заявлением об отмене решения арбитража при Всероссийской федерации волейбола. Арбитражем было вынесено решение о переходе одного из спортсменов в спортивный клуб «Белогорье». Своим определением от 8 февраля 2019 года[1] государственный суд прекратил производство по делу.

[1] *Федеральный закон от 4 декабря 2007 года № 329-ФЗ «О физической культуре и спорте в Российской Федерации».*

В соответствии с положением об арбитраже при Всероссийской федерации волейбола, арбитраж, решение которого было оспорено «Суперлигой», является органом при Всероссийской федерации волейбола, созданным для осуществления досудебного разрешения споров, возникающих между спортсменами, физкультурно-спортивными организациями, членами федерации и иными физическими и юридическими лицами, принимающими участие или имеющими отношение к официальным российским соревнованиям по волейболу, устраиваемым федерацией.

Рассматривая заявление спортивного клуба, государственный суд указал на то, что арбитраж при Всероссийской федерации волейбола является органом, осуществляющим досудебный порядок урегулирования споров в соответствии с Федеральным законом «О физической культуре и спорте в РФ»[2]. Из решения данного учреждения усматривается, что предметом спора являлись трудовые отношения, сложившиеся между клубом и спортсменом, и последствия расторжения трудового договора. Однако рассмотрение трудовых споров не относится к компетенции государственного арбитражного суда.

На основании вышеизложенного суд пришел к выводу о том, что заявление спортивного клуба «Суперлига» не подлежит рассмотрению в арбитражном суде. По итогам рассмотрения производство по делу было прекращено.

ПРАВО ОБЖАЛОВАНИЯ В КАССАЦИОННОМ ПОРЯДКЕ ПРИЗНАНО ТОЛЬКО ЗА ЛИЦАМИ, ЧЬИ ПРАВА НЕПОСРЕДСТВЕННО ЗАТРОНУТЫ РЕШЕНИЕМ СУДА

Номер дела в государственном суде: А56-23769/2013.

Стороны спора:
ООО «Хохтиф Проектентвиклюнг ГмбХ» (ФРГ) – заявитель кассационной жалобы в государственном суде;
ООО «Хохтиф Девелопмент Руссланд» (Россия) – заявитель в суде первой инстанции, кредитор по решению третейского суда;
ООО «Инвестиционная компания «Пулковская» (Россия) – заинтересованное лицо в государственном суде, должник по решению третейского суда.

Разрешавший спор третейский суд:
Арбитражный институт Торговой палаты города Стокгольма.

Представители сторон в третейском суде:
Н/д.

[2] *Федеральный закон от 4 декабря 2007 года № 329-ФЗ «О физической культуре и спорте в Российской Федерации».*

Арбитры:
Кристер Содерлунд, Кристер Дэниэльссон, Вильям Е. Батлер.

Представители сторон в государственном суде:
ООО «Хохтиф Проектентвиклюнг ГмбХ»: Ю. А. Манохин, А. С. Гутиев.
ООО «Хохтиф Девелопмент Руссланд» – А. В. Кузнецов (конкурсный управляющий).
ООО «Инвестиционная компания «Пулковская» – А. О. Майорова, И. И. Дубровская, Е. М. Войтенкова.

Судьи, вынесшие решение в государственном суде:
Пересмотр по вновь открывшимся обстоятельствам в суде первой инстанции: С. М. Кротов.
Суд кассационной инстанции: О. Ю. Нефедова (председательствующий судья), Е. В. Боголюбова, П. Ю. Константинов.

При рассмотрении кассационной жалобы немецкого мажоритария ООО «Хохтиф Девелопмент Руссланд» Арбитражный суд Северо-западного округа пришел к выводу, что участник общества не имеет права обжаловать решение, если он не принимал участия в заседании, не ходатайствовал о привлечении в качестве заинтересованного лица, а также если принятое государственным судом решение не затрагивает непосредственно его прав и обязанностей. К такому выводу пришел кассационный суд в своем определении от 12 февраля 2019 года[1].

Между российским дочерним предприятием немецкого ООО «Хохтиф Проектентвиклюнг ГмбХ» и ООО «Инвестиционная компания «Пулковская» в 2010 году был заключен договор на управление проектом на предварительной стадии и стадии проектирования в отношении объектов, инфраструктуры, а также дилерских центров таких компаний, как Mercedes-Benz и Porsche. Согласно одному из пунктов договора, в случае разногласий стороны передают споры из договора в арбитраж в Стокгольме для разрешения в соответствии с арбитражным регламентом данного арбитражного института.

С иском в третейский суд против ООО «Инвестиционная компания «Пулковская» обратилось ООО «Хохтиф Девелопмент Руссланд». Стокгольмский арбитраж удовлетворил в полном объеме его требования на сумму свыше 4,5 млн евро. Инвестиционная компания не исполнила вынесенное решение, в связи с чем ООО «Хохтиф Девелопмент Руссланд» обратилось в государственный суд с требованием о его принудительном исполнении осенью 2013 года. Требования заявителя были удовлетворены судом первой инстанции, определение которого было впоследствии оставлено без изменений кассационным судом.

В июле 2018 года ООО «Хохтиф Девелопмент Руссланд» было признано банкротом, в отношении него было открыто конкурсное производство по упрощенной процедуре.

В октябре 2018 года государственный суд пересмотрел решение от 2013 года по инициативе инвестиционной компании по вновь открывшимся обстоятельствам. Судом было установлено, что генеральный директор ООО «Хохтиф

[1] *Определение Арбитражного суда Северо-западного округа от 12 февраля 2019 года по делу № А56-23769/2013.*

Девелопмент Руссланд» Е. А. Радаева, а также сотрудники компании В. Д. Соколов и А. А. Ефремов совершили покушение на мошенничество в особо крупном размере, намереваясь создать видимость надлежащего выполнения работ по договору для получения возможности хищения денежных средств ООО «Инвестиционная компания «Пулковская». В частности, пересматривая решение по вновь открывшимся обстоятельствам, суд признал, что указанные лица подготовили проектную документацию, не соответствующую заданию заказчика, передав ее инвестиционной компании с заверением о коррекции подготовленной проектной документации в момент прохождения проектом государственной экспертизы. Для целей прохождения экспертизы генеральный директор ООО «Хохтиф Девелопмент Руссланд» и его сотрудники сфальсифицировали дополнение к проектной документации, при этом реально выполненные работы не соответствовали ни заданию заказчика, ни разрешению на строительство. Несмотря на последующие требования со стороны инвестиционной компании о выполнении работ в соответствии с заданием и документацией, руководство общества продолжало отступать от них, стремясь избежать лишних расходов. Наконец, после изготовления руководством общества подложного сопроводительного письма с отметкой о получении комплекта документов, подтверждающих соответствие итоговых результатов работ документации, ООО «Хохтиф Девелопмент Руссланд» обратилось к ООО «Инвестиционная компания «Пулковская» с требованием о выплате денежных средств, а после – в третейский суд. Во время рассмотрения спора в Стокгольме истцом были предъявлены подложные документы, подтверждающие соответствие выполненных якобы надлежащим образом работ заданию, а значит, наличие у ООО «Инвестиционная компания «Пулковская» денежного обязательства перед ООО «Хохтиф Девелопмент Руссланд». После выяснения государственным судом всех обстоятельств принятое в 2013 году определение о признании решения третейского суда было отменено, а в выдаче исполнительного листа на принудительное исполнение отказано.

Позднее в суд с кассационной жалобой обратилось уже немецкое общество «Хохтиф Проектентвиклюнг ГмбХ», не являющееся лицом, участвующим в деле. Заявитель жалобы полагал, что статус мажоритария дает ему право на обжалование решения российского государственного суда.

Однако суд не согласился с доводами немецкого ООО, указав, что оно не участвовало в пересмотре дела по вновь открывшимся обстоятельствам и не заявляло ходатайства о привлечении его к участию в разбирательстве в качестве третьего лица. Более того, судебный акт не был принят непосредственно о правах и обязанностях общества-мажоритария. Требования «Хохтиф Проектентвиклюнг ГмбХ» не были включены в реестр требований конкурсных кредиторов его дочернего общества. Заявление немецкой компании о привлечении к субсидиарной ответственности не рассмотрено, а размер ответственности не установлен.

На основании вышеизложенного Арбитражный суд Северо-Западного округа прекратил производство по кассационной жалобе общества с ограниченной ответственностью «Хохтиф Проектентвиклюнг ГмбХ».

ВИДИШЬ ЗНАКИ?

Угадай, какие понятия из сферы арбитража зашифрованы
в этих эмодзи-месседжах!

1.

EmojiLaw

2.

EmojiLaw

3.

EmojiLaw

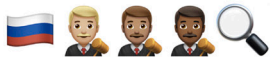
4.

EmojiLaw

5.

EmojiLaw

With regards,



EmojiLaw

Ответы на странице 78

КОНКУРС EMOJI ARBITRATION

🌟 Редакция Arbitration.ru, AdHoc Arbitration 🚀 и РАА 🔍 объявляют конкурс на лучший эмодзи-месседж про фабулу (кейс) Конкурса РАА по Арбитражу Онлайн:
🌠 RAAEmojiChallenge2019 🔍

⚔🍰 В вашем эмодзи-месседже должна раскрываться графически фабула дела IV Конкурса РАА по Арбитражу Онлайн, размещенная по адресу http://moot.arbitrations.ru/upload/medialibrary/69a/RAA-Online-Moot-IV-Mock-Case-_-final.pdf.

🤵 Также принимаются эмодзи-месседжи по проблематике арбитража, отдельно взятых институтов и понятий, связанных с арбитражем.

☝ От одного участника или команды принимается не более трех эмодзи-месседжей. При оценке месседжей будут учитываться:
– лаконичность;
– оригинальность;
– читаемость (доступность для расшифровки сообщения широкой аудиторией).

🥊 Пожалуйста, присылайте свои эмодзи-месседжи в графическом формате (jpg) вместе с ответами на электронную почту ave.moscow@yandex.ru с пометкой «RAA E-moji Challenge / Конкурс эмодзи».

📆 Срок приема месседжей – до 15 апреля 2019 года.
🏆 Конкурс предусматривает три призовых места.
📝 Победители получат призы от РАА, а лучшие месседжи будут опубликованы в нашем журнале.

РЕШЕНИЕ ВЕРХОВНОГО СУДА УКРАИНЫ ПО ДЕЛУ «ООО “ЭВЕРЕСТ ИСТЕЙТ” (УКРАИНА) И ДРУГИЕ ПРОТИВ РОССИЙСКОЙ ФЕДЕРАЦИИ»

Сергей Уваров,
Integrites, Киев,
советник

25 января 2019 года Верховный суд Украины вынес свое решение в деле № 796/165/2018 по заявлению украинской компании «Эверест Истейт» и 18 других заявителей о признании и приведении в исполнение решения инвестиционного арбитража против Российской Федерации. Данное дело является ответвлением серии дел, которые были инициированы украинскими инвесторами с целью взыскания с РФ компенсации за активы, экспроприированные в Крыму после событий 2014 года.

Арбитражное разбирательство по делу «Эверест Истейт» стало первым среди так называемых крымских дел, по которому было вынесено окончательное арбитражное решение. В решении от 2 мая 2018 года арбитражный трибунал признал нарушение двустороннего инвестиционного договора со стороны РФ и присудил истцам более 159 млн долл. компенсации и процентов (далее – арбитражное решение).

Несмотря на то что РФ обжаловала данное арбитражное решение в апелляционном суде Гааги, летом 2018 года украинские истцы подали заявление о признании и приведении в исполнение этого арбитражного решение в Украине. РФ в украинском процессе активно не участвовала, ограничившись направлением нескольких формальных писем-возражений. Тем не менее события по этому делу разворачивались весьма динамично. Уже 5 сентября 2018 года Апелляционный суд города Киева принял обеспечительные меры, среди прочего наложив арест на акции украинских банков ПАО «Проминвестбанк», АО «Сбербанк» и АО «ВТБ Банк» (далее – украинские банки), принадлежащие российским Внешэкономбанку, ПАО «Сбербанк России» и ПАО «Банк ВТБ» (далее – российские банки), а также наложив арест на все имущество перечисленных выше украинских банков. 25 сентября 2018 года Апелляционный суд города Киева также признал и привел в исполнение арбитражное решение. Оба определения были обжалованы.

В своих определениях Верховный суд оставил в силе решение о признании и приведении в исполнение арбитражного решения, однако частично изменил объем принятых обеспечительных мер. При этом Верховный суд вынужден был коснуться ряда вопросов, важных в контексте как развития арбитража в Украине в целом, так и ответственности государства и государственных компаний. Предлагаем читателям остановиться на них подробнее.

Юрисдикция украинских судов рассматривать заявление о признании и приведении в исполнение арбитражного решения

Согласно украинскому законодательству суды Украины полномочны рассматривать соответствующие заявления, только если ответчик

или же его имущество находятся на территории Украины. Важно отметить, что здесь нет указания на то, что на данное имущество возможно обратить взыскание. Поданное РФ заявление о том, что все ее имущество на территории Украины защищено иммунитетом, фактически подтверждало наличие такого имущества, а соответственно и юрисдикцию судов Украины рассматривать дело. Кроме того, Верховный суд сослался на «общеизвестный факт»: на территории Украины в Крыму и на Донбассе находится имущество РФ, в частности военная техника.

Доказательства наличия арбитражного соглашения

Нью-Йоркская конвенция 1958 года обязывает заявителя при обращении в суд предоставить копию арбитражного соглашения. Украинские суды, как правило, довольно консервативно подходили к этому требованию, особенно в случаях признания и приведения в исполнение решений инвестиционных арбитражей. Тем не менее в данном деле Верховный суд продемонстрировал весьма либеральный подход, указав, что арбитражное соглашение содержится в соответствующем международном договоре и предоставлять его копию не требуется.

Корпоративная вуаль и государственные компании

Решение Верховного суда по данному делу оставило больше вопросов, чем ответов. С одной стороны, Верховный суд подтвердил, что согласно законодательству Украины юридические лица не могут нести ответственность за долги своих учредителей. При этом был отменен арест, наложенный на имущество украинских банков. С другой стороны, обеспечительные меры были изменены и арест наложен на акции украинских банков, «принадлежащие Российской Федерации». Поскольку известно, что РФ непосредственно не является собственником акций украинских банков, остается непонятным, следует ли такое решение толковать как арест несуществующего имущества или все же как попытку

проникнуть за корпоративную вуаль российских банков. Вероятно, ответ на этот вопрос мы получим уже на этапе попыток фактического принудительного исполнения арбитражного решения в Украине.

Юрисдикционный иммунитет

Согласно законодательству Украины иностранные государства имеют так называемый абсолютный юрисдикционный иммунитет. При этом Украина не является стороной Конвенции ООН о юрисдикционных иммунитетах государств и их собственности. Тем не менее Верховный суд посчитал, что данная конвенция подлежит применению в Украине как часть международного обычного права, имеющего приоритет над национальным законодательством, и решил, что в соответствии с указанной конвенцией РФ отказалась от иммунитета, дав согласие на рассмотрение инвестиционных споров в арбитраже. Данная стратегия может иметь далеко идущие последствия для правоприменительной практики Украины.

Вместо заключения

Несмотря на то что в деле «Эверест Истейт» подняты действительно важные и интересные юридические вопросы, Верховный суд отнюдь не поставил точку в большинстве из них. Вероятно, как вопросы иммунитета от исполнения, так и вопросы проникновения за корпоративную вуаль вновь станут предметом рассмотрения при попытках фактического исполнения арбитражного решения.

6th Annual RAA Conference

The Russian Arbitration Association are proud to invite you to the 6th Annual RAA Conference, that will be held in Moscow in Marriott Grand Hotel on April 25,2019.
This year the RAA Conference is dedicated to the discussion of Arbitration of domestic disputes with a foreign element, Resolution of Disputes out of Public Procurement in Domestic and International Arbitration, Arbitrability of Russian Corporate Disputes and etc.

Date: 25 April, 2019
Venue: Marriott Grand Hotel, Moscow
Address: Tverskaya street, 26/1, Moscow, Russia
Time: 10.00-19.00 (registration begins at 09.30)

This conference brings together about 100 practitioners from around the globe to discuss the hot topics such as:

1) Arbitration of domestic disputes with a foreign element:

- Criteria for determining internal disputes
- Restrictions on place of arbitration;
- Restrictions on administration by foreign arbitration institutions.

2) Arbitrability of Russian Corporate Disputes:

- Recent changes in legislation;
- Practice of Russian arbitration centers;
- Practice of foreign arbitration centers (LCIA, ICC, SCC, etc);
- Practice of Russian courts;
- Cyprus view;

3) Session 3:

Consideration of disputes from public procurement and contracts with state financing in domestic and international arbitration

4)Blah-blah-blayka – short discussions from the floor:

- The fate of investment disputes involving Russia
- Trends in the practice of Russian courts in relation to arbitration
- The fate of ad hoc arbitration
- Mediation: the patient is alive rather than dead

Confirmed Speakers:

- Stepan Guzey, Partner, Lidings;
- Artem Doudko, Partner, Osborne Clarke;
- Marina Akchurina, Associate, Cleary Gottlieb;
- Valeria Romanova, Managing associate, Linklaters;
- Professor Kaj Hober, Chairman of the SCC Board;
- Timur Aitkulov, Partner, Clifford Chance, RAA, Member of the Board;
- Alexander Bezborodov, Partner, Beiten Burkhardt;
- Ivan Urzhumov, Counsel, Foley Hoag;
- Vladimir Khvalei, Partner, Baker McKenzie, Chairman of the Board, RAA;
- Dmitry Dyakin, Partner, EPAM;
- Sergey Usoskin, Attorney, Double Bridge Law;
- Andrei Kostitcyn, Ad Hoc Arbitration Forum;
- Irina Suspitcyna, Leading lawyer in foreign trade, ABH Miratorg;
- Pavel Boulatov, Counsel, White & Case

You may find the program here
To register the conference, please follow the link
For sponsorship opportunities, please contact Alexandra Brichkovskaya via e-mail alexandra.brichkovskaya@arbitrations.ru

If you have any questions about the Conference registration, please do not hesitate to contact Valeriya Teslina via e-mail valeriya.teslina@arbirtations.ru

III Annual Conference on Assets Tracing, Injunctions, Experts and 3d Party Funding

The Russian Arbitration Association is proud to invite you to the III Annual Conference on Assets Tracing, Injunctions, Experts and 3d Party Funding on June 6 in Moscow.

This is the only event of that kind in Russia and CIS and we are expecting about 100 representatives from corporations, banks and law firms.

Date: 6th June, 2019
Time: 10.00-19.00 (registration begins at 09.30)

Please see here the programme of the conference.
The sponsorship opportunities you may find here.
To register the conference, please follow the link.
If you would like to pay in RUB, please follow the Russian version of registration link.

Our previous events were supported by Dentons, Baker McKenzie, Linklaters, Hogan Lovells, PCB Litigation, Kroll, Conflict International, Smith & Williamson, Haberman Ilett and others.

Session 1: Discover the Undiscovered

- Unexplained Wealth Orders: are they Likely to Rise?
- US Disclosure Orders under S.1782 U.S.C.
- Russian Criminal Proceedings as a Tool for collecting evidence
- Discovery in Arbitration: recent developments
-

Session 2: I have a Claim! ... or I have a Dream?

- Avenues for Financing a Case
- Drafting a TPF Agreement
- Russian update on Third Party Funding
- Financing the Enforcement

Session 3: Show me the Money!

- Assets Tracing: Do it Yourself
- Professional Assets Tracing: Case study 1
- Professional Assets Tracing: Case study 2
- Cybercrime Investigations

Session 4: Cross-border Bankruptcy involving Russian parties

- Avoiding restitution in Russian Insolvency cases
- Cross-border Insolvency
- Enforcement of Russian insolvency judgments abroad: UNCITRAL framework and other Tools
- Arbitrability and Enforcement of Awards in Insolvency Proceedings in Russia

Ответы на зашифрованные эмодзи-месседжи

1. Строительный арбитраж (Construction arbitration)
2. Арбитражное соглашение (Arbitration agreement)
3. Морской арбитраж (Marine Arbitration)
4. Чрезвычайный арбитр (Emergency arbitrator)
5. Инвестиционный арбитраж (Investment arbitration)

Insight Guide to Paris from Russian-speaking arbitration practitioners

Dear readers,

This year, as per the usual practice, the Paris Arbitration Week (PAW) is taking place at the beginning of April.
The PAW is a perfect opportunity to meet many prominent arbitration practitioners from around the world and to enjoy Paris in spring!

Paris is traditionally considered as one of the main centres of arbitration. It is also known for its breathtaking sightseeing and delicious food. This is why we are delighted to share with you some tips and our favourite places to enjoy this side of France as much as you can! We are happy to present to your attention this little guide introducing Russian-speaking arbitration practitioners of Paris to the world.

Please note that we are also organising informal Russian- speaking dinners a couple of times per year. If you want to attend these events, do not hesitate to contact us when coming to Paris.

Best wishes and hope to see many of you in April!

Ekaterina Grivnova, Paris Baby Arbitration,
and Anna Guillard Sazhko, Shearman & Sterling LLP

PARTNERS

Full name
Galina Zukova

Current professional position
Partner at Belot Malan & Associes; Associate Professor at the University Paris-Saclay (Université de Versailles Saint-Quentin) and the Riga Graduate School of Law

Nationality
Latvian

Education
PhD, EUI, Florence
LLM, University of Exeter
LLB, University of Latvia

Admission
Paris, Latvia

Languages
English, French, Italian, Latvian, Russian and Spanish (fluent); German (working knowledge)

Your favourite restaurant in Paris
So many of them! The recent pleasant discovery is the restaurant by Dominique Bouchet (11 Rue Treilhard, 75008)

Your favourite French cuisine dish
Magret de canard. For treats and every day.

You favourite non-touristic place in Paris
So many of them again! My Passy Village neighbourhood

One thing you would like to share about Paris (in one sentence)
Come and visit the Marmottan museum in my 16th arrondissement – I hear all the time how much people love impressionism and Monet, yet many of them completely ignore the biggest Monet collection in Paris!

ASSOCIATES

Full name
Sergey Alekhin

Current professional position
Associate at Willkie Farr & Gallagher LLP

Nationality
Russian, French

Education
Double Masters Degree in Law and Economic Globalization, Sciences Po Paris and Paris I Panthéon – Sorbonne
Masters, Russian Academy of State Service
Voronezh State University

Admission
Paris, Russia (Voronezh)

Languages
Russian, English, French

Your favourite restaurant in Paris
Semilla (54 Rue de Seine, 75006)

Your favourite French cuisine dish
Confit de canard

You favourite non-touristic place in Paris
Tiny park next to place Marcel-Aymé in the 18th arrondissement

One thing you would like to share about Paris (in one sentence)
Walk around Paris as much as you can and soak up the atmosphere

Full name
Elina Aleynikova-Quinio

Current professional position
Associate at White & Case LLP

Nationality
Russian

Education
Master 2 in French and European Commercial Law, University of Cergy-Pontoise
JD, University of Pittsburgh School of Law
LLM, University of Pittsburgh School of Law
Rostov State Economic University, Faculty of Law, Civil law

Admission
Paris, New York, Russia (Rostov Region)

Languages
Russian, English, French

Your favourite restaurant in Paris
Le Boeuf Volant (4 rue Mariotte, 75017)

Your favourite French cuisine dish
Tournedos Rossini

You favourite non-touristic place in Paris
Parc des Buttes-Chaumont

One thing you would like to share about Paris (in one sentence)
Paris is the most inspiring centre of international arbitration.

Full name
Nataliya Barysheva

Current professional position
Associate at CastaldiPartners

Nationality
Russian, French

Education
Paris I Panthéon – Sorbonne
LLM, Queen Mary University

Admission
Paris, Russia

Languages
Russian, French, English, Italian, Spanish

Your favourite restaurant in Paris
Clémentine (5 Rue Saint-Marc, 75002)

Your favourite French cuisine dish
La fondue

You favourite non-touristic place in Paris
Galerie Vivienne, Passage Verdeau, Jardin du Palais Royal

One thing you would like to share about Paris (in one sentence)
"*There is but one Paris and however hard living may be here, and if it became worse and harder even—the French air clears up the brain and does good—a world of good.*" (Vincent Van Gogh)

Full name
Dmitry Bayandin

Current professional position
Associate at Derains & Gharavi

Nationality
Russian

Education
Master in International Economic Law, Sciences Po Paris
LLB in Public International Law, MGIMO

Admission
Russia (Perm Region), Paris

Languages
Russian, English, French, Spanish (basic)

Your favourite restaurant in Paris
For a coffee/brunch – Neighbours (89 Boulevard Beaumarchais, 75003)
For an apéro/classic dinner – le Fumoir (6 Rue de l'Amiral de Coligny, 75001)
For a dinner with ambience – le Minipalais (3 Avenue Winston Churchill, 75008)

Your favourite French cuisine dish
Confit de canard

You favourite non-touristic place in Paris
My rooftop

One thing you would like to share about Paris (in one sentence)
The combination of mild climate, beautiful architecture, good food and vibrant cultural life in a very compact-sized area.

Full name
Elena Fedorova

Current professional position
Associate at BONIFASSI Avocats

Education
Masters degree in Private international law, Paris I - Panthéon-Sorbonne
Masters degree in Private law, Higher School of Economics

Admission
Paris, Russian

Languages
Russian, French, English

Your favourite restaurant in Paris
Mamou near Opéra: small, cosy and very French restaurant (42 Rue Taitbout, 75009)

Your favourite French cuisine dish
Raclette and snails

You favourite non-touristic place in Paris
Le Carreau du Temple: public space with restaurants, market, cultural and sport events; le Caveau de la Huchette: jazz club

One thing you would like to share about Paris (in one sentence)
Amazing walks along the Seine at sunset!

Full name
Marlena Harutyunyan

Current professional position
Senior associate at Baker McKenzie

Nationality
French, Armenian

Education
Masters in Commercial Law, Magistère de Juriste d'Affaires (D.J.C.E.), Paris II - Panthéon-Assas University
Graduate Diploma in Foreign Languages, University of Sumy, Ukraine

Admission
Paris

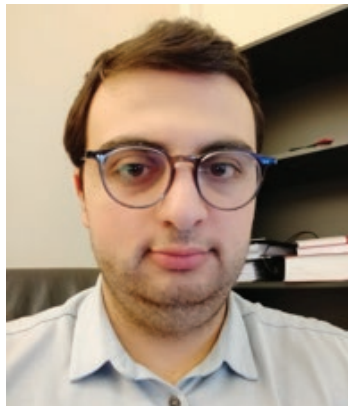
Languages
Armenian, Russian, French, English, Ukrainian

Your favourite restaurant in Paris
Nomad's (12-14 Rue du Marché Saint-Honoré, 75001)

Your favourite French cuisine dish
Raclette

You favourite non-touristic place in Paris
Glow on the Go (in the Marais)

One thing you would like to share about Paris (in one sentence)
There is only one thing I would change in Paris: the Parisians' state of mind.



Full name
Erik Grigoryan

Current professional position
Associate at Curtis, Mallet-Prevost, Colt & Mosle LLP

Nationality
Russian

Education
Master 2 in Litigation, Arbitration and ADR, Paris II - Panthéon-Assas University
Masters, MGIMO

Admission
Russia, France

Languages
Russian, English, French, Armenian

Your favourite restaurant in Paris
Bar à Huitres (несколько адресов), Le Caveau de l'Isle (36 Rue Saint-Louis en l'Île, 75004), La Campanella (18 Avenue Bosquet, 75007), Bar Le Village (56 Rue de la Montagne Sainte Geneviève, 75005)

Your favourite French cuisine dish
Duck breast in honey sauce, Burgundy beef, Welsch

You favourite non-touristic place in Paris
Ile Saint-Louis, Coulée verte Rene-Dumont

One thing you would like to share about Paris (in one sentence)
Try to discover different districts of Paris, each of them has its own unique spirit.

Full name
Anna Guillard Sazhko

Current professional position
Associate at Shearman & Sterling LLP

Nationality
Ukrainian

Education
Master 2 in Comparative Law, Université Paris I - Panthéon-Sorbonne
Master 1 in Private Law, Université Paris II Panthéon-Assas
Masters, Yaroslav the Wise National Law University

Admission
France, Ukraine

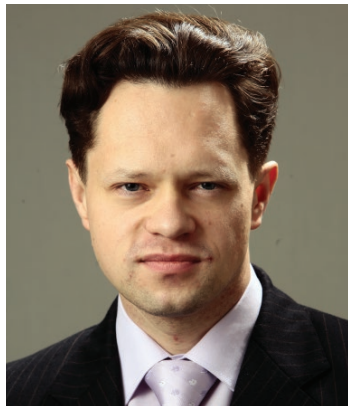
Languages
English, French, Russian and Ukrainian

Your favourite restaurant in Paris
Le Concert de Cuisine (14 Rue Nélaton, 75015)

Your favourite French cuisine dish
Aligot

You favourite non-touristic place in Paris
Auction house “Drouot”

One thing you would like to share about Paris (in one sentence)
One of the best periods to visit Paris is in August when it’s almost dead city.



Full name
Dimitri Litvinski

Current professional position
Lawyer at Baltlex Avocats

Nationality
French, Russian

Education
PhD, University Paris II - Pantheon-Assas
PhD, Saint Petersburg State University
Master 2 in International law, University Paris II - Pantheon-Assas
Masters, Saint Petersburg State University

Admission
Paris

Languages
English, French, Russian

Your favourite restaurant in Paris
La Fourmi Ailée (8, rue de Fouarre, 75005)

Your favourite French cuisine dish
Oysters

You favourite non-touristic place in Paris
Bercy village

One thing you would like to share about Paris (in one sentence)
In Paris there is no winter for International Arbitration, only spring and summer.

Full name
Greg Lourie

Current professional position
Associate at Cleary Gottlieb Steen & Hamilton

Nationality
German, Russian

Education
PhD in Public International Law, Frankfurt, Germany
Second State Exam, Frankfurt, Germany
First State Exam, Mainz, Germany

Admission
Germany

Languages
Russian, German, English, French

Your favourite restaurant in Paris
Le Potager du Père Thierry (16 Rue des Trois Frères, 75018)

Your favourite French cuisine dish
Mousse au Chocolat

You favourite non-touristic place in Paris
Jardin des Rosiers

One thing you would like to share about Paris (in one sentence)
If you want to earn the respect of the Parisians, be snappy.

Full name
Lisa Mykhaylova Arpin-Pont

Current professional position
Associate at Curtis, Mallet-Prevost, Colt & Mosle LLP

Nationality
Ukrainian, French

Education
Master 2, Litigation, Arbitration and ADR, University Paris II – Panthéon-Assas
Master 2 in European Law, University Paris XII
Master 1 in International Law, University Paris II – Panthéon-Assas Paris
Master 1 in Business Law, University Paris I - Panthéon Sorbonne
Bachelor of Jurisprudence, University of Economics and Law, Kyiv, Ukraine
Bachelor's degree in Culture, National University "Kyiv-Mohyla Academy"

Admission
Paris

Languages
Russian, Ukrainian, English, French

Your favourite restaurant in Paris
One of my favourite restaurants is called Chamarré Montmartre (52 Rue Lamarck, 75018).
This is a small restaurant hidden in Montmartre which is only known to connaisseurs. The chef of this restaurant is Antoine Heerah who comes from Mauritius. I like this restaurant for its refined gastronomic cuisine which has some Mauritius touch and represents a European and Mauritius mixture or "mélange" as French say.

Your favourite French cuisine dish
Foie gras with fig jam and scallops with leek

You favourite non-touristic place in Paris
I love Jardin du Luxembourg even though it may be quite touristic

One thing you would like to share about Paris (in one sentence)
Paris is such a beautiful and charming city that I discover it each time as though I have just arrived, even though I have been living here for 15 years.

Full name
Andrei Solin

Current professional position
Associate at Shearman & Sterling LLP

Nationality
Belarusian

Education
Magister Juris, University of Oxford
Masters, Belarusian State University
Specialist in International Law, Belarusian State University

Admission
Belarus

Languages
Belarusian, English, Russian

Your favourite restaurant in Paris
Semilla (54 Rue de Seine, 75006)

Your favourite French cuisine dish
Oysters with Pouilly-Fumé

You favourite non-touristic place in Paris
La Campagne à Paris – it's like a village smuggled into Paris

One thing you would like to share about Paris (in one sentence)
If you find yourself at (beautiful) Place de Vosges, know that No. 6 is where Milady from The Three Musketeers lived.

Full name
Yelena Stasyk

Current professional position
Associate at Curtis Mallet-Prevost Colt & Mosle LLP

Nationality
Ukrainian

Education
LLM in European Law, University of Paris II - Panthéon-Assas and College of Europe
Masters in Business Law, Kiev University of Law of the National Academy of Science of Ukraine
Bachelor of Jurisprudence, Kiev University of Law of the National Academy of Science of Ukraine

Admission
Paris, Ukraine

Languages
Ukrainian, Russian, English, French

Your favourite restaurant in Paris
Les Petites Crus (13 Rue St Sabin, 75011)

Your favourite French cuisine dish
Tartare de boeuf

You favourite non-touristic place in Paris
Rue de la Fontaine au Roi

One thing you would like to share about Paris (in one sentence)
Do not drive in Paris!

LAWYERS

Full name
Oksana Varakina

Current professional position
Lawyer at Winston & Strawn

Nationality
Ukrainian

Education
LLM in International Dispute Settlement (MIDS), University of Geneva
Masters, Kyiv International University
Bachelor of Jurisprudence, Kyiv National Taras Shevchenko University

Admission
Ukraine (expected in 2019)

Languages
Ukrainian, Russian, English

Your favourite restaurant in Paris
Jacopo (5 bis Rue Vernet, 75008)

Your favourite French cuisine dish
Escargots au beurre persillé

You favourite non-touristic place in Paris
Semi-touristic: Eiffel Tower view from avenue de Camoëns, coffee at the garden of Petit Palais and brunch at Musée Jacquemart-André

One thing you would like to share about Paris (in one sentence)
Modern Parisian experience will not be complete without going to a speakeasy bar, such as Moonshiner or Candelaria.

Full name
Anastasia Davis Bondarenko

Current professional position
Associate Director at Vannin Capital

Nationality
Canadian

Education
The Hague Academy for International Law, Public and Private International Law Courses
Masters in International and European Law, University of Geneva
JD, University of Ottawa
Bachelor of Laws, University of Montréal and University Paris II - Panthéon-Assas

Admission
Paris, New York, Quebec

Languages
English, French, Russian, Hebrew

Your favourite restaurant in Paris
Café Constant (139 Rue Saint-Dominique, 75007)

Your favourite French cuisine dish
Saucisson

You favourite non-touristic place in Paris
My apartment. Everything else is touristic and absolutely worth the detour!

One thing you would like to share about Paris (in one sentence)
It is true what they say, Paris is absolutely, simply wonderful!

Full name
Dmytro Koba

Current professional position
Legal Officer at Jus Mundi

Nationality
Ukrainian

Education
Master 2 in International Economic Law, University Paris 1 - Panthéon-Sorbonne
Master 1 in International Business Law, University Paris 1 - Panthéon-Sorbonne
Masters in International Law, Taras Shevchenko National University of Kyiv

Languages
Ukrainian, English, French, Russian

Your favourite restaurant in Paris
Les Bols de Jean (2 Rue de Choiseul, 75002)

Your favourite French cuisine dish
La raclette

You favourite non-touristic place in Paris
Parc André Citroën

One thing you would like to share about Paris (in one sentence)
Paris cannot be described but felt.

Full name
Anastasia Medvedskaya

Current professional position
Lecturer at the Paris Bar School Advanced Program in Investment Arbitration

Nationality
Russian

Education
Postgraduate Diploma in International Economic Law in Africa, University Paris II – Panthéon-Assas
Master 2, Litigation, Arbitration and ADR, University Paris II – Panthéon-Assas
Masters in International Business Law, University of Nanterre

Admission
Paris (qualified)

Languages
Russian, French, English, Czech, Spanish

Your favourite restaurant in Paris
Café de la Nouvelle Mairie (19 Rue des Fossés Saint-Jacques, 75005)
La Cave de l'Insolite (30 Rue de la Folie Méricourt, 75011)

Your favourite French cuisine dish
Fondant au chocolat

You favourite non-touristic place in Paris
Place de l'Odéon, Canal Saint Martin, Rue Mouffetard

One thing you would like to share about Paris (in one sentence)
Paris is always a good idea, especially when it comes to history, culture, food, fashion and international arbitration.

Full name
Sergii Melnyk

Current professional position
Deputy Counsel at ICC International Court of Arbitration

Nationality
Ukrainian

Education
LLM in International Dispute Settlement (MIDS), University of Geneva
Masters in International Law and Economics (MILE Program), World Trade Institute, University of Bern
Masters in International Business Law (IBL Program, LL.M), Central European University, Budapest
Bachelor of Jurisprudence, Yaroslav the Wise National Law University

Admission
Ukraine

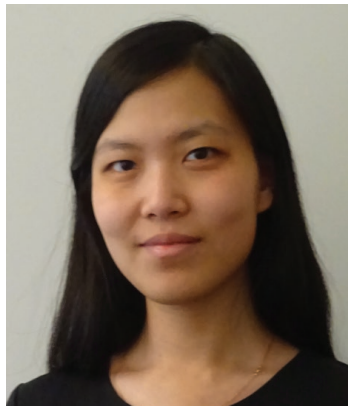
Languages
English, French, Ukrainian, Russian

Your favourite restaurant in Paris
Blue Elephant (43-45 Rue de la Roquette, 75011)

Your favourite French cuisine dish
Quiche

You favourite non-touristic place in Paris
Marché aux puces de Saint-Ouen

One thing you would like to share about Paris (in one sentence)
If you find yourself in Paris subway, avoid by all means line 13!



Full name
Marina Sim

Current professional position
Consultant at Aceris Law LLC

Nationality
Russian

Education
Master 2 in International Economic Law, University Paris II - Panthéon Assas
Masters, MGIMO

Languages
Russian, English, French, Spanish

Your favourite restaurant in Paris
Small *crêperies* near Montparnasse

Your favourite French cuisine dish
Aligot Saucisse

You favourite non-touristic place in Paris
Parc de Bagatelle

One thing you would like to share about Paris (in one sentence)
I agree with Hemingway saying: "*There is never any ending to Paris and the memory of each person who has lived in it differs from that of any other. We always returned to it no matter who we were or how it was changed or with what difficulties, or ease, it could be reached. Paris was always worth it and you received return for whatever you brought to it.*"

TRAINEES

Full name
Victoria Barausova

Current professional position
International Arbitration trainee at Shearman & Sterling LLP

Nationality
Russian

Education
Masters, London School of Economics and Political Science
Bachelor of Jurisprudence, Lomonosov Moscow State University

Languages
Russian, English

Your favourite restaurant in Paris
L'Aller Retoir (5 rue Charles Francois Dupuis, 75003)

Your favourite French cuisine dish
Tartare de boeuf

You favourite non-touristic place in Paris
Parc Monceau

Full name
Ekaterina Grivnova

Current professional position
International Arbitration trainee at Allen & Overy

Nationality
Russian

Education
Master 2 in Arbitration and Business Law, University of Versailles
Master 1 in European Law, University Paris II - Panthéon-Assas
Bachelor of Jurisprudence, Russian Foreign Trade Academy

Languages
Russian, French, English

Your favourite restaurant in Paris
A l'heure du vin (46 rue Sainte-Anne, 75002)

Your favourite French cuisine dish
Scallops and asparagus under butter sauce

You favourite non-touristic place in Paris
Place des Vosges, Jardin des Plantes, Jardin du Palais Royal, Quartier chinois

One thing you would like to share about Paris (in one sentence)
Capital of art, food and law

Full name
Veronika Timofeeva

Current professional position
International Arbitration trainee at Freshfields Bruckhaus Deringer

Nationality
Russian

Education
Double degree in English law and French law, King's College London and University Paris I - Pantheon Sorbonne
LLM in International Dispute Resolution, Fordham University School of Law
Master 2 in International law, University Paris I - Panthéon Sorbonne
Master 2 in Arbitration and international business law, University Paris I - Panthéon Sorbonne

Admission
New York, Paris (pending)

Languages
Russian, English, French

Your favourite restaurant in Paris
Daroco (6 Rue Vivienne, 75002)

Your favourite French cuisine dish
Aligot

You favourite non-touristic place in Paris
The square behind the Palais de justice on the Île de la Cité

One thing you would like to share about Paris (in one sentence)
The atmosphere of lightness and insouciance with everyone having their coffee on the terraces at all times of the day and night.

Full name
Valeriya Tsekhanska

Current professional position
International Arbitration trainee at Bredin Prat

Nationality
Ukrainian

Education
Masters in Global Law and Governance, SciencesPo Paris, Columbia Law School and University Paris I – Panthéon Sorbonne
Masters in Economic Law, SciencesPo Paris
Bachelor of Arts, SciencesPo Reims

Languages
Ukrainian, Russian, English, French, German, Spanish

Your favourite restaurant in Paris
Le Hibou (16 Carrefour de l'Odéon, 75006); Au Pied de Fouet (3 Rue Saint-Benoît, 75006)

Your favourite French cuisine dish
Tartare de boeuf

You favourite non-touristic place in Paris
No such thing in Paris, unfortunately L

One thing you would like to share about Paris (in one sentence)
You will find anything you are looking for in Paris, only better.

Full name
Nargiza Yussupova

Current professional position
International Arbitration trainee at Curtis, Mallet-Prevost, Colt & Mosle LLP

Nationality
Kazakh

Education
Master 2 in Arbitration and Business Law, University of Versailles
Postgraduate Diploma in European Law, University Paris II – Panthéon-Assas
Bachelor of Jurisprudence in Chinese Law, Shanghai Jiao Tong University

Languages
Russian, French, English, Chinese, Kazakh

Your favourite restaurant in Paris
Café de la Paix (5 Place de l'Opéra, 75009)

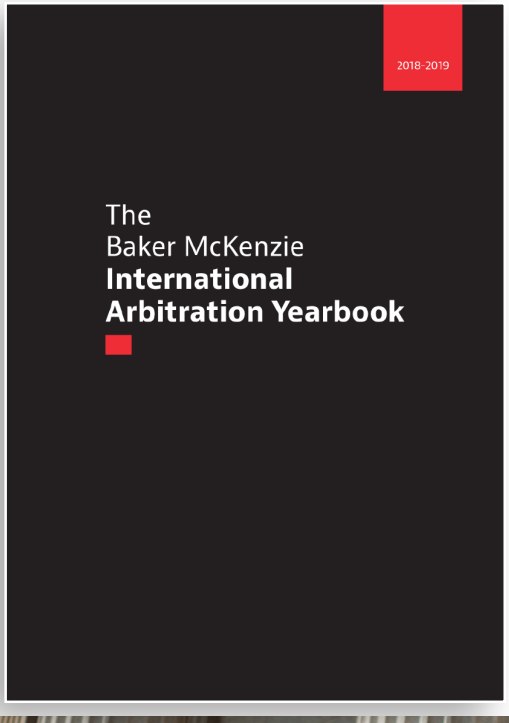
Your favourite French cuisine dish
Ratatouille

You favourite non-touristic place in Paris
Le Marais district

One thing you would like to share about Paris (in one sentence)
In Paris, you can be anything you want.

Baker McKenzie.

BAKER MCKENZIE IS SOON TO RELEASE THE 12TH EDITION OF THE INTERNATIONAL ARBITRATION YEARBOOK 2018-2019!



We are pleased to announce that the latest edition of **The Baker McKenzie International Arbitration Yearbook** will be available soon.

In this edition, we look at important developments in arbitration in 45 jurisdictions over the past year, including new legislation, institutional rules, and key cases.

This year's edition includes a special feature on diversity in arbitration.

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Baker McKenzie.

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