RAA 40
Russian Arbitration Association

Newsletter

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Welcome from Co-Chairs

Dear friends and colleagues,

We are very pleased to present the eighth issue of RAA40 Newsletter, which we are releasing at the ABA's 10th Annual Moscow Conference on the Resolution of International Business Disputes and our seminar *'A pre-appointment interview of a potential arbitrator: how far is too far?'* on the eve of the Conference.

Our choice of topic and content of the 2018 Newsletter is very well explained by events that took place this year. This Newsletter follows recent noteworthy decisions of the Court of Arbitration for Sport (CAS) related to Russian athletes. It has also coincided with the 2018 FIFA World Cup held in Russia, probably the brightest event of this summer. All that surged the interest in sports law and contributed to overall attractiveness of sports-related matters. In particular, sports arbitration has gradually become a hot topic for publications and discussions in Russian legal community.

In light of the above, this Newsletter focuses on main developments in sports arbitration in Russia and abroad. It covers specific features of the arbitration procedure in the CAS compared to commercial arbitration and focuses on such restrictions in CAS proceedings as those related to provisional measures, evidence, choice of rules, seat of arbitration and applicable law, confidentiality and burden of proof that exist. It also touches upon recent decisions of the Swiss Federal Tribunal, the appellate body in relation to awards rendered by the CAS. Finally, it provides a general overview of international anti-doping system and discusses strict liability for anti-doping violations and its implications in practice for athletes filing appeals before the CAS.

This Newsletter also includes an interview with (a) Alexander Kiknadze, the Deputy Executive at the Russian Ice Hockey Federation, who reveals his thoughts on how to become a successful sports lawyer, the benefits and challenges of acting as a sports arbitrator, and the skill set a good adjudicator of sports disputes must have; (b) Dr. Hamid Gharavi, Founding Partner at Derains & Gharavi International, who agreed to share what brings renowned arbitration practitioners to sports law and what is so different about arbitrating sports disputes; and (c) Alexey Vyalkov who shares his experience of pursuing an LL.M degree in Oxford University, sheds light on how he got Gillis Wetter Prize and provides insight on how to get internship abroad after completing an LL.M Degree.

You will also find in the Newsletter our regular columns: overview of key cases decided in Russia and abroad and a list of arbitration events to attend in 2018 – early 2019.

It has been a great pleasure to be with you these 9 months of 2018. We have had a chance to organize a number of seminars and events in Moscow, including the traditional *Women in Arbitration* meeting, a seminar on the topic in demand of building a successful career as an arbitrator titled *"Launching Your Career into Arbitrators' Orbit"* and a satellite event at Saint-Petersburg International Legal Forum concerning "*Practical aspects of international arbitration: modern challenges and a look into the future."*

We have also continued our new trend of organizing arbitration-related events outside Russia in partnership with young arbitration groups of other countries. This year we held a seminar *"What to expect when arbitrating in Finland, Russia and/or Sweden?"* in Finland on the eve of the Helsinki Arbitration Day in partnership with Young Arbitration Club Finland (YACF) and Young Arbitrators Sweden (YAS). We take this opportunity to thank all those who supported and attended all these events.

We would like to take this moment to welcome Izabella Sarkisyan as co-chair of RAA40 who joined us at the beginning of 2018 and has already made substantial contributions to the development of RAA40 and its activities. Izabella is a Senior Associate at the Moscow office of Baker Botts. In her practice she focuses on international arbitration, including both commercial and public international law disputes. We warmly welcome Izabella to our team and are very pleased to have her with us.

Last but not least, with the end of year approaching we are happy to announce that soon we will be launching voting for RAA40's annual award *'Top 10 Young Arbitration Practitioners'*. Don't miss this chance to vote for your friends and colleagues whom you believe should be on the list!

As always, please do not hesitate to contact us at raa40@arbitrations.ru should you have any queries about the activities of RAA40, wish to share with us your ideas or submit contributions to the Newsletter.

Yours sincerely,
RAA40 Co-Chairs

Marina Akchurina

Olga Tsvetkova

Izabella Sarkisyan

Denis Almakaev

KIAP | Korelskiy Ischuk Astafiev

Courts and Arbitration in Russia

Overview of Key Court Decisions: January 2018 – July 2018

*By **Marina Akchurina**, Associate, Cleary Gottlieb, and **Natalia Andreeva**, Paralegal, Egorov Puginsky Afanasiev & Partners*

1. The violation of principle of proportionality of civil liability may constitute a violation of a public policy and lead to the refusal of recognition and enforcement of the internal arbitral award

(Federal Grid Company of the Unified Energy System v. LLC CenterEnergoStroyProject, no. A45-4214/2017, Supreme Court, 11 January 2018, Supreme Court ref. no. 304-ЭС17-20756)

The Supreme Court confirmed that a court may refuse enforcement of an internal arbitral award on public policy grounds if it finds that the amount of penalty that the arbitral tribunal awarded under the contract is disproportionate to the damage suffered by the claimant.

The Supreme Court referred to para. 29 of the Information letter of the Presidium of Higher Commercial Court dated 22 December 2005 N 96 which states that public policy of the Russian Federation is based on the principles of the parties' equality in civil law relations, good faith of their conduct, proportionality of civil liability measures to the damage suffered.

Therefore, the Supreme Court confirmed broad interpretation of the public policy concept by the lower courts in the context of recognition and enforcement of the internal arbitral awards.

2. The Supreme Court upheld the validity of arbitration agreements concluded before 1 September 2016 within the transition period and emphasized that the state courts may not disregard a valid and capable of being performed arbitration clause

(LLC Information Technologies in Transport v. LLC Leonidas, No. A40-251666/2016, Supreme Court, Commercial Division, 22 January 2018 (Supreme Court ref. no. 305-ЭС17-14401))

In this case the parties entered into a contract in June 2014. The contract contained an arbitration clause referring the disputes to the Commercial Interinstitutional Arbitration Court (the "Arbitration court"). The trial, appellate and cassation courts left the claim without consideration because of the arbitration clause in the contract.

The Supreme Court upheld the lower courts' decisions finding that at the time the claim was filed (19 December 2016) the arbitration clause was valid[1].

As of the date of the claim with the state court, the Arbitration court did not obtain the right to exercise the functions of a permanent arbitration institution. However, the transition period for formation of the permanent arbitration institutions expired only on 1 November 2017. Therefore, as of the date when the claimant initiated the proceedings in the state court, the Arbitration court had the right to consider the case as an *ad hoc* arbitration court and the arbitration agreement was, thus, capable of being performed.

The Supreme Court emphasized that the state courts may not disregard an arbitration clause that is valid and capable of being performed because it would result in the disregard the parties' choice of forum and the violation of the freedom of contract principle (Article 421 of the Civil Code of the Russian Federation).

At the same time, the Supreme Court indicated that if the Arbitration court ceased to exist, the claimant retains the right to file its claims to the competent state court. Therefore, the fate of the arbitration clauses that refer the dispute to resolution in accordance with the rules of the arbitration institutions that did not receive the permit to exercise the functions of permanent arbitration institution remains unclear.

3. The claimant is not entitled to recover debts under a settlement agreement that was partially reflected by the arbitral tribunal in an arbitral award on agreed terms if the state courts refused to recognize and enforce such arbitral award in

1 Under par. 5 of Article 52 of the Federal Law No. 382-FZ of December 29, 2015 on Arbitration (Arbitration Proceedings) ("Law on Arbitration") arbitration agreements concluded before the date of entry into force of this Law (1 September 2016) shall remain valid and may not be regarded invalid or incapable of being performed solely on the grounds that this Law provides for rules other that those, which were in effect when the agreements were concluded.

the earlier proceedings due to violation of a public policy

(JSC LATVIJAS TILTI v. JSC Manufacturing Association Vozrozhdenie, No. A56-87166/2016, Supreme Court, 24 January 2018, Supreme Court ref. no. 307-ЭС 17-21011)

The claimant entered into a settlement agreement with the defendant in the course of the arbitration proceedings with the ICAC. The settlement agreement provided that it shall be submitted to the ICAC for the latter to render an arbitration award on agreed terms. The ICAC tribunal, however, rendered an arbitral award which reflected in it only a part of the settlement agreement agreed upon by the parties. The ICAC tribunal reasoned that it is bound by the claims submitted in arbitration and therefore can only render an award with respect to a part of settlement terms agreed upon by the parties. The ICAC tribunal expressly mentioned that partial reflection of the settlement agreement in the award on agreed terms shall not have any effect on the validity of the remainder of the settlement agreement.

In 2015, the claimant applied to a state court for enforcement of the arbitral award on agreed terms (A 56-14627/2015, Supreme Court ref. no. 307-ЭС 15-18773). The courts refused to recognize and enforce the arbitral award because, in view of the courts, the arbitral tribunal violated the public policy of the Russian Federation because it interfered with the principles of voluntary conciliation of the dispute between the parties when it formalized only a part of the settlement agreement in the arbitral award on agreed terms. According to the state courts, the arbitrators who had their own objections to the terms of settlement agreed upon by the parties, had to continue the proceedings and make a decision in the usual manner or invite the parties to amend the conditions agreed upon by them.

After the state courts refused to recognize and enforce the arbitral award on agreed terms, the claimant filed a claim to recover debts under a settlement agreement entered into in the course of arbitration proceedings. The lower courts did not enforce the terms of the settlement agreement entered into between the parties because they refused to treat the settlement agreement as a separate civil law transaction but considered it to be a procedural agreement that terminates the dispute between the parties with the ICAC. Furthermore, since the state courts refused to recognize and enforce the arbitral award on agreed terms that was rendered earlier by the ICAC tribunal, the proper remedy for the claimant is to submit its dispute for resolution by the state courts rather than to seek enforcement of the terms of the settlement agreement.

The Supreme Court agreed with the above logic of the lower courts and refused to transfer a cassation appeal for consideration of the Supreme Court's Judicial Board.

4. A party of arbitral proceedings bears a risk of non-delivery of a notification at the address specified in the contract containing an arbitration clause

(PJSC Sberbank v. LLC Domashnit Uyut, LLC Posudny Mir et al., Supreme Court, Civil Division, 30 January 2018, Supreme Court ref. no. 5-КГ17-226)

The claimant filed a claim to the Arbitration Court of the Independent Arbitration Chamber against a number of citizens and organizations for a joint recovery of debts under the loan agreement and guarantee agreements.

The arbitration court notified the defendants on the time and place of the hearing by sending telegrams to the addresses indicated in agreements that contained arbitration clauses. These telegrams were not handed over to two of the defendants. Subsequently, the defendants did not attend the hearing at the arbitration court and the court considered the case in their absence.

Further, the claimant applied to the Dorogomilovsky district court of Moscow for enforcement of the award. The district court refused the enforcement due to the improper notification of the two defendants.

The Supreme Court disagreed with the district court and reversed its ruling. It pointed out that the arbitration court shall forward documents to the party at the address indicated by it. The party is deemed to have received the documents even if it is not located at this address. Thus, according to the Supreme Court, the party bears the risk of non-delivery of a notification at the address specified in the contract containing the arbitration clause.

5. A failure to comply with a mandatory out-of-court dispute resolution procedure is a violation of a public policy of the Russian Federation, provided that the other party of a dispute is interested in out-of-court settlement

(LLC Gruz-Logistika v. Sole Proprietor Olga Kulikova, No. A38-2183/2017, Supreme Court, Commercial Division, 18 May 2018, Supreme Court ref. no. 301-ЭС 17-20169)

In August 2016 the parties entered into a contract of carriage. The contract contained a dispute resolution clause with a mandatory out-of-court dispute resolution procedure. In particular, the dispute resolution clause provided that if a dispute between the parties is not settled through this procedure, it shall be submitted to the state court or the First arbitration institute.

In compliance with the above described procedure the Claimant sent the claim to the address of the sole proprietor, Ms. Olga Kulikova, indicated in the contract. Having received no reply, the claimant filed the claim to the arbitration court. The arbitration court granted this claim.

The trial and cassation courts refused to enforce this award due the violation of the public policy of the Russian Federation since the Claimant failed to comply with the mandatory dispute resolution procedure set out in the contract by sending the claim to the incomplete address (the Claimant did not specify the apartment number in a multi-family residential building).

The Supreme Court ruled that the failure to comply with the out-of-court settlement procedure may amount to a violation of the public policy of the Russian Federation. However, in this particular case the Supreme Court concluded that the pre-arbitration dispute settlement procedure had been followed. The Claimant sent the pre-arbitration claim to the address specified in the contract and was not obliged to check the accuracy of the address indicated therein or use other means of communication specified in the contract.

The Supreme Court emphasized that the facts in the case file indicate that the defendant had no real intention to resolve this dispute through the out-of-court procedure, which means that the right of the defendant for out of court settlement was not violated.

6. Enforcement of arbitral awards in the absence of originals or duly certified copies of the arbitration agreement violates the public policy of the Russian Federation

(Korean National Insurance Corporation (DPRK) v. VTB Insurance, No. A40-60583/16-68-517, Supreme Court, 20 June 2018, Supreme Court ref. no. 305-ЭС17-993)

The claimant applied to the Moscow City Commercial Court for recognition and enforcement of 12 *ad hoc* arbitral awards with seat of arbitration in London rendered in the dispute arising from reinsurance contracts.

The claimant was not able to present the originals or duly certified copies of reinsurance contracts that contained arbitration clauses to the court.

The trial and cassation courts granted an enforcement of the awards. However, the Supreme Court overturned the lower courts' decisions and returned the case for further review finding that the lower courts did not examine whether the parties had entered into the arbitration agreements in relation to the respective disputes.

At the second round of review, the trial and cassation courts refused to enforce the arbitral awards. They relied upon the right to fair trial as the fundamental principle of public policy. In view of the courts, enforcement of arbitral awards in the absence of originals or duly certified copies of reinsurance contracts violates the right to fair trial. The courts also noted that the claimant failed provide the documentary support for the authority of the signatory of the respective arbitration agreements in the reinsurance contracts.

The claimant argued that the parties performed the reinsurance contracts that contained the arbitration clauses. However, the courts rejected this argument and ruled that performance of the main contract does not confirm that the parties entered into an agreement to arbitrate their disputes. The courts did not address the conclusion of an arbitration agreement by exchange of documents.

The Supreme Court agreed with the above position of the lower courts and refused to transfer a cassation appeal for consideration of the Supreme Court's Judicial Board.

7. The procurement disputes involving state-owned entities are arbitrable as non-arbitrability of these disputes is not explicitly stipulated in Russian legislation

(JSC Mosteplosetstroy v. JSC Mosinzhproekt, No. A 40-165680/2016, Supreme Court, Commercial Division, 11 July 2018, Supreme Court ref. no. 305-ЭС 17-7240)

In 2013 JSC Mosteplosetstroy and JSC Mosinzhproekt entered into the contract on construction works in the Moscow Metro. The contract contained the arbitration clause referring the disputes to the Arbitration Court of the Construction Companies of the City with the Autonomous Non-Profit Organization "Center for Legal Support of Construction Companies of the City" (the "Arbitration Court").

JSC Mosteplosetstroy filed a claim to the Arbitration Court to recover debts for the performed works. The Arbitration Court ruled in favor of the claimant. Further, the claimant applied to the state court for enforcement of the award. The trial and cassation courts enforced the award. The courts stated that there were no grounds to refuse the enforcement as the contract was not concluded in the public interest notwithstanding the fact that the defendant's 100% shareholder was the City of Moscow.

The defendant applied to the Supreme Court to reverse the decisions of the trial and cassation courts. The Supreme Court upheld the rulings of the lower courts.

The Supreme Court referred to the earlier positions of the Constitutional Court according to which civil law nature of the dispute is the criterion of its arbitrability. The Supreme Court emphasized that disputes related to procurement procedures involving state-owned entities are generally of civil law nature.

According to the Supreme Court, both before and after the arbitration reform Russian laws do not provide for any limitations of the arbitrability of disputes between state-owned companies even if the underlying contract between them was subject to procurement procedures set forth by the federal law (Federal Law No. 223-FZ). Therefore, such disputes are, as a general rule, arbitrable.

The Supreme Court noted however that the claimant may still prove the dispute involves public policy element if, for example, spending of budget funds is involved.

The position of the Supreme Court in this case is of particular importance since it describes the general approach that the lower courts should follow when determining arbitrability of disputes involving public policy elements.

8. The internal award on agreed terms should not enforced if the settlement agreement was concluded in circumvention of the law on registration of rights to immovable property

(LLC Stroymarket v. LLC UNI-STROY, No. A40-212386/17, the Moscow Circuit Court, 6 April 2018)

The claimant entered into a settlement agreement with the defendant in the course of the arbitration proceedings at the First Arbitration Institution. Under this settlement agreement the defendant undertook to transfer the immovable property against its debt to the claimant. In the course of the arbitration proceedings the defendant did not submit documents confirming its ownership of the property. The claimant applied to a state court for enforcement of the arbitration award on agreed terms.

As a general rule, civil law disputes involving transfer of immovable property are generally arbitrable even if such disputes involve the state registration of rights to immovable property (Resolution of the Constitutional Court of the Russian Federation dated 26 May 2011 N 10-P). However, in this particular case, the trial and cassation courts refused to enforce the award. The courts found that by submitting the dispute for arbitration the parties intended to circumvent the legal requirements for legitimizing the rights to an unauthorized construction and registration of rights to immovable property. Such circumvention of legal requirements is a violation of public policy and arbitral award should not therefore be enforced.

9. The amount of liability for a failure to comply with the internal arbitral award must correspond to the provisions of Art. 395 of the Russian Civil Code on interest for a wrongful retention of funds

(PJSC Sumskoye Mashinostroitelnoye Nauchno-Proizvodstvennoye Obyedineniye v. CJSC Uralstroienergomontazh, No. A40-201473/16, the Moscow Circuit Court, 11 May 2018)

Ukrainian company filed a claim to the ICAC to recover debts and penalties from Russian company. The ICAC rendered an award in favor of Ukrainian company and the state court granted the enforcement of this award. However, Russian company did not perform this award in full.

Russian company filed a damages claim against Ukrainian company to the ICAC. Within this case Ukrainian company filed a counterclaim for interest for a failure to comply with the ICAC's award in the first case. The ICAC partially granted the counterclaim and ordered Russian company to pay interest for a wrongful retention of funds at a rate of 16% per annum. Ukrainian company applied for enforcement of the second ICAC's award. However, the trial and cassation courts refused its enforcement.

The courts concluded that the amount of liability for a failure to comply with an arbitral award must comply with the provisions of Art. 395 of the Russian Civil Code on interest for a wrongful retention of funds. With reference to the Ruling of the Supreme Court dated 14 June 2016 the cassation court noted that the arbitral tribunals do not have authority to apply measures of punitive nature to the parties because arbitration is a consensual process.

The cassation court found that the rate of 16% applied by the arbitral tribunal was excessive and did not comply with the requirements set forth in Art. 395 of the Russian Civil Code.

As a result, the trial and cassation courts concluded that the ICAC's decision to grant a counterclaim contradicted the public policy of the Russian Federation as it violated the principles of legality and proportionality of civil liability.

10. The party of the arbitration clause loses its right to object the competence of the state court due to the existence of the arbitration clause at the second round of the court review provided that at the first round it did not raise such objections

(OJSC Investbank v. LLC Baltiyas Aviatsiyas Sistemas, No. A40-165835/2014, the Moscow Circuit Court, 28 May 2018)

In OJSC Investbank (Russian bank, the creditor) and LLC Baltiyas Aviatsiyas Sistemas (Latvian company, the borrower) entered into a loan facility contract. The contract contained an arbitration clause referring the disputes to the ICAC. In circumvention of the arbitration clause the bank filed a claim to the Moscow City Commercial Court to recover the debt from the borrower. The trial and appellate courts granted the creditor's claims but the cassation court sent the case for the second round of review because the borrower was improperly notified of the increased amount of claims.

At the second round of review the borrower relied on the arbitration clause. The trial and appellate courts left the claim without consideration. However, the cassation court did not agree with the lower courts. It stated that the defendant did not refer to the arbitration clause at the first round of review. The defendant's procedural behavior indicated that it acquiesced on the competence of the state court and lost its right to object the competence of the state court. When the case has been with the state court for a long period of time (more than three and a half years) the arbitration clause can no longer be the effective tool to ensure the goals of the dispute settlement procedure.

Therefore, the cassation court held that there were no grounds to left the claim without the consideration due to the existence of the arbitration clause.

Courts and Arbitration Aboard

By **Veronika Lakhno**, *Junior Associate, Egorov Puginsky Afanasiev & Partners*

1. One of the largest ICC awards in history

Phillips Petroleum Company Venezuela Limited, ConocoPhillips Petrozuata B.V. v. Petroleos De Venezuela, S.A., Corpoguanipa, S.A., PDVSA Petroleo, S.A., ICC Case No. 20549/ASM/JPA (C-20550/ASM)

Available at: https://www.italaw.com/cases/6602

An ICC tribunal granted a US$2.04 billion award in favour of ConocoPhillips for expropriation of two oil projects by Venezuela's national oil and gas company PDVSA and two of its subsidiaries.

History

During an "Oil Opening" campaign, which took place in the 1990s in Venezuela, the Government actively invited foreign investors to participate in oil projects. In order to attract foreign investors, it provided them with certain financial incentives, such as reduced income-tax rate and royalty, along with other legal protections against Government measures that could harm the investments.

In 2007 – in breach of the assurances – the state increased the royalty rates and income taxes on oil projects as part of its new oil and gas regime. Foreign companies were also required to operate only as mixed enterprises which were at least 60% owned by PDVSA or any other affiliate designated by PDVSA.

Decision

Although the ConocoPhillips' original claim was for US$20 billion (the amount specified as the contractual indemnity governed by Venezuelan law), the tribunal applied an express cap in the contract and limited damages to US$2 billion. Conoco took an alternative attempt to obtain further compensation through a claim for damages and asserted that PDVSA committed a wilful breach by participating in the measures that resulted in Conoco's losses. Although these damages would not be subject to the cap, the entire claim was rejected by the tribunal.

One of the arguments raised by PDVSA in the ICC arbitration was the risk of double recovery. PDVSA relied on an ongoing ICSID arbitration under the Netherlands-Venezuela BIT between ConocoPhillips and Venezuela over the same two oil projects and an additional offshore project where ConocoPhillips is seeking US$30 billion in damages.

The tribunal rejected this objection as ConocoPhillips expressly acknowledged that "*if Claimants receive payment for damages or indemnification in connection with this ICC proceeding and are later awarded monetary reparation in connection with the ICSID Arbitration (to the extent that such damages are based on the same actions by the Government and/or PDVSA), Claimants will reimburse Respondents for the amount that Respondents have paid in this ICC Arbitration, after deduction of Claimants' legal and expert costs, to the extent necessary to prevent double recovery*".

2. Arbitration to the moon and back

Avanti Communications v. The Government of Indonesia, LCIA

A British satellite company won a US$20 million LCIA award against Indonesia.

Facts

In 2015, Indonesia's satellite Garuda-1 suffered malfunctions and fell from its correct orbit. It was a serious problem for Indonesia as under the UN's International Telecommunication Union rules, the countries that leave orbital slots vacant for three years lose any ownership rights over them. Indonesia ordered a new US$850 million military satellite from Airbus Space and Defence which it expects to receive in 2019. In order to secure the Indonesia's slot, it ordered the lease of a satellite (with a beautiful Ancient Greek name "Artemis") from Avanti. Avanti agreed to lease Artemis to Indonesia for US$30 million.

Decision

Avanti argued that it had received only two payments in the amount of US$12 million (out of US$30 million due) and on this basis terminated the contract. The situation was exacerbated by the fact that Artemis was sold to Avanti in 2013 by the European Space Agency under the condition that Avanti will bear the costs of operating the satellite. After the termination of the contract with Indonesia, Avanti had to "re-orbit" Artemis, putting an end to its operational life.

Avanti argued before the LCIA tribunal that Indonesia's Ministry of Defence owed US$17 million in lease payments. In response, Indonesia alleged that its plans to launch a new Airbus satellite in the same orbital slot in 2019 may have been ruined by Avanti's termination of the Artemis contract. The tribunal granted Avanti US$20 million damages, which also reflected the interest and costs. It should be noted that the Government of Indonesia has already confirmed that it intends to satisfy the award in full.

3. Would such an award be enforced in your country?

Sanum Investments Limited v. ST Group Co, Ltd and others, [2018] SGHC 141

Available at: https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/sanum-for-release-18-6-18amend-pdf.pdf

The High Court of Singapore allowed enforcement of a US$270 million SIAC award despite finding that the seat of arbitration should have been in a different place and that the tribunal was formed in violation of the applicable procedure.

Facts

In 2007, Sanum partnered with ST Group to develop and operate various casinos and slot clubs in Laos. Sanum entered into two kinds of agreements: the Master agreement with various ST parties envisaged that there would be three joint ventures created to develop certain properties – two involving casinos, and a third involving operation of several slot clubs; and into the Participation agreement with ST Vegas Enterprise executing a 50-year joint venture with respect to two of the slot clubs.

The dispute arose in relation to one of the slot clubs - the Thanaleng Slot Club. Under the Master Agreement, it was envisaged Sanum would eventually take over the Thanaleng Slot Club. However, when the time came in 2012, ST Vegas Enterprise informed Sanum that it considered all agreements relating to the Thanaleng Slot Club to have been terminated. The club was shut down and Sanum was refused access.

The Master agreement contained a multi-tier dispute resolution clause providing for amicable negotiations, followed either by arbitration before the Lao Organization of Economic Dispute Resolution (OEDR) or by litigation before the Lao courts. Subsequently a dissatisfied party would have the right to go to "an internationally recognized mediation/arbitration company in Macau". The participation agreement contained a similar clause except for second step which provided for SIAC arbitration in Singapore.

Sanum lost its initial claim before the OEDR and was successfully sued by ST Vegas Co in the Lao courts. Being unsatisfied with such an outcome, Sanum initiated a SIAC arbitration seeking damages for breaches of the both agreements. The ST parties did not participate in the arbitration, arguing that they had never agreed to it.

In terms of jurisdiction, the tribunal found that the dispute arose out of the two agreements (Master agreement and Participation agreement) and that the SIAC clause in Participation agreement "amplifies and supplements" the dispute resolution procedure in the Master agreement. These findings were determined by the claimant's expert evidence that Lao families frequently use different companies in their business dealings that they should be viewed as one enterprise. The tribunal further found that ST was in breach of its agreements with Sanum and ordered ST Group to pay damages for failing to turn over the club exceeding US$270.

Decision

The ST parties chose not to attempt to set the award aside, but resisted enforcement.

The ST parties argued that the tribunal exceeded its jurisdiction because the award was made pursuant to an arbitration agreement to which not all the respondents were parties.

A court in Singapore found that the dispute did arise out of the Master agreement only. Thus, the disputes clauses in the two contracts should not have been combined. As to the seat, the court found that the seat of arbitration was wrong at it should have been Macau (although the arbitral institution could have been SIAC). Moreover, SIAC's decision to appoint a three-member tribunal was incorrect as it was made on the basis of the Participation agreement and not on the basis of the Master agreement, which provided for appointment of a sole arbitrator.

However, despite all these factors, the court held that the Respondents did not demonstrate how these irregularities had affected the procedure. Moreover, the choice of the seat was "less critical" as the court considered an application to refuse enforcement of the award rather than set it aside. Thus, this judgment serves as a very good example of how high the bar should for a party to resist enforcement.

4. Set-aside on public policy grounds – guess in which jurisdiction?

Group v. Sarl Onix and Société Financial Initiative, 16 January 2018, No. 15/21703

The Paris Court of Appeal set aside an ICC award obtained by Onix and Financial Initiative against a Russian company MK Group due to violation of public policy – an often raised but rarely successful ground (the French courts reject nearly 90% of applications for non-enforcement).

Facts

Dao Lao gold mining company was created in 2003, having a Russian company MK Group as a majority shareholder (60%). In 2010, MK Group agreed to transfer its shares to a Ukrainian company Onix. However, in 2014 MK Group filed for arbitration seeking damages and requesting to declare the transfer of shares invalid as Onix did not invest the promised US$12.5 million.

By a majority vote, the ICC tribunal declared that the shares had been validly transferred and that Onix was their rightful owner. It dismissed MK's damages claim and ordered it to pay US$275,000 in costs.

Decision

The Paris court found that the award provided an international protection to the investment made through the fraudulent acquisition of the administrative approval and thus violated public policy. In particular, it found that there was a discrepancy between two versions of a 2011 memorandum of understanding with Laos' ministry of natural resources. The version relied upon on by MK Group (in Laotian language, the one which was presented to the Laotian authorities) made the transfer of its shares conditional on an investment of US$12.5 million, but the version relied on by Onix (English version) did not. Not surprisingly, that investment was never made.

The Paris court ruled that for the Lao authorities this condition was a significant factor and that the resulting award violated the international public order "manifestly, effectively and concretely".

5. A very exclusive jurisdiction

Hardy Exploration & Production (India) Inc v. Government of India v India Infrastructure Finance Company (UK) Ltd [2018] EWHC 1916

Available at: https://www.bailii.org/ew/cases/EWHC/Comm/2018/1916.html

English Commercial Court ruled that it could not issue a final third-party debt order in support of a UNCITRAL award against India in relation to the company domiciled in England due to the "exclusive jurisdiction" clause submitting all disputes between that company and India to the courts in Delhi.

Facts

In 2013, Hardy obtained a UNCITRAL arbitral award against India the amount of more than £70 for illegal revocation of Hardy's rights for natural gas.

Hardy's attempts to enforce the award in India as well as in USA were unsuccessful. However, as part of its efforts to enforce an award in July 2017, the Commercial Court of England granted Hardy an order for the enforcement of the award against India's assets in England and Wales. In February 2018, the same court Hardy granted an interim third-party debt order against IIFC, a company which currently owes approximately US$2.1 billion to the Indian government. Under such order third party pays sums owed to the judgment debtor to the judgment creditor. Therefore, the debt owed by IIFC to the Indian government, would have had to be paid to Hardy.

Decision

IIFC applied to discharge the order, arguing that the English court lacked jurisdiction to make orders over debts arising from its agreements with the Indian government, which contained an exclusive jurisdiction clauses selecting Delhi courts.

Hardy argued, on the other hand, that as IIFC is domiciled in the UK and has its bank accounts within the jurisdiction, the English court was entitled to make the order.

The judge agreed that there was a general presumption that a debt is recoverable or enforceable in the place of domicile of the debtor. However, that presumption may be overruled if it can be demonstrated that the debt can be effectively enforced in another jurisdiction as a result of a "special agreement", such as between IIFC and the Indian government. The rationale behind this rule is that any order of the English courts would not in any event discharge IIFC's as a matter of Indian law.

6. No place for fraud allegations

Republic of Kazakhstan v. Stati et al, 1:14-cv-01638-ABJ

http://res.cloudinary.com/lbresearch/image/upload/v1522067666/d_262118_1336.pdf
https://www.italaw.com/sites/default/files/case-documents/italaw9718.pdf

A US court has enforced a US$520 million SCC award obtained by Moldovan investors Anatolie and Gabriel Stati against Kazakhstan.

Facts

In 2013, the SCC tribunal found that Kazakhstan had violated the Energy Charter Treaty through a series of actions that led to the seizure of the investors' local oil and gas operations.

Decision

Kazakhstan's main argument against enforcing the award is that it was obtained by fraud. In particular, it alleges that the Statis inflated the value of their investment and manufactured expert evidence to support their claim. Indeed, the English High Court ruled in June 2017 that Kazakhstan had established a "sufficient prima facie case" that the award had been obtained through fraud.

However, the Swedish courts did not share this view and refused to set the award aside on the basis of allegations of fraud in 2016. This position was supported by the US courts. In 2016, the DC district court refused to introduce fraud defence, stating that there were no fraudulent evidence relied upon by the tribunal. After Kazakhstan applied for reconsideration of the decision, the DC court stated that Kazakhstan had failed to present the fresh allegations when it initially tried to introduce the fraud claims and that it could not use its request for reconsideration to raise new arguments that it could have advanced earlier.

The US court also had a look at the attitude of the courts at the seat of arbitration, as it ruled that the award was not contrary to the US public policy because the Swedish courts had already enforced the award after hearing and rejecting the state's fraud claims.

Cases to Watch in Russia and Abroad

*By **Anastassia Rozeeva** and **Boris Belkin**, Cleary Gottlieb*

Case: Dredging and Maritime Management SA v. Transstroi (A40-176466/2017)

Forum: Arbitrazh Court of the Moscow District

Significance of the Case: The court refused to enforce the ICC award as being contrary to the public order of the Russian Federation. The court found that in case bankruptcy proceedings are initiated against the debtor in the national court, the recognition of the award outside bankruptcy proceedings will lead to preferential discharge of the creditor's claims and will be contrary to the aim of equal judicial relief. In addition, the court noted that the arbitration clause will be unenforceable if the parties having agreed to specific arbitration rules, have not specified the exact arbitral institution.

The judgment is now being appealed to the Supreme Court.

Case: Legal Intelligence Group Limited v. Andreeva (A40-204126/2017)

Forum: Arbitrazh Court of the Moscow District

Significance of the Case: The court annulled the award of the ICAC at the RF CCI as contrary to the public order of the Russian Federation, because the assignment agreement in respect of the company's shares (under which arbitration was initiated) was connected to the initial SPA and was aimed to change the shareholding structure of the company that was not even brought into the proceedings.

The judgment is now being appealed to the Supreme Court.

Case: Henry Schein Inc. v. Archer and White Sales Inc. (17-1272)

Forum: Supreme Court of the United States

Significance of the Case: In this case, the Court of Appeals held that it was for the court, and not the arbitrator, to decide the question of arbitrability, even if arbitration agreement delegated this question to the arbitrator. According to the judge, courts must look first to whether the parties "clearly and unmistakably" intended to delegate the question of arbitrability to an arbitrator. If they did, "the motion to compel arbitration should be granted in almost all cases," except where "the argument that the claim at hand is within the scope of the arbitration agreement is 'wholly groundless', which was the exact issue in the case.

Is the Court of Arbitration for Sport All About Restriction? Provisional Measures, Evidence, and Party Autonomy

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Recent decisions of the Court of Arbitration for Sport (CAS) related to Russian athletes have caused a significant growth of popularity of the topic, although this arbitral institution has already existed for more than 30 years.

At first glance, CAS seems very similar to classical arbitral institutions. Its competence is based exclusively on arbitration agreement. New York Convention 1958 applies to awards, arbitrators tend to follow IBA Guidelines on conflict of interest, and there are basic features that stress the ADR nature of the procedure. Even the Swiss Federal Tribunal analysing the legal nature of the CAS refers to the court as to international arbitration.[1]

At the same time, CAS has a lot of significantly unusual peculiarities. They not only differentiate CAS from what we are used to in major dispute resolution institutions. Some of these specificities would seem very unusual, erroneous, or even unfair to commercial arbitration practitioners, although they conform with applicable rules and do not contradict public order.

These restrictions can be explained by the specificity of the 'industry' of sport. Since many practitioners tend to represent parties both in commercial, investment, and sports arbitration, author offers a short overview of some unusual features.

1. Restrictions in regard to provisional measures

CAS Rules provide in article R37 a rare and positive regulation that it is possible to apply for provisional measures even before the tribunal has been formed. However, at the same time the very same article sets a number of restrictions to the parties in regard to provisional measures.

The first restriction concerns the possibility of applying to state courts to grant provisional measures. The competence of state courts is excluded by applicable CAS rules, in particular according to para.3 of Art. R37 of the CAS Rules:

In agreeing to submit any dispute subject to the ordinary arbitration procedure or to the appeal arbitration procedure to these procedural rules, the parties expressly waive their rights to request any such measures from state authorities or tribunals.

CAS Rules are sometimes bitterly criticized for such provisions[2] but they fully conform with Swiss legislation. Although such a restriction would have been illegal in Austria[3] and Germany.[4]

1 The Swiss Federal Tribunal Decision dated March 15, 1993 No. DFT 119 II 271 // Reeb M. (ed), Digest of CAS Awards | 1986-1998, Digest of CAS Awards Series Set, Volume 1. Kluwer Law International 1998. P. 561 – 575; Kaufmann-Kohler G. Blaise S. International Arbitration in Switzerland: A Handbook for for Practitioners. 2004. P. 198.

2 Rigozzi A. Provisional Measures in CAS Arbitration // The Court of Arbitration for Sport, ed. Blackshaw. 2006. P. 223; Walther F. Vorläufiger, Rechtsschutz durch Schiedsgerichte//The Proceedings before the Court of Arbitration for Sport, ed. Rigozzi A., Bernasconi M. Berne. 2009. P. 124; Roth H. Der vorsorgliche Rechtsschutz im internationalen Sportrecht // Preliminary Remedies in International Sports Law. Zürich: Schulthess Polygraphischer Verlag, 1999. P. 40; Osterwalter S., Kaiser M. Von Rechtstaat zum Richtersport? Fragen zum vorsorglichen Rechtsschutz in der Sportschiedsgerichtsbarkeit der Schweiz // Zeitschrift für Sport und Recht (SpuRt) 6. 2011. P. 234.

3 Oberhammer P. Entwurf eines neuen Schiedsverfahrensrechts. Vienna. Manz. 2002. P. 60; Heider M., Nueber M., et al., Dispute Resolution in Austria: An Introduction. Kluwer Law International. 2015. P. 45; Schwarz F. T., Konrad C.W. Interim Measures of Protection. The Vienna Rules: A Commentary on International Arbitration in Austria. Kluwer Law International. 2009. P. 580-582.

4 Walther F. Vorläufiger Rechtsschutz durch Schiedsgericht // The Proceedings before the Court of Arbitration for Sport, ed. Rigozzi A., Bernasconi M. Berne. 2009. P. 124, 127; Hofmann K. Zur Notwendigkeit eines institutionellen Sportschiedsgerichtes in Deutschland. Hamburg: Kovač, 2009. P. 362; Netzle S. Die Praxis des Tribunal du Sport (TAS) bei vorsorglichen Massnahmen // The Proceedings before the Court of Arbitration for Sport: CAS & FSA SAV Conference, Lausanne 2006: colloquium/ed. by A.Rigozzi, M.Bernasconi. Berne: Editions Weblaw; Zurich: Schulthess, 2007. P. 137-138.

Occasionally, parties disregard this restriction of R37 provision and apply to state courts for provisional measures. This attempt might be unsuccessful (like was the case in E. Isinbaeva S. Shubenkov 2016 cases, Russian Paralympics Athletes 2016 case[5], P. Kulizhnikow, and the D. Yuskov, A. Loginov, I. Starikh, D. Wasiljev, T. Borodulina 2018 case[7]), but may also be successful (E. Lagno chess player 2014 cases in Norway courts[8] and G. Hall v. FINA 1998 case[9]).

This approach can be explained by the fact that in sports arbitration both provisional measures and remedies sought usually concern non-monetary claims related to some specific performance (such as allowing the athlete to participate in international competitions). Thus the ultimate relief and provisional measure are often the same and going to the state court with the same claim would mean avoiding a proper forum.

CAS *Ad hoc* Rules (separate arbitration rules enacted for each major sport event) do not provide for such a restriction in requesting state courts to grant provisional measures.

The second restriction concerns prerequisites for ordering provisional measures. CAS rules strictly provide for such conditions and they include 1) the necessity to protect the applicant from irreparable harm; 2) the likelihood of success on the merits of the claim, and 3) the interests of the applicant shall outweigh those of the opponent.

The third restriction concerns the impossibility of first file a preliminary version of provisional measures and then the full version with additional extensions. The request shall be final ab initio.

The fourth restriction concerns failing to file a claim within a strict deadline. If the party files a motion for provisional measures and then fails to file the main claim (within 21 days for appellate proceedings and 10 days for ordinary proceedings), provisional measures shall be revoked.

Apart from restrictions, there are also some positive issues in regard to provisional measures in sports arbitration, in particular the opportunity to enforce them over sports bodies (international and national sports federations and clubs), by not applying to state courts.

The main problem pertaining to the enforcement of provisional measures in Russia, while there have been changes in Art. 17 of Arbitration Law, remains the same: provisional measures, issued by the foreign tribunal, do not oblige Russian national state courts to enforce these orders. For sports arbitration, it is not an issue. Such preliminary awards for granting provisional measures are enforced over sports organizations (chains of international and national sports federations) and there is no need to apply to state courts. During the whole history of CAS' existence, provisional measures have never been enforced through state courts, only through sports bodies.[10]

2. Restrictions in regard to evidence

It is difficult to imagine that together with submission of the very first request for arbitration, counsel has to provide a full list of witnesses and experts. That is how the rapid proceedings of CAS backfire. According to articles R44.1 and R51 of the CAS Rules, one party has to specify the names of any witnesses it intends to call, including a brief summary of their expected testimony, and the names of any experts, stating their area of expertise and any other evidentiary measure which it requests.

CAS has been criticized for this[11] but such an approach fully conforms with applicable law. Attempts to annul CAS awards in the Swiss Federal Tribunal on the grounds that the party was deprived of the right to have its witnesses heard were never successful.[12] Whereas in another jurisdiction, even in investment arbitration, this could be a ground for annulment.[13]

CAS rarely allows additional evidence. Parties are not authorized to supplement or amend their requests or their argument, produce new exhibits, or specify further evidence upon which they intend to rely after the submission of the appeal brief and the answer. The only exception when additional evidence may be allowed are so-called "exceptional circumstances".

3. Restriction in choosing rules, seat of arbitration, applicable law and arbitrators

The only way for an athlete to exclude competence of CAS is not to participate in international competitions.

5 Swiss Federal Tribunal Case № 4A_444/2016; 4A_446/2016 // URL: https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight_docid=aza%3A%2F%2F17-02-2017-4A_444-2016&lang=de&type=show_document&zoom=YES&.

6 URL: http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/09/ qk20160915_1bvq003816.html.

7 URL: https://tass.ru/sport/4928064.

8 I. Marisin Materials of Lecture on St. Petersburg International Legal Forum, May 2018 // https://spblegalforum.com/en/2018_Video; See also https://www.quinnemanuel.com/the-firm/news-events/firm-news-quinn-emanuel-once-again-to-defend-russian-chess-federation/ and http://chess-news.ru/sites/default/files/Letter%20from%20RCF.PDF.

9 H. v. FINA, CAS 98/218, 1999 // URL: http://jurisprudence.tas-cas.org/Shared%20Documents/218.pdf.

10 Netzle S. Die Praxis des Tribunal du Sport (TAS) bei vorsorglichen Massnahmen // The Proceedings before the Court of Arbitration for Sport: CAS & FSA SAV Conference, Lausanne 2006: colloquium/ed. by A.Rigozzi, M.Bernasconi. Berne: Editions Weblaw; Zurich: Schulthess, 2007. P. 142-143.

11 Scherer M. Calling a witness (too) late in the proceedings', Kluwer Arbitration Blog, September 15 2011 // http://arbitrationblog.kluwerarbitration.com/2011/09/15/calling-a-witness-too-late-in-the-proceedings/.

12 See the Swiss Federal Tribunal case dated July 20, 2011 on the matter No. 4A_162/2011 // http://www.servat.unibe.ch/dfr/bger/110720_4A_162-2011.html.

13 See Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, 23 декабря 2010., ICSID Case No. ARB/03/25 // https://www.italaw.com/sites/default/files/case-documents/ita0341.pdf.

All professional athletes are urged to be party to arbitration agreements which they usually do not even read and are contained in entry forms to competitions (normally by reference to charters of sports organizations). This has led to discussion as to whether the nature of arbitration is consensual or not and whether such a constraint is allowed. The Swiss Federal Tribunal finds it acceptable to urge parties to agree on such a dispute resolution mechanism as CAS.[14]

In commercial and investment arbitration, parties are normally free to choose the seat of arbitration in their arbitration clause This choice is important for determining procedural rules that might influence proceedings, and is also important to ensure coherence with the state courts (such as, for instance, on the stage of possible annulment). In international sports arbitration nobody can choose any seat of arbitration other than Switzerland, even if the hearings are held elsewhere. This is stipulated in CAS procedural rules, Art. R 28.

Whilst according to Art. 187 of PIL the arbitral tribunal shall decide the case according to the rules of law chosen by the parties, CAS tends to disregard the parties' choice and apply Swiss law. This is directly stipulated in Article R58 of the CAS rules:
The Panel shall decide the dispute according to the applicable regulations and, ***subsidiarily****, to the rules of law chosen by the parties.*

This provision was enacted in 2013. In 2012 regulation was different:
The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which.
This tendency proves that CAS is not following the way of broadening party autonomy.

As far as free choice of arbitrators is concerned, CAS has a closed list of arbitrators and parties are unable to choose an arbitrator not included in this list. Moreover, even IBA guidelines on conflict of interest in international arbitration in part of 3.1.3 (orange list) are not applicable to sports arbitration, which is directly set in reference to the guidelines.

4. Restrictions in confidentiality

CAS ordinary and appellate proceedings have a different approach to confidentiality. Whereas ordinary proceedings are confidential (see R43) in appeal arbitration procedure the award, a summary, and/or a press release setting forth the results of the proceedings shall be made public by CAS (See R59).

5. Restriction in burden of proof

Normally both in investment and commercial arbitral proceedings each party has to substantiate with evidence those issues that it relies upon. But the disciplinary proceedings of CAS are different in this regard because there is a presumption of guilt in the doping cases. In case one finds a forbidden substance in blood, the guilt is automatically presumed. This is called a "strict liability principle" and this principle was drafted by CAS and later implemented in the WADA Code.[15]

Whilst this provision seems to be in breach of Art. 6 of ECHR, it was stressed by CAS and the Swiss Federal Tribunal multiple times that the legal relations between an athlete and a federation are of a civil nature and there is no room left for the application of principles of criminal law.[16]

Conclusion

Everybody usually speaks of features that commercial arbitration can learn from sports arbitration such as: speed (during the Olympics proceedings in CAS ad hoc take no more than 24 hours); specialized expertise; affordability (appeal proceedings are in fact free of charge and it is possible for athletes to apply for legal aid); voluntary enforcement of provisional measures and awards (all enforcement proceedings are pursued through sports bodies, and not over state courts, even though New York Convention 1958 is applicable to CAS awards, but in fact is used only for enforcement of awards on reimbursement of legal fees), and procedural efficiency.

But the negative of all the positive features of CAS is an extremely dense amount of regulation and restriction that causes a lack of party-autonomy. Representing parties before CAS urges us to act carefully, because agreeing on CAS rules means we agree to all the limitations they provide for.

14 The decision of the Swiss Federal Tribunal dated March 22, 2007 № 4P.172/2006 ¶ https: // law.marquette.edu/assets/sports-law/pdf/2012-conf-canas-english.pdf; The decision of the Swiss Federal Tribunal dated February 13, 2012 dated №4A_428/2011 // http://www.swissarbitrationdecisions.com/dismissal-of-an-appeal-to-set-aside-a-cas-award-on-the-grounds-.

15 Kaufmann-Kohler G. Arbitral Precedent: Dream, Necessity or Excuse? // Arbitration International. Vol. 23. No. 3. LCIA. 2007. P 365–366 (2007).

16 A. v. Fédération Internationale des Luttes Associées (FILA), CAS 2000/A/317, 2001 (¶26) // https://jurisprudence.tas-cas.org/Shared%20Documents/317.pdf ; Decision of the Swiss Federal Tribunal dated March 31, 1999 on the matter No. 5P.83/1999 dated March 31, 1999, (¶3d) // Reeb M. (ed.) Digest of CAS Awards II 1998-2000. Digest of CAS Awards Series Set. Volume 2. Kluwer Law International. 2002. P. 775 – 782; the decision of the Swiss Federal Tribunal dated March 27, 2014 on the matter No. 4A_362/2013 // http://www.swissarbitrationdecisions.com/reasonable-standards-evidence-cannot-be-contrary-public-policy#footnote21_bk2as5f; the decision of the Swiss Federal Tribunal dated March 15, 1993 on the matter No. DFT 119 II 271 // Reeb M. (ed.), Digest of CAS Awards I 1986-1998, Digest of CAS Awards Series Set, Volume 1. Kluwer Law International 1998. P. 561 – 575.

Recent Jurisprudence of the Swiss Federal Tribunal in the Area of International Sport Arbitration

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The Federal Tribunal, the highest court of Switzerland, plays a key role in the area of international sport arbitration, resulting from its competence to consider appeals against the awards of the Court of Arbitration for Sport (CAS). Such appeals can be brought only on specific grounds for challenging arbitral awards exhaustively listed in Article 190(2), items (a) – (e) of the Swiss Federal Private International Law Act (LDIP).[1] The following overview of several decisions of the Federal Tribunal, rendered in 2017 – first half of 2018 on appeals against CAS awards, reveals current trends of its jurisprudence in this area and identifies possibilities of successfully challenging the awards under each of these grounds.

Irregular appointment of a sole arbitrator or improper constitution of an arbitral tribunal (art. 190(2)(a) LDIP)

This ground of appeal covers: (1) irregularities in the constitution of an arbitral tribunal as well as (2) violations of its independence and impartiality.[2] Although in past the athletes have repeatedly tried to challenge the CAS awards on this ground, claiming lack of the CAS independence from the International Olympic Committee (IOC) or international sport federations, the Federal Tribunal has consistently rejected this challenge.[3] This approach was re-affirmed in the Decision 4A_260/2017 in *X. v. Fédération Internationale de Football Association*.[4] In this case, the appellant, a Belgian football club, argued that the CAS does not constitute a real arbitral tribunal within the meaning of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") and is even more illegal because it is imposed by the statues of FIFA. The Federal Tribunal rejected these claims, primarily relying upon its reasoning in *Lazutina* case, which confirmed the independence of the CAS from the IOC.[5] It also analyzed in detail the various existing links between the FIFA and the CAS and came to the conclusion that there were no reasons to change its well-established jurisprudence on the independence of the CAS in the present case.[6] Nevertheless, as long as the case of *Claudia Pechstein v. Switzerland* (67474/10),[7] where the German skater is challenging,

> The Federal Tribunal rejected these claims, primarily relying upon its reasoning in Lazutina case, which confirmed the independence of the CAS from the IOC

1 Loi fédérale sur le droit international privé (LDIP), du 18.12.1987, available at: https://www.admin.ch/opc/fr/classified-compilation/19870312/201704010000/291.pdf

2 Club X. SA v. Z. (4A_282/2013), 13.11.2013, ATF 139 III 511. The decisions of the Swiss Federal Tribunal, including unpublished decisions since 2000, can be found at: http: //www.bger.ch

3 Club X. SA v. Z. (4A_282/2013), 13.11.2013, ATF 139 III 511. The decisions of the Swiss Federal Tribunal, including unpublished decisions since 2000, can be found at: http: //www.bger.ch

4 X. v. Fédération Internationale de Football Association (4A_260/2017), 20.02.2018, ATF 144 III 120.

5 Id. at 124-125, consid. 3.4.1.

6 Id. at 125-129, consid. 3.4.2-3.4.3.

7 Requête No. 67474/10 Claudia Pechstein c. la Suisse, http://hudoc.echr.coe.int/eng?i=001-117166
Emirats Arabes Unis et consorts contre Westland Helicopters Limited et Tribunal arbitral, 19.04.1994 (Switz.), ATF 120 II 155, 163-164; B. Fund Ltd c. A. Group Ltd et Tribunal arbitral

among other things, the CAS independency, is still pending before the European Court of Human Rights, this issue is far from being closed.

Wrong acceptance or denial of competence by an arbitral tribunal (art. 190(2)(b) LDIP)

This ground of appeal covers: (1) non-arbitrability of a dispute (art. 177 LDIP), (2) invalidity of the arbitration agreement from the point of view of its form (art. 178(1) LDIP) and substance (art. 178(2) LDIP), as well as (3) issues related to interpretation of the arbitration agreement, in particular, its scope.[8] In February of 2018, the Federal Tribunal annulled on this ground the CAS award in a dispute between a football player and his agent under an exclusive agency agreement.[9] In the English translation, the dispute resolution clause of this agreement provided that "*for processing and elucidation of any conflict that may arise in connection with the celebration [conclusion], interpretation, execution, and extinction of the present contract and without prejudice that can occur before national and international bodies corresponding states (the Dispute Resolution Body of the AFA* [Asociación del Fútbol Argentino)] *and the FIFA* [Fédération Internationale de Football Association] *Players' Status Committee in the international order), based on the constitutional guarantee of natural judge (Art. 18 NC* [National Constitution]*) the parties submit themselves to the jurisdiction and decisions of the courts in the Comercial de Capital Federal, República Argentina.*"[10] Following the detailed analysis of this clause (which did not refer to CAS), the Federal Tribunal came to the conclusion that it lacked the certainty regarding the clear will of the parties to settle their disputes by arbitration, with the exclusion of state courts. Consequently, the CAS decision accepting its competence to resolve the dispute between the player and his agent was incorrect and had to be annulled.[11]

Ruling beyond the claims submitted to the arbitral tribunal or failure to decide on one of the claims (art. 190(2)(c) LDIP)

This ground of appeal covers: (1) awards which allocate more that was requested (*ultra petita* awards) or something else than what was requested (*extra petita* awards),[12] as well as (2) awards which fail to decide on one of the claims (*infra petita* awards).[13] The International Motorcycling Federation (FIM) relied upon this ground, together with claim concerning lack of the CAS competence, to challenge the arbitral award rendered in its dispute with Kuwait Motor Sports Club (KMSC).[14] Among its prayers for relief, the Club requested the CAS to issue a direct order to the FIM to accept and to register KMSC as the only and legitimate affiliated federation of the FIM for Kuwait. Nevertheless, the award itself did not directly order the FIM to accept the Club's application, but only demanded to decide on this application within nine months after the notification of the award, applying the rules in force at the time when the application was made and respecting the Club's right to be heard.[15]

> the CAS should not substitute the competent body of international federation to decide on the merits of a request for affiliation of national federation

On appeal, the Federal Tribunal rejected the FIM's challenge that by ordering a different thing than that requested by the KMSC, the CAS award constituted *ultra petita* or, at least, *extra petita*.[16] First, the Federal Tribunal recalled the CAS award in *Federacio Catalana de Patinatge c. International Roller Sport Federation*, according to which, in view of autonomy of sport federations, the CAS should not substitute the competent body of international federation to decide on the merits of a request for affiliation of national federation.[17] Second, it also noted that by remanding the affiliation decision to the FIM, the CAS respected its freedom of association and preserved its rights, in particular, its autonomy. Thus, by objecting against this decision, which was beneficial to the FIM, the Federation adopted an attitude that seemed difficult to the Tribunal to reconcile with the rules of good faith. Finally, relying

8 Emirats Arabes Unis et consorts contre Westland Helicopters Limited et Tribunal arbitral, 19.04.1994 (Switz.), ATF 120 II 155, 163-164; B. Fund Ltd c. A. Group Ltd et Tribunal arbitral (4P.168/2006), 19.02.2007 (Switz.), ATF 133 III 139, 141-142, consid. 5.

9 A v. B. (4A_432/2017), 22.02.2018; Pablo Gustavo Cosentino v. Ezequiel Matias Schelotto (CAS 2016/A/4554), award of 21.06.2017 (as of 12.08.2018, this award was not included in the CAS database (http://jurisprudence.tas-cas.org/Help/Home.aspx)).

10 A v. B. (4A_432/2017), 22.02.2018, part A.a.

11 Id. consid. 3.3.

12 X. Ltd c. Y. BV (4P.226/2001), 1.02.2002, ATF 128 III 234, 242, consid. 4; Fédération Internationale de Motocyclisme c. Kuwait Motor Sports Club (4A_314/2017), 28.05.2018, consid. 3.2.1.

13 X. Ltd c. Y. BV (4P.226/2001), 1.02.2002, ATF 128 III 234, 242, consid. 4

14 Kuwait Motor Sports Club c. Fédération Internationale de Motocyclisme (TAS 2015/4316), award of 1.05.2017 (as of 12.08.2018, this award was not included in the CAS database).

15 Fédération Internationale de Motocyclisme c. Kuwait Motor Sports Club (4A_314/2017), 28.05.2018, part B.b.

16 Id. consid. 3.2.2.

17 Federacio Catalana de Patinatge (FCP) c. International Roller Sport Federation (FIRS) (TAS 2004/A/776), award of 15.05.2005, 49, available at: http://jurisprudence.tas-cas.org/Shared%20Documents/776.pdf

upon "a maiore minus" principle ("who asks for more, asks for less") the Tribunal concluded that by giving to the KMSC less that it has requested, the CAS did not render *ultra petita* or *extra petita* award. Therefore, the challenge based on art. 190(2)(c) was unfounded.[18]

Violation of principle of equal treatment of the parties or of their right to be heard in adversarial procedure (art. 190(2)(d) LDIP)

This ground of appeal covers: (1) violation of principle of equal treatment of the parties, and (2) violation of their right to be heard. Although this right (also guaranteed by art. 182(3) LDIP) does not require that the award is motivated, according to constant jurisprudence of the Federal Tribunal, the arbitral tribunal has a minimum duty to examine and to address the pertinent issues. This duty is violated when the arbitral tribunal, due to oversight or a misunderstanding, overlooks some legally pertinent allegations, arguments, evidence or offers of evidence from a party.[19]

> Federal Tribunal came to the conclusion that the sole arbitrator failed to take into account the arguments repeatedly brought forward by the athlete in support of his subsidiary prayers for relief. Since these arguments were important for the outcome of the dispute, the Tribunal partially annulled the CAS award.

The Federal Tribunal re-confirmed this approach in its Decision 4A_478/2017 in *X. c. Agence Mondiale Antidopage (AMA)*.[20] Following the detailed review of the wording of the CAS award,[21] it came to the conclusion that the sole arbitrator failed to take into account the arguments concerning the starting date of the period of ineligibility, repeatedly brought forward by the athlete in support of his subsidiary prayers for relief. Since these arguments were important for the outcome of the dispute, the Tribunal partially annulled the CAS award.

At the same time, in its Decision 4A_80/2017 in *A. v. International Weightlifting Federation (IWF)*, the Federal Tribunal reiterated that the right to be heard does not include the right to a materially correct decision.[22] Rejecting the appeal of a Russian weightlifter, it recalled that even a manifestly wrong finding by the arbitrators was not sufficient for the annulment of the ward.[23] According to the Tribunal, the party seeking such annulment has to demonstrate that the judicial oversight deprived him from introducing and proving his position with respect to a procedural issue.[24]

Incompatibility of the award with public policy (art. 190(2)(e) LDIP)

This ground for appeal covers incompatibility of the award with: (1) substantive public policy and/or (2) procedural public policy.[25] An arbitral award is contrary to *substantive* public policy when it violates fundamental principles of substantive law and is therefore incompatible with the largely recognized essential values which, according to the conception prevailing in Switzerland, form the basis of every legal system.[26] In its turn, an award is contrary to procedural public policy when there is a violation of fundamental and generally recognized procedural principles, leading to an intolerable contradiction with the sense of justice, so that the award appears to be incompatible with the values recognized in a State based on the rule of law.[27]

The Federal Tribunal recognizes the particularities of sport arbitration as concerns treatment on appeal of certain procedural issues (notably, the validity of a waiver by an athlete of the right to appeal the arbitral award).[28] Still, while evaluating the compatibility of the

18 Fédération Internationale de Motocyclisme c. Kuwait Motor Sports Club (4A_314/2017), 28.05.2018, consid. 3.2.2.

19 X. contre ATP Tour et Tribunal Arbitral du Sport (TAS) (4P.172/2006), 22.03.2007, ATF 133 III 235, 248, consid. 5.2; X. et consorts c. Z. GmbH (4A_342/2015), 26.04.2016, 142 III 360, consid. 4.1.1.

20 X. v. Agence Mondiale Antidopage (AMA) & Fédération biélorusse de taekwondo (4A_478/2017), 2.05.2018.

21 World Anti-Doping Agency (WADA) v. Belarus Taekwondo Federation (BTF) & Arman-Marshall Silla (CAS 2017/A/4954), award of 20.07.2017 (as of 12.08.2018, this award was not included in the CAS database).

22 A. c. International Weightlifting Federation (IWF) (4A_80/2917), 25.07.2017.

23 X. GmbH c. Y. S, 10.09.2001, 127 III 576, 577, consid. 2b.

24 A. c. International Weightlifting Federation (IWF) (4A_80/2017), consid. 4.

25 Egemetal Demir Celik Sanayi ve Ticaret A.S. gegen Fuchs Systemtechnik GmbH und ICC-Schiedsgericht, 28.04.2000, ATF 126 III 249, 253, consid. 3a.

26 Francelino da Silva Matuzalem gegen Fédération Internationale de Football Association (FIFA) (4A_558/2011), 27.03.2012, ATF 138 III 322; 327, consid. 4.1; X. S.p.A. c. Y. S.r.l. ainsi que Tribunal arbitral CCI, Lausanne (4P.278/2005, 8.03.2006, ATF 132 III 389, 391-392, consid. 2.

27 A. c. International Weightlifting Federation (IWF) (4A_80/2017), consid. 3.2; .A c. B. (4A_508/2013), 27.05.2014, 140 III 278, consid. 3.1; X. S.p.A. c. Y. S.r.l. ainsi que Tribunal arbitral CCI, Lausanne (4P.278/2005), 8.03.2006, ATF 132 III 389, 391-392, consid. 2.

X. contre ATP Tour et Tribunal Arbitral du Sport (TAS) (4P.172/2006), 22.03.2007, ATF 133 III 235, 245, consid. 4.3.

CAS awards with public policy, it consistently applies the same concept of public policy as in the area of "classical" international arbitration.[29] As a result, the very restrictive approach of the Federal Tribunal to the annulment of arbitral awards on the public policy grounds is fully applicable on the area of sport arbitration.[30]

The practical application of this approach can be illustrated on the example of the Decision 4A_470/2016,[31] where the Federal Tribunal rejected the appeal of the Russian Paralympic Committee (RPC) against the CAS award in its dispute with the International Paralympic Committee (IPC).[32] In this award, the CAS upheld the validity of the decision of the Governing Board of the IPC, dated August 7, 2016, which suspended the membership of the RPC with immediate effect due to its asserted inability to fulfill its IPC membership responsibilities and obligations, in particular its obligation to comply with the IPC Anti-Doping Code and the World Anti-Doping Code.[33] As a consequence of that suspension, by the application of article 9.6 of the IPC Constitution, the RPC could not enter athletes in competitions sanctioned by the IPC, relevantly, Paralympic Games in Rio de Janeiro in 2016.[34]

Unlike decision of the International Olympic Committee Executive Board, dated July 24, 2016,[35] the decision of the IPC did not provide any possibilities for Russian para-athletes to rebut the applicability of collective responsibility in their individual cases in accordance with the well-established rules of natural justice. Nevertheless, when the RPC asserted the violation of rights of para-athletes to natural justice (which it was mandated to do by virtue of its statutes) before the CAS, the Panel came to the conclusion that the RPC cannot itself seek relief as the holder, preserver or protector of these individual rights.[36] Although the CAS award effectively upheld the application of collective responsibility for alleged shortcomings of the RPC to individual para-athletes, without offering them any chance to demonstrate their non-involvement in the alleged State-run doping program in Russia, on appeal the Federal Tribunal did not found that this award was incompatible with public policy.[37]

Furthermore, the CAS subsequently refused to consider the claims of 34 individual para-athletes against the IPC in connection with the impossibility to participate in the Paralympic Games in Rio, claiming lack of jurisdiction.[38] Thus, the decision of the Federal Tribunal with respect to the CAS award in the dispute between the IPC and the RPC and this CAS award on jurisdiction with respect to individual claims resulted in a situation when the rights of the individual para-athletes to natural justice could not be protected neither by the RPC nor by the para-athletes themselves.

Conclusion

The preceding overview of the recent jurisprudence of the Federal Tribunal reveals that out of five grounds for appeals listed in art. 190(2) LDIP, the challenges against the CAS awards are less likely to succeed on the ground of irregular constitution of an arbitral tribunal (art. 190(2)(a)) and incompatibility of the award with public policy (art. 190(2)(e)). This jurisprudence coincides with the latest general statistics of challenging the arbitral awards (both sport and non-sport) before the Federal Tribunal, according to which only the percentage of awards that were set aside on ground (b) (jurisdiction) has recently increased, while successful challenges on all other grounds have decreased.[39] While these figures do not mean that losing parties before the CAS shall refrain from appealing the award to the Swiss Federal Tribunal, they require from these parties significant efforts and determination in protecting their rights and legitimate interests until the very end of judicial procedure.

30 According to certain statistics, out of 196 challenges of arbitral awards (sport and non-sport) on the grounds of incompatibility with public policy considered by the Federal Tribunal in 1989 – 2017, only 2 such challenges were successful. See, Felix Dasser, Piotr Wójtowicz, Challenges of Swiss Arbitral Awards. Updated Statistical Data as of 2017. //ASA Bulletin, 2018, Volume 36, No. 2, pp. 276, 281, available at: https://www.arbitration-ch.org/asset/d99894b9ab47b6a7fb3da8c0ad9d4d94/Challenges%20of%20Swiss%20Arbitral%20Awards%20Updated%20Statistical%20Data%20as%20of%202017.pdff

31 Russian Paralympic Committee v. International Paralympic Committee (4A_470/2016), 3.04.2017.

32 Russian Paralympic Committee (RPC) v. International Paralympic Committee (IPC) (CAS 2016/A/4745), award of 30.08.2016 (operative part of 23.08.2016), available at: http://jurisprudence.tas-cas.org/Shared%20Documents/4745.pdf

33 IPC: The IPC suspends the Russian Paralympic Committee with immediate effect, News, 7.08.2016, available at: https://www.paralympic.org/news/ipc-suspends-russian-paralympic-committee-immediate-effect>

34 Russian Paralympic Committee (RPC) v. International Paralympic Committee (IPC) (CAS 2016/A/4745), award of 30.08.2016 (operative part of 23.08.2016), ¶13, available at: http://jurisprudence.tas-cas.org/Shared%20Documents/4745.pdf

35 Decision of the IOC Executive Board Concerning the Participation of Russian Athletes in the Olympic Games Rio 2016, 24.07.2016, available at: https://www.olympic.org/news/decision-of-the-ioc-executive-board-concerning-the-participation-of-russian-athletes-in-the-olympic-games-rio-2016

36 Russian Paralympic Committee (RPC) v. International Paralympic Committee (IPC) (CAS 2016/A/4745), ¶80.

37 Russian Paralympic Committee v. International Paralympic Committee (4A_470/2016), 3.04.2017, consid. 4.2 - 4.4.

38 Interfax: Court of Arbitration for Sport refused to consider on the merits the claim of 34 para-athletes (Interfax: Sportivniy arbitrazh otkazalsya rassmatrivat po sushestvu isk 34-kh paralympyitsev), 21.10.2017, available at: http://www.interfax.ru/sport/584195

39 Felix Dasser, Piotr Wójtowicz, Challenges of Swiss Arbitral Awards. Updated Statistical Data as of 2017. //ASA Bulletin, 2018, Volume 36, No. 2, pp. 276, 281.

Competing Priorities in the Fight Against Doping

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I. Introduction[1]

The system that has been developed with the aim of identifying and punishing athletes who engage in doping is extensive, and involves numerous national and international bodies, most prominently the World Anti-Doping Agency ("**WADA**") and the Court of Arbitration for Sport ("**CAS**"). Establishing systems and procedures to ensure a level playing field for all athletes is critical. However, some have questioned whether in some instances the zealous pursuit of this goal may risk undermining certain fundamental rights of the individual athlete to natural justice and due process.

This article focuses on the strict liability principle, which is a key pillar of the established system, and identifies certain practical challenges faced by athletes who are subjected to this standard.

II. The International System

WADA and CAS are at the forefront of the fight against doping. Other institutions involved in this process include the IOC, national Olympic Committees, national sport bodies. The Code sets out anti-doping rules and is often the primary reference point for athletes, sport federations and CAS, among others.

National and international sport federations, which are signatories to the Code, are required to implement the Code, including by incorporating the rules set by the Code into their own rules and bylaws.[2] WADA publishes a list of all of the Code's signatories,[3] which includes: (i) the International Cycling Union; (ii) the International Ice Hockey Federation; (iii) FIFA; (iv) World Rugby, and many others. Individual athletes are deemed to have accepted the rules set by the Code through their agreement to the bylaws of sport federations that govern the events in which they compete. WADA retains extensive powers against both athletes and the sport federations. It closely monitors doping cases and has the right to appeal any decision by a sport federation directly to CAS.[4]

III. Strict Liability and its Practical Implications

In many instances, the Code and the CAS Procedural Rules provide the primary framework for an athlete to challenge an alleged doping violation. One of the cornerstone principles under the Code is the strict liability imposed on athletes for the presence of any prohibited substance in his or her system. Specifically,

1 The authors of this Article, Christopher Moore and Marina Zarubin, were members of the legal team at Cleary Gottlieb Steen & Hamilton LLP that represented professional hockey player Danis Zaripov in a recent high profile appeal before CAS. See https://uk.reuters.com/article/uk-sport-doping-russia-zaripov/russias-zaripov-has-doping-ban-cut-after-appeal-idUKKBN1DM0LN.

2 WADA Code, Article 23.

3 The full list can be viewed on WADA's website at https://www.wada-ama.org/en/what-we-do/the-code/code-signatories.

4 WADA Code, Article 13. CAS was established prior to WADA in 1984 and was meant to unify the dispute resolution process related to sport. It quickly became a key institution in the fight against doping and is widely considered the most important sport arbitration institution, not least because it is designated in the Code as the last instance arbitral institution for disputes concerning doping violations. Richard H. McLaren, Twenty-Five Years of the Court of Arbitration for Sport: A Look in the Rear-View Mirror, 20 Marq. Sport L. Rev. 305 (2010) (describing CAS as the "world's supreme court of sport").

Article 2.1 of the Code provides that:

> *"it is not necessary that intent, Fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1".*[5]

Accordingly, under this rule, an athlete may be suspended from competition based solely upon the presence of a prohibited substance in his or her system, regardless of how the substance entered the athlete's system or whether the athlete had any intention to cheat. Moreover, the length of some suspensions can be up to four years,[6] which for many could effectively end their career.

Where any athlete has tested positive for a prohibited substance, she has the opportunity to explain the presence of that substance and to seek to eliminate or reduce the resulting sanction. The right to a fair hearing for the athlete is guaranteed by the Code. Article 8.1 states:

> *"For any Person who is asserted to have committed an anti-doping rule violation, each Anti-Doping Organization with responsibility for results management shall provide, at a minimum, a fair hearing within a reasonable time by a fair and impartial hearing panel. A timely reasoned decision specifically including an explanation of the reason(s) for any period of Ineligibility shall be Publicly Disclosed as provided in Article 14.3".*[7]

It is before the "Anti-Doping Organizations", defined as signatories to the Code and which include all major sport federations as well as event organisations such as the IOC itself, that the athlete can seek in the first instance to eliminate or reduce the sanction.

Under Article 10.4, the applicable sanction may be eliminated *"[i]f an Athlete or other Person establishes in an individual case that he or she bears No Fault or Negligence"*.[8]

An athlete may seek a reduction of a sanction where she is able to demonstrate the she bears no significant fault or negligence,[9] which requires the athlete to show that she:

> *"[d]id not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule".*[10]

Some commentators have argued that the definition of No Fault of Negligence, particularly the standard of "*utmost caution*" in addition to "*reasonable*" knowledge or suspicion is too strict[11] and goes beyond the reasonable person standard.

Under this standard, where an athlete has consumed a contaminated product, in order to succeed in eliminating or reducing the resulting sanction, she must establish (i) the source of the prohibited substance; and (ii) that she could not reasonably have known or suspected even with the exercise of utmost caution, that a contamination had occurred. Many professional athletes take dozens of permissible food supplements and vitamins. Thus, where an athlete believes that the presence of a prohibited substance is due to contamination of an otherwise permissible substance, meticulous and methodical evidence-gathering is the only route to establishing the source, without which the rules provide no means for the elimination or reduction of the applicable sanction. This can be particularly challenging when the athlete is accused of taking a prohibited substance that is commonly used in other contexts for purposes other than enhancing an athlete's performance.

Where contamination is suspected, establishing the true source of the prohibited substance at issue can be akin to searching for a needle in a haystack.

For example, Hydrochlorothiazide ("**HCTZ**") is a substance that is identified as a prohibited substance under the Code. It is prohibited even though it has no performance enhancing qualities, on the basis that, because it is a diuretic, it could be used as a weight-reducing agent or to mask the effects of other performance enhancing substances. However, HCTZ is also one of the most commonly recommended substances for reducing blood pressure and is found in approximately 200 medications worldwide.[12] It is also

5 WADA Code, Article 2.1.

6 WADA Code, Article 10.2.1.

7 WADA Code Article 8.1.

8 WADA Code, Article 10.4.

9 WADA Code, Article 10.5.

10 WADA Code Appendix 1: Definitions.

11 T. Wyatt Cox, The International War Against Doping: Limiting the Collateral Damage from Strict Liability, Vanderbilt Journal of Transnational Law, Vol. 47:295 (2014), p. 321.

12 Vidal, Médicaments contenant la substance active en association, available at https://www.vidal.fr/substances/liste/type:associated/id:1798/.

one of the most commonly prescribed antihypertensive drugs, and is prescribed to over 100 million patients worldwide each year.[13] As a result of the extensive use of HCTZ it has also been identified in drinking water, which some athletes have identified as a source of contamination leading to a positive doping sample. For example, in the case in *Union Cycliste Internationale (UCI) v. Jack Burke & Canadian Cycling Association (CCA)*, a Canadian cyclist tested positive for HCTZ. In that case, the sole arbitrator found that the athlete satisfied on the balance of probabilities that the source of HCTZ was contaminated tap water. The athlete drank the water after filling up his water bottles in a local sports bar, after difficulty finding somewhere to fill up his water in between Stages 3 and 4 of a race, because no other sources were reasonably available at the time. The bar was next to a golf course and on the perimeter of open-pit gold mining operations. There, the athlete successfully argued that purification processes were less prevalent in the area where he obtained the tap water than was typically the case in most other parts of Canada and Europe and was thus more susceptible to contamination, including through well contamination, bio solid spreading, garbage disposal, landfill activity, or other human activities.[14]

Where contamination is suspected, establishing the true source of the prohibited substance at issue can be akin to searching for a needle in a haystack. The defence counsel and the athlete's team must leave no stone unturned. This was the case in another recent high profile case in which Russian ice hockey player, Danis Zaripov was initially banned by the International Ice Hockey Federation (the "**IIHF**") for two years after his sample was found to contain (i) 90 micrograms per millilitre of pseudoephedrine (an amount below the prohibited threshold of 150 micrograms per millilitre) and (ii) trace amounts of HCTZ. Following the initial disciplinary hearing before the IIHF, at which Mr Zaripov was not represented, the IIHF banned Mr Zaripov on the basis of the presence of HCTZ. Following that decision, Mr Zaripov engaged counsel[15] to file an appeal before CAS. Through many months of research, Mr Zaripov's new legal team identified extensive evidence supporting his position that HCTZ was present in his system due solely to the contamination of another legally permissible supplement that he had consumed. Ultimately, no decision at the CAS level was necessary, because Mr Zaripov and the IIHF reached a settlement. Based on "*the new evidence provided by Mr Zaripov, which was not available to the IIHF Disciplinary Board when it rendered its Decision*",[16] the IIHF determined that Mr Zaripov did not bear Significant Fault or Negligence and reduced Mr Zaripov's sanction to six months, which was approximately the same amount of time he had already been side-lined as a result of the incident. As a result, Mr Zaripov was immediately able to return to playing for his team.[17]

> The application of the strict liability creates an inherent tension between the desire to ensure an even playing field and the individual rights of the accused

Cases of contamination are likely to be the exception to the rule. But in cases where even the most diligent and "*cautious*" athlete is genuinely unaware of the source of possible contamination, particularly where the amount of a substance detected is minimal, the strict liability standard places an immense burden on the athlete, who in many instances may lack the resources necessary to establish the source.

Supporters say strict liability is justified because the athlete is best placed to police what substances she consumes, and that in the event the presence of a prohibited substance is identified, it would be unduly burdensome to place the burden on anti-doping organisations to establish the athlete's knowledge or intent.[18] Proponents of the strict liability principle also argue that even if its application may occasionally result in the sanctioning of an athlete that consumed a prohibited substance by accident or without any intent to cheat, that is nevertheless justified as it would be unfair to permit athletes to benefit in competition from gaining any competitive advantages from the use of a prohibited substance, whether intentional or not.

Nevertheless, the application of the strict liability creates an inherent tension between the desire to ensure an even playing field and the individual rights of the accused. The list of prohibited substances is extensive, and includes certain substances that are also found in common medications, as well as some

13 Franz H. Messerli et al., Antihypertensive Efficacy of Hydrochlorothiazide as Evaluated by Ambulatory Blood Pressure Monitoring, 57 Journal of the American College of Cardiology 5 (2011).

14 CAS 2013/A/3370 Union Cycliste Internationale (UCI) v. Jack Burke & Canadian Cycling Association (CCA), Award of 17 July 2014, paragraph 100.

15 Cleary Gottlieb Steen & Hamilton LLP was engaged by Mr Zaripov for the purpose of his appeal to CAS, and the authors of this Article were member of that team.

16 CAS 2017/A/5280 Danis Zaripov v. International Ice Hockey Federation.

17 Following his return, his team went on to win the league championship. See https://en.khl.ru/news/2018/04/22/387278.html.

18 A. Gray, Doping Control: The National Governing Body Perspective, in DRUGS AND DOPING IN SPORT: SOCIO-LEGAL PERSPECTIVES 11 (2001).

substances which arguably inhibit rather than enhance performance (e.g., marijuana). Moreover, the quality and sophistication of testing equipment has increased significantly over the years, such that even the most minute amounts of a substance can now be detected – even amounts so small that they could not provide any competitive advantage to the athlete. Some commentators have thus questioned the efficacy of the strict liability principle in every instance, particularly where it results in the sanctioning of an athlete based upon the presence of a negligible amount of a prohibited substance that could not have materially enhanced his or her performance, on the ground that in those circumstances the Code is arguably "*not carrying out any rational purpose*".[19] For these reasons, several proposals have been made by commentators to soften the current approach under the Code, including, e.g., to introduce a "*mistake of fact defence*",[20] impose more relaxed culpability standards,[21] or remove from the Prohibited List substances which have no performance enhancing effects.

However, WADA appears to be in no rush to move away from the strict liability principle as it is currently applicable under the Code. Indeed, in the most recent review of the Code, the new version of which took effect on 1 January 2015, citing CAS decisions, WADA has continued to argue that "*the strict liability rule for the finding of a prohibited substance in an athlete's specimen, with a possibility that sanctions may be modified based on specified criteria, provides a reasonable balance between effective anti-doping enforcement for the benefit of all clean athletes and fairness*".[22]

IV. Conclusion

The strict liability principle places a heavy burden on athletes who test positive for any amount of any of the substances listed on WADA's Prohibited List. Nevertheless, and despite certain proposals to introduce exceptions to this rule, WADA appears content with the current framework. For the time being, this framework will continue to recognize that any risk of certain athletes who inadvertently ingested a prohibited substance being punished, where they lack the time or resources to identify the source of possible contamination, is outweighed by the overriding desire to ensure a level – and clean – playing field for all.

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19 T. Wyatt Cox, The International War Against Doping: Limiting the Collateral Damage from Strict Liability, Vanderbilt Journal of Transnational Law, Vol. 47:295 (2014), p. 327.

20 See M. Hewitt, An Unbalanced Act: A Criticism of How the Court of Arbitration for Sport Issues Unjustly Harsh Sanctions by Attempting to Regulate Doping in Sport, Indiana Journal of Global Legal Studies, Vol. 22, Issue 2, Article 16 (2015), Section IV Proposed Reform: Allowing Reasonable Mistake of Fact As A Defence To The Strict Liability Scheme.

21 See T. Wyatt Cox, The International War Against Doping: Limiting the Collateral Damage from Strict Liability, Vanderbilt Journal of Transnational Law, Vol. 47:295 (2014), p. 326.

22 See WADA website, Q&A, Strict Liability in Anti-Doping.

Sports arbitration: an arbitrator's perspective

Interview with Hamid Gharavi

*Interview conducted by **Olga Kuprenkova**, Egorov Puginsky Afanasiev & Partners*

Hamid Gharavi

Dr Hamid Gharavi is a founding partner of Derains & Gharavi International. He has acted as arbitrator or counsel in over 200 ad hoc and institutional arbitrations, including commercial and over 30 investment arbitrations under foreign investment laws and bilateral and multilateral treaties, in relation to a broad spectrum of issues ranging from sanctions to political takings, and industries, ranging from oil and gas, mining, M&A, military ordnance and defense, telecommunications, media, and aviation, to agency, distribution, sales, construction (including all types of design contracts and engineering projects), poultry, duty free, hospitality, real estate, wood and derived products, pharmaceutical, and sports, including commercial, disciplinary sanctions and doping.

Dr Hamid Gharavi has been appointed to the Panel of ICSID Arbitrators, to the Court of the Istanbul Arbitration Centre, to the Court of the LCIA (from 2008-2012), the Commission on Arbitration of the ICC, as the President of the Board of the Tehran Regional Arbitration Centre, as well as to other panels, including DIAC, SIAC and the Court of Arbitration for Sport.

His experience in sports arbitration includes:

- Co-arbitrator in an arbitration under the auspices of CAS between a football Club of an Arab State and its former board member arising out of the termination of the mandate of the former board member as a result of the interference of the Arab State (CAS 2014/A/3570).
- Co-arbitrator in an arbitration under the auspices of CAS between the Fédération Internationale de Football Association and a national football league arising out of the selected dates of a major competition (TAS 2015/A/4021).
- Co-arbitrator in an arbitration under the auspices of CAS between a French football club and a European football body arising out of disciplinary sanctions (CAS 2017/A/5299).
- Co-arbitrator in 22 independent appeal proceedings under the auspices of CAS between Russian winter Olympic athletes in speed-skating, cross-country skiing and bobsleigh and the International Olympic Committee against the International Olympic Committee's decision for a life-ban exclusion of the athletes on the basis of a mass covert doping scheme allegations.
- Co-arbitrator in 7 independent appeal proceedings under the auspices of CAS between Russian cross-country skiing athletes and the International Ski Federation against the International International Ski Federation's decision on provisional suspension of the athletes.

Dr Gharavi, you are one of the most reputable international arbitration practitioners with impressive experience in handling large-scaled disputes involving states, what brought you to a small and unique world of sports arbitration? What is your favorite sport, and why?

The CAS is simply one of the many forms of binding dispute settlement, and in fact one of the many types of arbitration, just like investment arbitration. If by "small world" you mean a niche, it is not a smaller club than investment arbitration. Nor it is less important for the parties involved, the industry or the society. Nor are the disputes less prestigious or intellectually and factually interesting than investment arbitration disputes, if you are referring to these characteristics. What is more, the world of sports has now the full attention of Sovereign States, including their security services, as the 2018 FIFA World Cup or the Sochi Games saga have demonstrated.

I am enthusiastic about sports. I like tennis and played competitions at an early age. I also watch and attend major sports events. My wife, in fact, owns a major company that holds rights to and organizes major sport competitions. It is thus only natural that I got involved in this field. It is Mr. Nabil El-Araby, a former ICJ Judge, Minister of Foreign Affairs of Egypt and head of the Arab League, with whom I sat in an investment arbitration case, who recommended that my name be included on the list of arbitrators at the CAS, as at the time he held a senior function there.

What advantages and disadvantages of sports arbitration do you see to compare to commercial or investment arbitration?

The limited arbitration costs, the procedural expediency and flexibility, especially as compared to investment arbitration, constitute both the advantages and disadvantages of sports arbitration. This is because proceedings that are too fast, too cheap and have too much flexibility may not always give rise to sound awards, just like a costly, lengthy and rigid process can lead to unjust results. A careful balance must be struck in order to produce an optimal result.

Given the issues raised in the Pechstein case in respect of the alleged imbalance in the arbitral tribunal formation, specifically regarding the CAS list of arbitrators, do you see any bias when the list of arbitrators may potentially be controlled by one of the parties and the appointing authority could presumably have interests in favoring such party?

The default system of the appointment of the President of the Tribunal by the CAS Secretary General alone is an issue. This risk is not specific to the CAS and, in fact, exists also at ICSID. This is why I have so often called in conferences and articles for the creation of a collegial body for the appointment of tribunal presidents. It would attenuate the risk of abuse of this power or even simple misjudgments in the appointment process. It would, by the same token, assist in improving the confidence in the system of the end-users and counsel.

The recent overall victories of the Russian athletes in the Sochi appeal proceedings against the International Olympic Committee, one of the major contributors to the CAS, show that the CAS is unbiased and that no outcome-determinative manipulation exists in the appointment process or during the scrutiny of the Award under the current CAS Secretary General. Yet, management eventually changes, hence the risk of abuse, and the perception of the CAS arbitration system by the sports community remains an issue. All of this could be addressed by the establishment of a collegial body in charge of appointments, composed of personalities within and outside the CAS, from different walks of the Sports' world.

Speaking about specifics of sports arbitration market, one can assume that there is no genuine consent to arbitrate on the part of athletes, who are basically compelled to accept CAS arbitration agreement as a condition to compete on the international level. What is your opinion on this matter?

There is no "genuine" consent to many things, and even more so in international affairs. Yet, what better alternative is there? Let us not forget that the system can and does work efficiently for the athletes. Again, the recent victories of the Russian athletes against the International Olympic Committee scientifically prove this.

What do you think about the drive towards more transparency in sports arbitration?

Transparency is a good concept, as it pushes all the participants of the proceedings to act as they should. High profile sports-related awards hardly ever remain confidential anyways. Yet, a greater transparency would not hurt when it comes to the administration of the proceedings. For example, the CAS should clarify the appointment process of the tribunal secretaries/assistants and their prerogatives, and allow the Parties to take part in the same.

Do you believe that the CAS arbitration rules shall be revisited? If so, what would you propose to enhance the sports arbitration procedure?

A reform would be timely at this stage, just like for ICSID, which has finally announced a new reform of its Rules of Arbitration. Again, one area of improvement would be precisely to create a collegial body for the appointment of tribunal presidents. Another would be to establish some ground rules regarding the appointment of the tribunal secretaries/assistants by the CAS and their prerogatives. Explicit due process safeguards in relation to a number of issues, including testimonial evidence and the right to be heard, would be warranted given that not all CAS arbitrators are necessarily receptive to these notions or experienced in conducting arbitral proceedings.

In your opinion, how much does the work of a sports arbitrator differ from one arbitrating non-sports disputes? What does it take to be a good CAS arbitrator?

The peculiarity of the work of sports arbitrators is that they need to work fast, with limited means and have the aptitude to adapt and to cooperate with arbitrators who have very different procedural and professional backgrounds. A knowledge of and passion for the world of sports are of course essential.

What advice would you give to young arbitration practitioners trying to get into the field of sports arbitration?

I would recommend that they make their first steps in the field by reading about the subject, assisting counsel and arbitrators or working as CAS personnel. More importantly, they should gain experience in other fields of arbitration, which share some of the same attributes, so as to contribute to the sports arbitration by importing what they believe is required from other type of arbitrations. The list of arbitrators is vast, and the avenues for inclusion thereto are so numerous and essentially so merit-based that no qualified and perseverant application could be left out.

Interview with Alexander Kiknadze

Russian Ice Hockey Federation
Deputy Executive Director

Please tell us a few words about your current position at the RIHF? How did you get it?

I am the Deputy Executive Director of the Russian Ice Hockey Federation. I spent nine and a half years in the KHL, where I started as a junior counsel and progressed to the head of the legal department and executive board member. These nine and a half years gave me rich experience and provided me skills to deal with an extended specter of issues. Therefore, I gladly accepted an offer to work with the Russian Ice Hockey Federation. This October I will celebrate my first anniversary as Deputy Executive Director of the Russian Ice Hockey Federation.

What are your current major responsibilities at RIHF?

There are lots of matters the Russian Ice Hockey Federation deals with. My main responsibilities are as follows: the matters of engagement with the International Ice Hockey Federation, and national ice hockey federations of other countries on different matters.

This year the RIHF has opened seven branches with the focus on the development of minor hockey in regions, staging interregional competitions, and implementation of the Federation's ideas and prof. My role is to oversee and coordinate their activities.

The RIHF is taking steps to re-engineer business processes what should help the RIHF to achieve new organizational level.

How did your interest in sports law came about?

The first and main reason is my family, which gave sports lots of years. It all started with my grandfather, Alexander Vasilyevich Kiknadze, who was a writer and a sportswriter, and headed the international department in the Soviet Sport newspaper. My dad Vasily and my uncle Kirill have followed him in this career: both of them are sportswriters and managers.

Another reason is I'm very keen on sports. When I was a child I played basketball, which I still try to do, and was a sports school team member. It happened so, that at the suggestion of my tutor I started writing on sports law back in my third year, and in my fourth year my father asked me – Don't you want to try out your potential and do some work? So, at 19 I first started working with Vladimir Timofeevich Shalaev who suggested I joined him at the newly-created KHL where he became head of the sports department. That is how I found myself in sport, and that is how I began my carrier as an paralegal and executive secretary with the KHL Disciplinary committee.

What is a Disciplinary committee? It is a jurisdictional body whose status was at last captured in the sports law a couple of years ago when professional sports associations came to be regulated, though these bodies had been long in existence, far more than ten and even fifteen years. You can find such bodies in associations, federations, they review sports and legal disputes arising between hockey players and clubs, clubs and agents, players and agents, etc. At first I was involved in preparation of documents, and provision of legal analysis of disputable situations, then began taking the stage as an arbitrator, and later took the lead of this body. Thus, step by step I saw my interest in the sports law.

Why did you decide to become a lawyer in a non-lawyer family?

You know, I am actually the first lawyer in the family. It was a pretty straightforward story. I played basketball, and at 15 I had no clear views as to who I would like to be. And my dad, being a prudent man, said – Go and talk to a lawyer regarding who you should become. I did so, and I don't think I had much chance after that. In this respect, I guess I was lucky, because this was the person who put me on this road, and later when I still pursued the law, I was blessed with my tutors, and mentors. I guess having those who help you, who know when to give you a whopper, and when to support is one of the defining moments in the making of a real professional.

What would be your advice for young practitioners who wish to pursue their career in sports law? Is there any particular strategy a young practitioner should employ to build a successful career as a sports lawyer?

Many factors are at play here. Obviously, amat victouria curam, and any person who wants to achieve something in life should try hardest and do his best, but never forget about luck and chance, and the people who surround you. It is not for nothing that people say: right place, right time. But in order to achieve something and to get it you have to have healthy ambitions and clear understanding of what you want and to strive to take it.

One should keep in mind that the sports industry is far too narrow. Each sport constitutes a separate branch of law. I am well versed in law when it comes to hockey, and thanks to my personal interests I know what's what in basketball, but in order to make sense in football I will need some time because it has its own system of jurisdictional bodies, rules of engagement, challenging proceedings and regulations. That is why it is crucial that you fully understand what sport you want to be involved with, what sport you like. Moving from sport to sport is okay, but I cannot name you any examples off the top of my head. It is all due to the fact that each sport is fine-tuning mechanism requiring a great volume of regulatory documents.

My second recommendation is to specialize in sports part of legal counselling, be it in federations, or leagues. Because it is sports law that lies in the center of any sports arbitration issue. Any federation employs a lot of lawyers who are not always involved with sports law but with, let's call it regular law. This is why you need to be accurate when choosing your own path.

And thirdly, don't be afraid just because the sports law is very popular and much populated now, and many people want to get there. I will give you an example from my own experience. It is about a girl who wrote to the director, pretty much directly, by the way. She wanted to work with the company, and in the end we did hire her, because as it turned out, she was not only very talented and very smart, but she knew quite clearly what she wanted and was not afraid to take actions that will take her to the outcome she desired. Almost any fascinating story we read in books is about someone who succeeded in life just by taking the step and doing it. Don't be afraid, the sky is the limit here.

And possibly, the most important thing, you have to love the sport you come to work in. We don't have any people in the RIHF who are hockey-indifferent. And if you come up to any member of our team and ask him – Why are you in RIHF, the first and foremost answer will be – I love hockey.

Speaking about the lawyer's role in the sports federation, the principal feature is that besides knowing the civil law, the lawyer has to be proficient in the sports law too. The debates have been going on for many years now, but it seems they have been abating recently, whether sports law is a separate branch of law. The legislator has positively confirmed by enacting a special statute, that in terms of regulations, sports law is a separate branch now.

To be a successful sports lawyer do you need to know the details of a particular sport you are a lawyer in? From what you tell me it seems that to be a successful sports lawyer you have to be a sports fan?

You know it is true for any type of activities: you have to love what you do. You have to love your work, i.e. you have to smile going there and enjoy what you do there.

This could fully apply to the work of a sports lawyer. I guess, it is possible to come to sports, to become successful there and to reach certain heights, without loving it. But the matter is in the enjoyment and the feedback you get from the things you do. If you come to work smiling and each and every action gives you the kick, you are bound to get a certain outcome, and if you come to do you work as a robot, you do get the outcome as well, and you can still be successful, but the level of what you get from you work is much lower. It seems to me, that in any sphere, the love that you feel towards your cause lets you get more, because such work no matter how much effort you contribute, does not strip you of your energy, but rather provides you with more of the same. I cannot say, that this is the key element of any success, but not a trivial one either.

So answering your question it's not a "must have" but it is "a very welcome" to know the details of a particular sport you are a lawyer in.

Is RIHF (or you personally) involved in representing Russian hockey players on behalf of RIHF in sports disputes? Is it a challenging task? Why?

Generally, RIHF does not defend the players, because usually players are represented by their own lawyers or their clubs' lawyers. The only exception I do remember, is the sessions of the Oswald Commission when

our women hockey players and other athletes were represented by Schellenberg Wittmer. Our federation was involved in the proceedings in support of our hockey players, and I attended both the sessions of the Oswald Commission, and later the hearings that took place at the CAS. Indeed, this was a fascinating challenge, because, on the one hand you have to rigorously prepare for the actual hearing, and on the other hand you come to face the actual athletes, and since the dispute involved a female team this meant emotions, excitements, and stresses. The girls needed support, and they did great to overcome all this.

And obviously the principal challenge came when our national team was barred from participating in the Olympics, and we had to help the girls who were very much hurt by the attitude demonstrated by the IOC. I am satisfied that the CAS took a fairer view with respect to the whole situation and reversed the decisions made by the Oswald Commission. In fact, the case is not closed yet, because not every girl has received written reasons for judgement.

We know that in addition to working as deputy executive director at RIHF, you also acted as an arbitrator in sports cases. Tell more about it.

Yes, this is true, I am an arbitrator. At the KHL Disciplinary committee we used to review as many as 100-120 cases annually, quite a volume I should say, and the key achievement, as I see it, is the minimum number of appeals filed against our awards, and the still smaller number of the awards amended, or reversed. As for reversals, we have had only one that concerned our very first award. This was the time when we just started to grasp the idea of a restricted free agent, and how the whole mechanism functioned. I believe that the panel failed to clearly see the things that were new to it. This was in 2008 and 10 years later we can boast that none of our awards have been reversed since then. This is, perhaps, our major achievement.

Which role (a manager and a lawyer or an arbitrator), in your view, is the most difficult one and why? Which one is the most interesting?

I cannot say that any of these is more difficult than the other; they are both very interesting, because each one comes with its own interesting tasks. The management role seeks to achieve certain strategic objectives in sports development, which is a beautiful and engaging process involving meetings, decision making and taking the responsibility. Arbitration means contacting people, taking their problems to heart, and coming up with a resolution which is never easy.

In 2010's I fell into mediation and underwent mediation training, from which I benefited greatly because I was able to reach the new level of interaction with the parties. This has triggered the increase of settlement agreements entered into between the parties to the dispute in the disciplinary committee. The methods I have learned to apply allowed me to help people open up in the proceedings, to better understand the problems of each other; more of them started opting for the settlement.

That is why there is no choosing between what is more difficult and what is more interesting. Both roles are interesting since they offer me challenges and tasks I like to resolve.

Among those who combine the role of an attorney and a commercial arbitrator I heard a view that a role of arbitrator is somewhat more difficult because it requires that an arbitrator is impartial and independent all the time which is a challenging task that requires a lot of self-discipline

The KHL's operations are governed by its principal document, the Regulations, which we among ourselves coined as "our sports constitution". We had to supervise general compliance. There was never the question which side is right and which is wrong, the question was whether parties had complied with the Regulations or not. Because it is the Regulations that lie at the heart of most of the disputes.

We have had very complicated cases from a psychologic and emotional point of view, e.g. the cases involving transferring kids from one sports school to another in connection with the change of the residence address, or some other circumstances. We felt more pressure in these situations, because, strictly speaking, there were no rules here that can underlie any award we may pass. We had to deal with the human factor, with parents who would give away everything for their child's success. And if in the beginning you tend to take the parents' side, after you had reviewed several similar cases, you eventually come to the understanding that there is a situation that needs to be correctly compartmentalized and structured and subsequently lead you to the correct award based on common sense.

In your view, how sports arbitration is different from an ordinary commercial arbitration?

The sports arbitration requires that the panel should consist of arbitrators with experience in sports, but I believe such specificity is called for not only in the sports arbitration, but in any other arbitration as well.
If we are to speak of some specific features of the process, as a matter of fact, there is no some unique specificity, because the rules are the same, the procedures are the same, and the whole process is organized in the same way, including applications, motions, reviewing the case on its merits; and the hearings follow the same procedure, everything is the same. If the process involves an athlete, the procedure is not that strict. But I believe, this is the matter of the process management, and the views held by the arbitrators as to how organize the process in a reasonable and appropriate way. When I was at the CAS hearings I saw the same approach: with lawyers, the panel strictly

followed the procedure in hearing the arguments, and with athletes the panel used to change the approach and the attitude taking into account the human factor. This is possibly the feature of any arbitration, that the process is managed and monitored by arbitrators. If with ordinary arbitration everything is clearly laid out, and there are civil and commercial processes, and any incompliance triggers reversal of the award, with sports arbitration there are no severe restrictions. Undoubtedly, we do follow the principal rules of the proceedings set forth in the laws and arbitration rules, but as for the procedure itself, we practice a not so rigorous approach that seeks to establish the truth.

Who is a good sports arbitrator? What is the skill set that a good adjudicator of sports disputes, in your view, must have?

This depends on the case. If we have a dispute involving an athlete, this should be the person who understands both the law, and the sports. In other words, he never wavers emotionally because this is the direction where any athlete would drag him to, and at the same time he does not strive to become a lawyer through and through, understanding well enough that with sports you need to take into account its specific features. It is a fact that the athletes who want to achieve something work day and night, because either you work and get to the top, or you don't and you quit it. In reality, one of the major problems in sports today is that in overwhelming majority of cases an athlete has to choose between education and sports career. One of the projects we are working on at the RIHF right now is the program that will permit to acquire a civil and a sports profession simultaneously. This is why a sports arbitrator is the one who knows the law, and understanding what sports is all about, is able to establish an inner balance between these two beings, and taking into account all the facts of the case, pass a justified award.

What do you think about sports law and sports arbitration in Russia? Do you think it will continue developing in the near future?

I believe that the events of the last year clearly demonstrated how important sports lawyers are, and in order to ensure efficient defense we need to bring up a new generation of sports lawyers who will defend the interests of athletes, leagues, sports federations, and the Russian Federation on the global level. The advancement of the new generation of sports lawyers will result in the increase of both the quality and the quantity of sports law issues. This will consequently require a more accurate approach to the institute of sports arbitration, and that is why I am sure, it will develop further. The question of the direction of such development I guess is still open at the moment, because we do have the sports arbitration institute at the Autonomous non-profit organization "Sports arbitration chamber", we have a sports chamber in the ICAC, and both places can boast of their professional arbitrators who know their business quite well. Another sports arbitration institute is in the process of formation now, it will be established in pursuance of the law on sports.

I believe that in the long run we will have several sports arbitration institutions that will be able to review athletes' individual labor disputes too. Currently we have a lot of cases arising from labor contracts, i.e. individual labor disputes. The problem we face is that sports is a fast –moving industry, and in order for the athletes to continue doing sports, certain issues should be resolved very quickly. Or, take for example, medical issues, surgeries that should be undertaken urgently without of arguing for years trying to determine who is to pay for them, how and when, etc. The athlete may not have the money to pay for an expensive surgery, if the club, for example, refuses to pay. And in order to arrange for a surgery, and to give a chance for a quick recovery and rehabilitation, the dispute should be reviewed in an expedited manner. However if it arises from a labor contract, it may be qualified as an individual labor dispute. In the situation we have currently found ourselves in, the absence of an arbitration institute that may review such a dispute means delays in the resolution of the matter. But the athlete cannot afford losing even six months, because he will lose his relevance as an athlete, he will stay out of practice for far too long, and later will face problems with getting back to the level he used to be previously. The athletes that do get back, sacrifice a lot: an ordinary spectator cannot even begin to imagine what the athlete is going through to get back to the previous level. I am sure we will see new developments in this field, and I am sure there will be several arbitration institutions that will review labor disputes, that this issue will only gain importance with time. This at least what I see as a trend now.

Interview with Alexey Vyalkov

Pursuing MJur at Oxford University, Winning Gillis Wetter Memorial Prize and Getting Internships Abroad After Completing Your LL.M Degree

Alexey Vyalkov

Alexey Vyalkov received an LLB from Lomonosov Moscow State University (2015) and an MJur from the University of Oxford (2016). He switched several firms while a trainee, starting with Hogan Lovells in Moscow and then moving on to the Paris offices of Freshfields and Three Crowns. Alexey also completed a traineeship at the Arbitration Institute of the Stockholm Chamber of Commerce (2018). He is currently an associate at Clifford Chance in Moscow doing a mix of arbitration and litigation.

Why did you decide to obtain an LL.M.? Were you focusing from the beginning on masters' degrees in arbitration? Why not do an extended professional training course (ICC Academy, CIArb training programs) instead?

There was no strategic thinking involved. My LLB program left me hungry for knowledge, and my main goal was to simply do more studies in law, so a master's degree (whether it is called an LLM or otherwise) was the most natural way of continuing the studies.

When planning the field of further studies, I did not consider digging into arbitration – I felt like I had learnt a good deal of arbitration and received enough of professional training during my LLB program in Moscow (thanks to my Vis Moot team and coaches and my thesis supervisor Prof Asoskov).

Why Oxford? What other programs have you considered and why you chose Oxford in the end of the day?

I chose Oxford, because (1) for educational standards, I wanted to do my master's in England, and (2) I was (and still is) very much into conflict of laws – in England there is no better place than Oxford to study conflicts, where Profs Briggs, Dickinson, and Peel teach. In the end of the day, I applied only to Oxford and was lucky enough to be admitted.

What's your advice to those preparing applications for the Oxford University program or LL.M.s more generally? When should one start and what are the most important documents?

It is difficult to give a practical advice of this sort in the abstract. Usually, the list of documents required is not terribly extensive. However, obtaining some of them may require time, so it may be important check that list well in advance. Also, scholarship applications usually close earlier than applications for the program, which shifts the starting date for your applications back in time. When it comes to the substance of your application – just decide for yourself, what is the real reason why you want to pursue a master's in law and express it honestly in your application.

Can you give an overview of the program (what courses were offered and which ones you chose, how was the program structured and what activities were offered apart from lectures)?

A master's at Oxford offers a wide variety of courses in the field of arbitration, public international law, English private and public law, conflict of laws. There were also courses on EU law back then, but they may no longer be on the menu given the decreasing appetite for EU matters in the UK. Among all those, a student is allowed to choose only four, which may feel disappointing, but only until it becomes clear further along the way that four is more than enough – Oxford goes for depth, rather than breadth.

My courses were balanced between the local civil procedure, conflict of laws, international disputes and an English private law course on commercial remedies, which I particularly enjoyed. Apart from studying, there are plenty of societies at Oxford, which will suit every taste – sports, culture, politics (the famous Oxford Union), gaming, drinking, etc. And do check the local joy – punting with Pimm's (preferably, in sunny weather)!

Prof William W Park and Alexey Vyalkov at Gillis Wetter Prize awards ceremony. Photo courtesy of the LCIA.

How much time per week you spent on the program in terms of classes, doing the reading and assignments etc?

I was definitely spending long hours at libraries, although I never did the math. Any one-year master's program is intense, so one should probably not expect a master's program taken seriously to be an easy walk. Unlike other master's programs, Oxford offers tutorials, which add to the intensity of absorbing knowledge, but also to stress. Essentially, a tutorial is a one-hour dialog with a professor on the agreed topic – this requires from students a lot of preparation and helps them fill in any gaps they may have in their understanding of the subject. Your tutor is usually a professor different from the one in charge of the seminars, and this is supposed to put the legal issues being studied into a different perspective. That said, there is certainly a way of spending less time in the library if you are aiming just for the degree.

Who was you favorite professor/lecturer?

Prof Stevens who taught me Commercial Remedies and Prof Tzanakopoulos who taught me International Dispute Settlement. As all of the people working at Oxford, they are very talented scholars (although I may certainly lack sufficient authority to judge), and they are also brilliant at teaching.

Who were you classmates? Where did they come from, were they experienced practitioners or recent graduates?

Some of my classmates were recent graduates of English universities, including Oxford itself, others came from common and civil law jurisdictions from across the world. There were experienced practitioners among them, although it did not make any difference in the classrooms (for better or worse).

Is there any alumni network for the graduates of the Oxford University arbitration program?

There is no particular alumni network for Oxford arbitration people, but we do keep in touch. Also, arbitration world is very small and we often meet each other during business trips and arbitration events.

Looking back is there anything you would have done different (choosing other classes, engaging in some extracurricular activities etc)?

I would have done more of general public international law.

We know you won a number of awards while at Oxford and shortly thereafter. Tell us about this!

Competition for jobs in the common law world is intense, and universities have come up with ways of distinguishing students who perform at the exams slightly better than their peers. Oxford gives awards for the best exam papers, which system encourages students to prepare for the exams thoroughly, instead of just relying on the points they might have gained for any classroom work throughout the year, as it happens in some other universities. While at Oxford, I won an award for International Dispute Settlement. This small success excited my curiosity and encouraged me to do more studies in the field, which studies resulted in my receiving of several other awards for my academic research, including the Gillis Wetter Memorial Prize from the LCIA, the International Law in the XXI Century Prize from the ICLRC, and the honourable mention at the recent Nappert Prize held by McGill University in Canada.

In these competitions, choosing the right topic for the paper will get you halfway to success. You are competing with young and promising academics and practitioners from all over the world, and the judges are top arbitration practitioners and elite arbitrators, who know the field very well and develop it with their own hands. It is therefore important to get the judges interested in your piece from the outset by posing an important and underdeveloped question and then presenting an original answer to that question. It is also a great chance to transplant your ideas to the minds of the judges and then, hopefully, see these ideas implemented in their arbitral awards someday.

In this respect, legal practice is a great source of inspiration for the topics of academic papers. A partner at

one of the firms where I was a trainee once said that practitioners deal with issues a lot more diverse than academics, who are inclined to develop answers to model situations, irrespective of how often such models arise in practice. I believe, this is a very accurate summary of how I have been choosing the topics for my papers. For instance, the topic for the Gillis Wetter Prize paper came to my mind when assisting with reviewing the merits of a potential investment claim in one of the firms where I completed a traineeship. The idea was perhaps too novel to be suggested to the client at the time of the advice, and I decided to develop it and then test it in the academic circles first. It took me a while to turn the idea into a proper article, but, as follows from the (surprising) results of the competition, it was worth the time spent and the idea turned out to be a success.

How did you career develop immediately following the graduation?

I went on to do three internships – two in Paris, at Freshfields and Three Crowns, and one in Stockholm, at the SCC.

How difficult it is for a practitioner coming from Russia (or CIS more generally) to secure an internship position in London?

I believe, it depends on the firm and the firm's current workload and portfolio of cases. Some of them are also generally less selective than the others. One difficulty with London is that there may be not many firms doing just international work, where your qualifications matter less. Most of them are focused on local work as well, which involves English court litigations and to do which you must have English qualifications. For this reason, there is no real system of "internships" in London, but for the few exceptions. There are long training contracts aimed at preparing your for doing job in the local (as opposed to international) market.

Is it different in Paris?

Unlike London, Paris does have a system of six-months internships, which French students are required to undertake in order to qualify for the local Bar. As a foreign student, you will be competing for such internships with French students. This is not to suggest that landing an internship in Paris is easier. However, given that French internships are shorter, this may give you more room for maneuver (French word used unintentionally), when it comes to your long-term career plans. In Paris you can pick up some experience and then go on doing law elsewhere, in London you invest too much time in your local qualifications to then move elsewhere with as much ease. Perhaps, one thing the aspiring arbitration practitioners from CIS should not be concerned about is the migration formalities – if you are good enough to secure a traineeship in Paris or, where applicable, London, the firm will take care of your visas and you will have no problem with travelling abroad for work.

You have done an internship at SCC. Please tell us about it.

My time at the SCC was a cherry on a cake. I was assisting with a lot of interesting work on procedural issues arising in SCC arbitrations, the SCC team is great and Stockholm is wonderful. I highly recommend it, especially to students from CIS. SCC receives a lot of applications from aspiring practitioners from all over the world, and they always welcome applications from the CIS. If your credentials are good enough to get you shortlisted, there will be an interview to test you and your ability to fit in the team, after which you will be notified of the outcome.

In your view what have you gained by completing the program?

Knowledge, skills, mind full of and open to new ideas. The feature of English law and public international law is that it is made (in part) of judgments written by brilliant lawyers and advocates. Just by reading their judgments you learn not only about law, but also about (at least) written advocacy and ways of presenting and structuring your thoughts on paper.

What is your experience of living in Oxford?

I have met a lot of talented people there and made great friends. Spending time together was a lot of fun.

Oxford must be expensive – what would be your advice to a Russian student moving there to do a masters?

Oxford is less expensive, compared to London, but more expensive, compared to Moscow. Explore scholarship opportunities!

Arbitration Events to Attend

27 September 2018	**The ABA's 10th Annual Moscow Conference on the Resolution of International Business Disputes** Organizer: American Bar Association Section of International Law Location: Moscow, Russia www.arbitrations.ru
27–28 September 2018	**13th ICC New York Conference on International Arbitration** Organizer: ICC Location: New York, United States www.iccwbo.org
16–17 October 2018	**6th International Arbitration Conference** Organizer: The Australian Centre for International Commercial Arbitration (ACICA) Location: Melbourne, Australia https://www.lawcouncil.asn.au
18 October 2018	**ICC YAF: Arbitral Ring "Opposing positions regarding public order in international arbitration"** Organizer: ICC Young Arbitrators Forum Location: Mexico City, Mexico www.iccwbo.org
19 October 2018	**Vilnius Arbitration Day 2018** Organizer: Vilnius Court of Commercial Arbitration Location: Vilnius, Lithuania www.arbitrazas.lt
25-25 October 2018	**LCIA-AIPN Joint Conference: Dispute Resolution in the Oil and Gas Business** Organizer: LCIA, AIPN Location: London, England www.lcia.org
25 October 2018	**Conference SCAI-ASA-RAA** Organizer: RAA Location: Moscow, Russia http://arbitrations.ru
29 October 2018– 2 November 2018	**Hong Kong Arbitration Week** Organizer: Hong Kong International Arbitration Centre (HKIAC) Location: Hong Kong http://hkaweek.hkiac.org
30 November 2018	**9th CAM Annual Conference** Organizer: Milan Chamber of Arbitration (CAM) Location: Milan, Italy https://www.camera-arbitrale.it
6 December 2018	**Dispute Appointment Service (DAS) Convention** Organizer: Norton Rose Fulbright LLP Location: London, UK www.ciarb.org
7-13 February 2019	**14th ICC International Commercial Mediation Competition** Organizer: ICC Location: Paris, France https://iccwbo.org
16 March 2019	**LCIA North American Users' Council Symposium** Organizer: LCIA Location: Montréal, Canada www.lcia.org

RAA40 Events in 2018

Women in Arbitration

On **March 6, 2018**, on the eve of International Women's Day, an innovative networking and discussion event was held for female arbitration practitioners in Moscow. This was the only event of its kind held in Russia, to focus just on women in arbitration and with an all-female attendance.

The 'Women in Arbitration' event discussed the position of women in the legal profession and in arbitration, and examined balancing work-life commitments. It is being held at a private Moscow art gallery, **L'Appartement 83**.

Speakers at the event included:

• **Prof. Tamara E. Abova** (Institute of State and Law of the Russian Academy of Sciences, Head of Department of Civil law, Civil and Arbitrazh procedure) who shared her experience on how she was first elected as an arbitrator on a case and gave advice to young arbitration practitioners on how to advance the career in arbitration in order to be elected as an arbitrator. The gist of that advice was to work hard and to make yourself known and respected in the local arbitration and dispute resolution community so that your name is available to the parties and professional arbitration instructions when a dispute arises. Prof. Abova also elaborated on the professional qualities a good arbitrator should have such as the ability to listen carefully to the positions of the parties, impartiality and the ability and desire to have detailed knowledge and understanding of the facts and law.

• **Oxana Peters** (Tilling Peters, Managing Partner) who discussed her experience of establishing her own litigation/arbitration boutique. Oxana's view was that it is worth thinking of establishing your own business only when you have your own well established client base and the ability to bring new clients who will keep the business afloat. In Oxana's view, it is more difficult and challenging to run you own law business rather than working as an employee in a law firm or in-house. This is because you bear responsibility now only for yourself but for the employees of the firm and for its reputation more generally.

• **Ekaterina Lobacheva** (X5 Retail Group, General Counsel) who talked about developing the career in-house, the difference between the role of a lawyer in-house and in consulting and gave her advice to young practitioners who would like to pursue their career in-house. Ekaterina's view was that the role of in-house lawyers is different from the one in consulting because the in-house counsel should evaluate each case and give legal advice taking into account the business of the company as a whole as well as all internal and external factors, which are not always available to external consultants. Ekaterina shared that she has degrees in law, economy and math and they all help her significantly in her day-to-day work as General Counsel.

RAA40 has also invited **Alexei Dudko** (Partner and Head of Russian/CIS Arbitration/Litigation Group, Hogan Lovells), as a special guest, who shared his views on the topic of women's career in arbitration and provided his advice to young women arbitration practitioners on how to advance career in arbitration/litigation in a major international law firm. Alexei emphasized the importance of motivation, focus and the need to excel, which he thought could be the universal advice for all practitioners notwithstanding gender. The transformation methodology to become a well-esteemed professional in the arbitration community would necessarily involve having a built-in desire for constant improvement of knowledge and skills as well as willingness to go beyond the ordinary boundaries.

The event was organized by RAA40 and Olesya Petrol. **Cleary Gottlieb** and **Tilling Peters** sponsored the event. **Marina Akchurina**, moderated the discussion.

Seminar "Launching Your Career into Arbitrators' Orbit"

On **April 12, 2018**, the International Day of Human Space Flight, RAA40 hosted a seminar devoted to exciting topic of becoming an arbitrator at the Moscow offices of **Hogan Lovells**.

The event brought together a panel of distinguished speakers such as **Anton Asoskov**, Professor, Lomonosov Moscow State University; Arbitrator and Member of the Nomination Committees of the ICAC, ICC Russia and the RSPP; **Dmitry Marenkov**, Senior Manager, GTAI (Bonn), FCIArb; **Sergey Usoskin**, Partner, Double Bridge Law; and **Roman Zykov**, Secretary General, Russian Arbitration Association.

The debate focused on the key obstacles facing aspiring arbitrators in getting a first appointment. In addition, the panel addressed the concerns as to whether arbitrators from Russia and CIS countries have an equal chance of getting an appointment in international cases as compared to their western colleagues. The event attracted the audience of over 60 participants.

The discussion was moderated by RAA40 Co-Chairs, **Denis Almakaev** (Hogan Lovells), **Olga Tsvetkova** (EPAM) and **Izabella Sarkisyan** (Baker Botts) and was followed by drinks, courtesy of the host and the event sponsor, **OST Legal**.

Satellite Event At Saint-Petersburg International Legal Forum

For the second year in a row, RAA40 and ICDR Y&I held a joint seminar in St. Petersburg during the exciting days of the International Legal Forum. On **17 May 2018**, the arbitration practitioners and those interested in the topic got together to discuss "**Practical aspects of international arbitration: current issues and outlook for the future**".

This year the seminar was honored to be part of the SPBILF 2018 program as a satellite event. This is not the only feature that made the seminar stand out among other events organized by RAA40. For the

first time in the history of RAA40 events the St. Petersburg seminar was run in an interactive format that allowed for the simultaneous discussions of several topics. Each topic was presented by one moderator at one table and guests had a chance to join the discussion at any table, moving from one issue to another. The issues were presented by RAA Co-Chair, **Marina Akchurina** (Cleary Gottlib, Moscow), **Natalia Gulyaeva** (Hogan Lovells), **Egor Misiura** (KPMG), **Kirill Udovichenko** (MZS) and **Egor Chilikov** (Petrol Chilikov).

Among the topics discussed were disclosure and data protection; client-counsel relations (including such issues as costs, efficiency and expectations management), assets tracing, third party funding (Russian experience) and recent trends in commercial arbitration in Russia. The guests had a chance to enjoy not only an enlightening discussion but also the warm and cozy atmosphere of a picturesque city café the Buddy accompanied by exceptional wine and perfect appetizers. This event was kindly sponsored by **Bryan Cave Leighton Paisner LLP**, **KPMG**, **MZS** and **Schellenberg Wittmer**.

Helsinki Seminar

Last year has seen RAA40's new trend of taking arbitration-related events outside Moscow. This year we followed the trend and took a seminar to a neighboring country, namely – Finland, on the eve of Helsinki Arbitration Day.

On 23 May 2018 Young Arbitration Club Finland (YACF), Young Arbitrators Sweden (YAS) and the Russian Arbitration Association 40 (RAA40) organized a joint seminar gathering young practitioners to discuss the issue of "What to expect when arbitrating in Finland, Russia and/or Sweden?". The speakers included **Andreas Johard** (MAQS, Sweden), **Teemu Taxell** (Merilampi, Finland) and **Denis Almakaev** (Hogan Lovells, attending on behalf of RAA40).

The panel discussion focused on legal and cultural differences of arbitrating in these three countries and was moderated by **Hanna Roos** (Latham & Watkins LLP). Each of the speakers was asked to describe a distinctive feature of the arbitration in their home jurisdiction, give a few do's and don't's and finally share a comical/amusing/memorable feature of arbitration in each of the three countries.

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These events would not have been possible without your support. We firmly believe that the events you sponsored helped promoting arbitration among young practitioners and gave them valuable opportunities for professional development.