ARBITRATION ASSOCIATION

RU/EN №5 (9) MAY 2019

Arbitration.ru

Издание о международном арбитраже

Взыскание долгов// Collecting Bad Debts

Аналитика

Розыск и возвращение активов из-за рубежа

Трансграничное банкротство

TPF в России

Обзор

Обзор решений российских судов

Дело номера

Banwell против АО «Росшельф»

English Section

- Malaysia
- Interview with Prof. Sundra Rajoo, Ex-director AIAC
- UWOs, AFOs, NPOs… and other anti-fraud tools

P A A

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

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

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

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Sidney Piaget. “It hinged back like the lid of a box.” Illus. to The Adventure of the Second Stain by Arthur Conan Doyle. The Strand Magazine, December 1904.

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ОТ РЕДАКЦИИ

Vladimir Khvalei
Arbitration Association
Chairman of the Board

Dear colleagues,

there are two main topics in the May edition of Arbitration.ru. The first one is the collection of bad debts. This is not a coincidence that the upcoming RAA June conference is devoted to the same issues. The second topic is the story of Malaysia and the Asian International Arbitration Center. With a stronger competition among seats of arbitration globally, what is happening in Kuala-Lumpur is certainly worth a closer look.

Дмитрий Артюхов
главный редактор Arbitration.ru

Розыск и возвращение активов и долгов – тема, одновременно благородная и неприятная. С одной стороны, кто не мечтал, как Робин Гуд, отнимать у богатых неправедно нажитое и отдавать бедным? Или идти по следу преступника, как Шерлок Холмс? Нести неотвратимое возмездие, как Джеймс Бонд? С другой стороны, у многих из нас есть долги – или риск обрасти ими в любой момент. Недаром же давным-давно появилась пословица «От сумы и от тюрьмы не зарекайся».

С точки зрения политики и юриспруденции здесь есть и другой конфликт. Если исходить из уважения к труду прошлых поколений, то не очень понятно, почему активы многих российских государственных – то есть созданных усилиями народа – предприятий контролируются через офшор. Очередной пример такой схемы читатель найдет, например, в статье «Связь со стратегическим предприятием – иммунитет от исполнения арбитражного решения?».

Но и обращать внимание на эту проблему тоже неловко, ведь курс на деофшоризацию российской экономики взят уже шесть-семь лет назад. Получается, что король-то голый. Кроме того, размещать активы за рубежом помогают множество российских и иностранных юристов, и как-то неудобно мешать коллегам зарабатывать себе на хлеб.

Тема неоднозначна и с точки зрения этики поведения государств. Страны, поначалу охотно принимавшие постсоветские капиталы – и тем изрядно пополнившие свои бюджеты, – теперь морщат нос, если в кейсе есть связь с СНГ. Появляются UWO, AFO, NPO и другие процессуальные инструменты для раскрытия происхождения и ареста капиталов (о них читайте в статьях Винсона Антуна и Маркуса Прайса, а также Константина Кроля).

Во всем этом круговороте серых денег почувствовать себя благородными (сыщиками или разбойниками – это уж кому как нравится) могут только те юристы, которые занимаются поиском и возвращением активов. Но и здесь невольно возникает вопрос, а чисты ли перед законом их заказчики.

Напряженного вам чтения!

THE LIVE CASE OF PROFESSOR SUNDRA RAJOO

> ***"I am confident that justice will prevail in the end and I will be vindicated – what saddens me is the professional jealousy and the unprofessional desire for control."***

Dmitry Artyukhov
Arbitration.ru Editor-in-chief

On April 28th 2019, an international arbitrator and construction expert Professor Sundra Rajoo, wrote a responsive letter to the Russian Arbitration Association explaining his version of the events that led to his resignation from the Director's position of the Asian International Arbitration Centre (AIAC) in Kuala-Lumpur.

Professor Sundra Rajoo attending the Annual RAA Conference 2015 in Moscow

Background

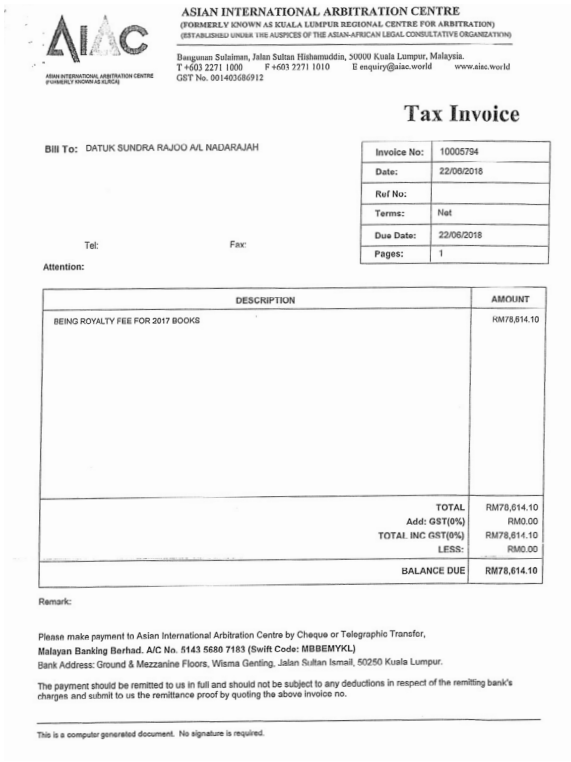
Professor Sundra Rajoo is a Malaysian arbitrator, who has chaired the Asian International Arbitration Centre (AIAC) in Kuala-Lumpur from 2010 to 2018. He was President of the Chartered Institute of Arbitrators (2016) as well as the Past Chairman of the Chartered Institute of Arbitrators Malaysia Branch and past Deputy-President of the Malaysian Institute of Arbitrators. He is author of numerous books on international arbitration as well as construction law in Malaysia. Sundra Rajoo is listed on many Panels of Arbitrators worldwide. In November 2018, he was detained by the Malaysian anti-corruption commission (MACC), which has also searched his office. Then Sundra faced criminal charges for the breach of trust against the AIAC.

Charges

Prof. Sundra Rajoo was accused by the Malaysian government for an alleged misuse of USD 220,000 and is now facing criminal charges for the breach of trust against the arbitration centre, which he was chairing for 8 years, AIAC[1]. According to the Attorney General of Malaysia, the former director of AIAC is accused of spending funds on a purchase of a book he authored, the 2nd edition of the Law and Practice of Arbitration, published in 2016 by LexisNexis. The offence carries a sentence from 2 to 20 years in prison, a fine and whipping as corporal punishment is still practised in Malaysia[2].

[1] The AIAC is the successor of Kuala Lumpur Regional Centre for Arbitration (KLRCA), renamed in February 2018.
[2] The World Justice Project Rule of Law Index 2017-2018 published in the U.S. ranked Malaysia 53rd out of 113 countries, preceded by Brazil and followed by Tunisia (with Russia ranked 89th). The Index measures countries' adherence to the rule of law from the perspective of ordinary people and their experiences and presents a portrait of the rule of law in 113 countries by providing scores and rankings based on eight factors: constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice, says the publication.

Professor Sundra Rajoo attending the Annual RAA Conference 2015 in Moscow



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(FORMERLY KNOWN AS KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION)
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GST No. 001403686912

Tax Invoice

Bill To: DATUK SUNDRA RAJOO A/L NADARAJAH

Invoice No:	10005794
Date:	22/06/2018
Ref No:	
Terms:	Net
Due Date:	22/06/2018
Pages:	1

Tel: Fax:
Attention:

DESCRIPTION	AMOUNT
BEING ROYALTY FEE FOR 2017 BOOKS	RM78,614.10
TOTAL	RM78,614.10
Add: GST(0%)	RM0.00
TOTAL INC GST(0%)	RM78,614.10
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Excerpt from Letter of Undertaking to pay out royalties from Prof. Sundra Rajoo to the AIAC

No further details of the criminal charges are known to the editor. Prof. Sundra Rajoo commented that "I was simply left with no choice - with that kind of duress, where I was detained and forced to resign without ever have been asked a question by any authority before so I could explain." He has repeatedly denied criminal charges at the court proceedings and in a letter sent to his fellow arbitration colleagues from the Russian Arbitration Association. "I made every effort to ensure that any royalties paid to me were reimbursed to the AIAC," – he once wrote. In 2018 the arbitrator has paid the AIAC royalty of ca. USD 19,000.

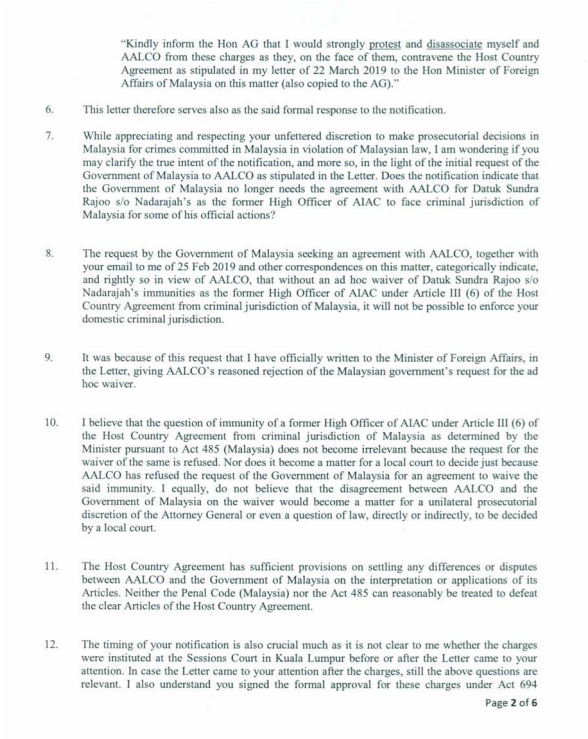
He describes the book as "a resource to explain Malaysian law especially in the context of international dispute resolution." Remarkably, the book that brought misery to Prof. Sundra Rajoo has received very positive reviews globally. "It does not happen often that a treatise focused on a particular region is valuable to a global readership at large. <...> Rajoo's contribution belongs on the shelves of arbitration practitioners and scholars right next to Fouchard, Gaillard and Goldman, Redfern and Hunter and Gary B. Born. It is past time that these standard works, which have all been written from a Western perspective, are complemented by an Asian voice on arbitration," – wrote Mr J. Ole Jensen in Transnational Dispute Management book review.

Remedy sought

Prof. Sundra Rajoo sought remedy against the Malayan Attorney General's charges in court by appealing to his diplomatic immunity as President of an international organization. The AIAC that he was chairing is regulated by an international agreement called the 2013 Host Country Agreement between the Asian African Legal Consultative Organization (AALCO) and the Government of Malaysia.

Besides Kuala-Lumpur, AALCO has arbitration centres in Teheran, Cairo, Nairobi and Lagos. The head of the AIAC, as well as other branches of the organization, reports to and is supervised by the Secretary General of AALCO. Therefore, Prof. Rajoo appealed to his personal immunity granted to him by the International Organizations Act 1992 and the KLRCA Regulations from 1996 and the AALCO-Malaysian Host Country Agreement as the "High Officer", being the Director of the AIAC.

The state has claimed that the immunity covered only his actions as the officer of the AIAC, but not his personal actions. The Attorney General proceeded with the charges against Prof. Rajoo in March 2019. Rajoo called for a judicial review of the prosecution's actions, filing a claim against the Ministry of Foreign



"Kindly inform the Hon AG that I would strongly protest and disassociate myself and AALCO from these charges as they, on the face of them, contravene the Host Country Agreement as stipulated in my letter of 22 March 2019 to the Hon Minister of Foreign Affairs of Malaysia on this matter (also copied to the AG)."

6. This letter therefore serves also as the said formal response to the notification.

7. While appreciating and respecting your unfettered discretion to make prosecutorial decisions in Malaysia for crimes committed in Malaysia in violation of Malaysian law, I am wondering if you may clarify the true intent of the notification, and more so, in the light of the initial request of the Government of Malaysia to AALCO as stipulated in the Letter. Does the notification indicate that the Government of Malaysia no longer needs the agreement with AALCO for Datuk Sundra Rajoo s/o Nadarajah's as the former High Officer of AIAC to face criminal jurisdiction of Malaysia for some of his official actions?

8. The request by the Government of Malaysia seeking an agreement with AALCO, together with your email to me of 25 Feb 2019 and other correspondences on this matter, categorically indicate, and rightly so in view of AALCO, that without an ad hoc waiver of Datuk Sundra Rajoo s/o Nadarajah's immunities as the former High Officer of AIAC under Article III (6) of the Host Country Agreement from criminal jurisdiction of Malaysia, it will not be possible to enforce your domestic criminal jurisdiction.

9. It was because of this request that I have officially written to the Minister of Foreign Affairs, in the Letter, giving AALCO's reasoned rejection of the Malaysian government's request for the ad hoc waiver.

10. I believe that the question of immunity of a former High Officer of AIAC under Article III (6) of the Host Country Agreement from criminal jurisdiction of Malaysia as determined by the Minister pursuant to Act 485 (Malaysia) does not become irrelevant because the request for the waiver of the same is refused. Nor does it become a matter for a local court to decide just because AALCO has refused the request of the Government of Malaysia for an agreement to waive the said immunity. I equally, do not believe that the disagreement between AALCO and the Government of Malaysia on the waiver would become a matter for a unilateral prosecutorial discretion of the Attorney General or even a question of law, directly or indirectly, to be decided by a local court.

11. The Host Country Agreement has sufficient provisions on settling any differences or disputes between AALCO and the Government of Malaysia on the interpretation or applications of its Articles. Neither the Penal Code (Malaysia) nor the Act 485 can reasonably be treated to defeat the clear Articles of the Host Country Agreement.

12. The timing of your notification is also crucial much as it is not clear to me whether the charges were instituted at the Sessions Court in Kuala Lumpur before or after the Letter came to your attention. In case the Letter came to your attention after the charges, still the above questions are relevant. I also understand you signed the formal approval for these charges under Act 694

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Excerpt from Prof. Dr. Kennedy Gastorn's, Secretary General of AALCO letter to Attorney General of Malaysia, Minister of Foreign Affairs of Malaysia and the MACC

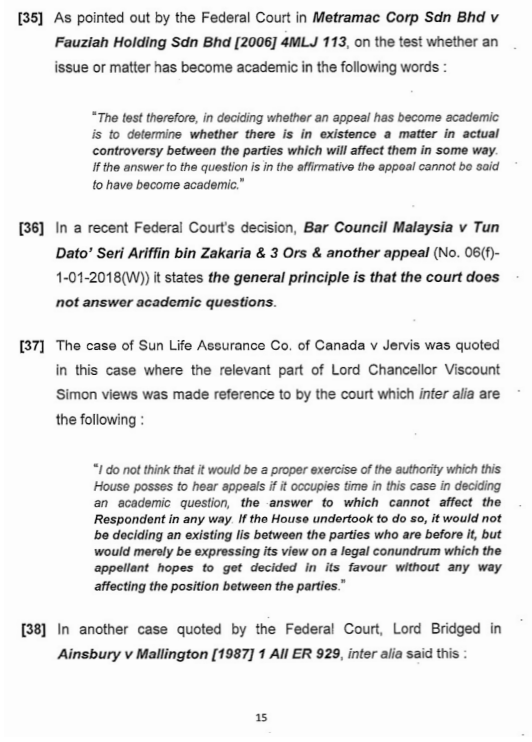
Affairs, the Attorney General of Malaysia and the MACC.

The Secretary General of AALCO sent a letter of diplomatic protest to the Malaysian Ministry of Foreign Affairs – an unprecedented step in the 64-year history of this organization which was founded in 1955.

In his letter. Prof. Rajoo gives vivid details of his attempted arrest Before the judicial review hearing: *"Whilst I was away attending to a religious ceremony out of town, agents of the MACC surrounded my home in Kuala Lumpur beginning from the late hours of the Friday night of the weekend before the hearing. They left letters in my home, which I have now seen, requiring me to attend at the MACC on Sunday and that I would be charged on Monday. I would no doubt have been arrested, held overnight, and brought to Court in handcuffs if I had not been fortuitously away."*

In its ruling on the matter, the Malaysian court ruled that it lacks jurisdiction to rule on Attorney General's actions and stated that the Attorney General has the "unfettered competence" to initiate and stop the criminal proceedings.

The Malaysian court refused to assess whether Rajoo acted on said charges as the Director of the AIAC or as a private individual. However, absent such assessment the court was unable to rule on the issue of the diplomatic immunity. The court considered this question as a rather "academic" and therefore having no effect on the parties. In Prof. Rajoo's view this issue was at the heart of the problem because it could answer whether a director of an international organisation can be charged in the case: *"The immunity issue is a live one as on 6th March 2019, I had filed for judicial review in Civil High Court for declaratory relief and consequential relief of prohibition and certiorari. On 22nd March 2019, AALCO confirmed its refusal to waive my immunity. On 26th March 2019, I was charged in the criminal Sessions Court. On 3rd April 2019, AALCO has lodged a strong protest and disassociated itself from both the AG's action and also, the Acting Director's purported waiver of immunity. I understand AALCO is consulting its member states on further action to be taken on the matter."*



[35] As pointed out by the Federal Court in ***Metramac Corp Sdn Bhd v Fauziah Holding Sdn Bhd [2006] 4MLJ 113***, on the test whether an issue or matter has become academic in the following words :

> "*The test therefore, in deciding whether an appeal has become academic is to determine* ***whether there is in existence a matter in actual controversy between the parties which will affect them in some way****. If the answer to the question is in the affirmative the appeal cannot be said to have become academic.*"

[36] In a recent Federal Court's decision, ***Bar Council Malaysia v Tun Dato' Seri Ariffin bin Zakaria & 3 Ors & another appeal*** (No. 06(f)-1-01-2018(W)) it states ***the general principle is that the court does not answer academic questions***.

[37] The case of Sun Life Assurance Co. of Canada v Jervis was quoted in this case where the relevant part of Lord Chancellor Viscount Simon views was made reference to by the court which *inter alia* are the following :

> "*I do not think that it would be a proper exercise of the authority which this House posses to hear appeals if it occupies time in this case in deciding an academic question,* ***the answer to which cannot affect the Respondent in any way. If the House undertook to do so, it would not be deciding an existing lis between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellant hopes to get decided in its favour without any way affecting the position between the parties***."

[38] In another case quoted by the Federal Court, Lord Bridged in ***Ainsbury v Mallington [1987] 1 All ER 929***, *inter alia* said this :

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Excerpt from the Kuala Lumpur High Court judgement

Possible causes

Prof. Rajoo explains: *"It was my plan to display Malaysia as a mature arbitral jurisdiction and the head of the KLRCA as a person with the necessary expertise to take things forward – which had the blessings of the AALCO and the Chairman of the KLRCA Advisory Board."*

In his letter sent to the members of the international arbitration community, Prof. Rajoo explained that the accusations against him are part of the current Malaysian political changes: *"There has been a regime change in Malaysia from May 2018. The new Government has removed and sacked many heads of business, statutory bodies and Government departments and replaced them including the former Attorney General. In my case, it was done more extremely by of an arrest and trumped up charges so that I resign given the fact that AIAC is an international Organisation based in Malaysia under the auspices of AALCO." "If the relationship between AALCO and AIAC survives with the current incumbents in AIAC, the AALCO will then have to perform the additional functions of a watchdog over the centre given the circumstances, and justifiably so"*, continues Prof. Rajoo.

In his letter Prof. Rajoo also mentions twice "the expunged dissenting judgment of his Lordship, Datuk Hamid Sultan in the Court of Appeal." In July 2018, Court of Appeal judge Hamid Sultan Abu Backer in the ruling on a construction case of Leap Modulation Sdn Bhd vs PCP Construction Sdn Bhd called the AIAC "a foreign governmental organization intentionally or ignorantly given the monopoly to administer matters related to arbitration. " The named judge stated that "the stakeholder of justice must take serious steps under the new Government to investigate the role of KLRCA (AALCO) viz-a-viz access to justice. " The Malaysian Federal Court expunged this dissenting judgment alongside with the affixed to it order for the MACC and police to investigate the arbitration centre, posted Weehingthong.org Malaysian news blog.

Professor Rajoo speaks with bitterness about his forced resignation: *"I still recall taking the job in 2008 when no one wanted to take it up – we were half a floor, three staff in total having a caseload that could be counted on fingers. At that time, forgoing substantial time from my well-to-do arbitrator practice, I jumped on board to lead the Centre to what it has become today, a two-building campus having been described by GAR as the world's best hearing facility outside of the Permanent Court of Arbitration in The Hague, an annual case load of over a 1000 cases, more than 45 staff including 15 legal counsels. <...> I was also deeply saddened that AIAC is not following up on the license to provide ADR services in Russia which I had earlier pursued with some vigour."*

Professor Rajoo was released by the court on bail of USD 25,000 immediately on being charged. He is now focusing on his arbitral practice and writing works. He is able to travel abroad and was chairing a recent ICC arbitration in New Delhi.

In 2017, contributors to the 35 ASA Bulletin Harald Sippel and James Ding wrote: *"Any arbitration is in safe hands with the current Director, Datuk Professor Sundra Rajoo, who is a very prominent arbitration practitioner both internationally and in Malaysia. That being said, a question persists, asking what will happen to the position once the current Director retires. Whoever takes over from Datuk Professor Sundra Rajoo will have big shoes to fill..."*

Sources

Documents provided by Prof. Sundra Rajoo to the editorial

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EX-DIRECTOR OF AIAC (KLRCA) PROF. SUNDRA RAJOO MEETS ARBITRATION.RU

The rapid success and speed of change in the Centre and my longevity as Director maybe have been construed by some that that I must be doing something extraordinary

We know, that the Kuala Lumpur Regional Centre for Arbitration (KLRCA) (recently renamed as Asian International Arbitration Centre (AIAC)) was established by AALCO in 1978 in Malaysia. How many cases it had before you took your role in 2010?

The record shows that there was a cumulative total of 22 registered cases from 1978 to 2010.

You were appointed as the KLRCA Director in 2010, how many cases KLRCA had since then?

After I took over in 2010, it grew to 52 cases in 2011, 68 cases in 2012, 97 cases in 2013, 88 cases in 2014, 86 cases in 2015. With the introduction of statutory adjudication, the number of cases increased. I do not have the exact details but from my existing records, but from 2010 to 2018, there was a total number of 2,745 administered cases (arbitration, adjudication, mediation and domain name).

What measures the KLRCA took in order to boost its case load of domestic and international arbitration cases?

There were a number of holistic measures that I devised to bolster not only international cases but also, domestic cases of the Asian International Arbitration Centre ("AIAC"). Firstly, it sits in one of Malaysia's most iconic buildings, Bangunan Sulaiman, formerly known as Kuala Lumpur Regional Centre for Arbitration ("KLRCA"). The idea was to have a seamless transition so that the Asian International Arbitration Centre ("AIAC" or "the Centre") takes up the baton of its predecessor, the Kuala Lumpur Regional Centre for Arbitration ("KLRCA"). It was aimed at broadening the boundaries beyond the horizon and deliver the future. Behind the new AIAC brand, we remained the same organization with a proven track record for the provision of world-class institutional support as a neutral and independent venue for the conduct of domestic and international arbitration and other alternative dispute resolution (ADR) proceedings. This new identity is a natural reflection of the ongoing commitment to the global ADR ecosystem and the stakeholders.

The Centre is dedicated to providing the best possible services and innovations in the industry, focusing on ADR, dispute avoidance and holistic dispute management. Despite the change in identity, AIAC remains loyal to the 40 years of heritage in Malaysia as the Centre was the first of its kind to be established under the Asian African Legal Consultative Organization ("AALCO"), an international organization comprising 47-member states from across the region. Formed pursuant to the host country agreement between Malaysia and AALCO, the AIAC is a not-for-profit, non-governmental international arbitral institution which has been accorded independence and certain privileges and immunities by the Government of Malaysia for the purposes of executing its functions as an independent, international organization. It is

given the mandate to serve the region and as an international organization. My plan was to make it the Centre a provider of world-class institutional support as a neutral and independent venue for the conduct of domestic and international arbitration, and other ADR proceedings as part of the global ADR ecosystem.

These included capacity building between 2010 to 2018 by holding 30 over international conferences, 250 events and training programmes to create awareness, talent pool for export and become a leading ADR and specialist knowledge disseminator. We engaged in international collaborations with 48 agreements with international and domestic institutions putting Malaysia and AIAC on the global map with collaborations across the world. There were agreements with universities and institutions of learning to build capacity in terms of basic knowledge and expertise. The pioneering initiatives included for the then KLRCA to be the first arbitral institution in the world to adopt and modify the UNCITRAL Arbitration Rules 2010, create GAR award winning I-arbitration rules and also, being the first arbitral institution in Asia to conduct training in Islamic and sports arbitration. These rules are kept under constant revision to ensure relevance with commercial practicalities and expectations supported by guides and circulars to facilitate the use of and understanding of its rules.

Apart from the provision of institutional support for domestic and international arbitration and other ADR proceedings, AIAC under me offered hearing facilities and ancillary administrative services to tribunals operating ad hoc or under the auspices of another institution. The AIAC is also an official Court of Arbitration for Sports (CAS) alternative hearing centre. In its efforts in capacity building and disseminating information on ADR, the AIAC organizes various courses, training programmes and forums on the different avenues of ADR covering niche areas such as commercial arbitration, sports arbitration, maritime arbitration, adjudication, arbitral domain name dispute resolution and Islamic finance to create capacity, mould and shape the future of the ADR arena.

In conjunction with its 40th Anniversary in Malaysia, the Kuala Lumpur Regional Centre for Arbitration (KLRCA) was officially renamed as the Asian International Arbitration Centre (AIAC) on 7th February 2018. It was part of my strategy to make the Centre to become a pre-

mier dispute resolution provider and move towards becoming an international ADR provider. Therefore, the name change was part of a larger rebranding of the Centre, strengthening its regional footprint and presence globally. Along with the name change, the Centre also changed its domain name of its official website to www.aiac.world. This was done by way of the Arbitration (Amendment) Act 2018 which was gazetted on 10th January 2018 to signify the change of name. To officiate the name change, a signing ceremony of the Supplementary Agreement was held between the Asian-African Legal Consultative Organisation (AALCO) and the Government of Malaysia.

Between 2nd and 4th of March 2018, the AIAC hosted the 2nd AIAC-ICC Pre-Moot for the William C. Vis International Commercial Arbitration Moot with over 70 teams, close to 300 participants, 177 hearings with arbitrators from 21 countries competing for 13 prizes. It was the largest pre-moot in Asia of its kind and the second largest worldwide. Attendees of the Pre-Moot were as near from neighbouring ASEAN countries all the way to South America. They enjoyed a truly diverse experience in which they were able to interact with students and practitioners from numerous and different cultural and legal backgrounds.

Unlike most others, AIAC's Pre-Moot permits students to participate without requiring registration for the Vis Moot (in Vienna) or the Vis East Moot (in Hong Kong). The curtain raiser to the Pre-Moot was The First Asian Conference for Students and Young Practitioners, wherein outstanding students and experienced arbitrators shared their practical and academic experience and ideas.

I understand that my work paid off and this year in March, the Pre-Moot had over a 100 teams participating. Hence, the recent decision by the William C. Vis International Commercial Arbitration Moot to use the AIAC Arbitration Rules for its 29th Moot competition 2 years from now.

On 9th March 2018, AIAC launched its new AIAC Arbitration Rules 2018, AIAC I-Arbitration Rules 2018, AIAC Fast Track Arbitration Rules 2018 and the AIAC Mediation Rules 2018. (all effective 9th March 2018).

The key features of the AIAC Arbitration Rules 2018 include the introduction of sophisticated provisions as to the arbitral tribunal's power to award interest on any sums that are in dispute, including simple and compound interest. Additionally, parties to an international arbitration can now pay arbitral tribunal's fees and administrative fees in currencies other than MYR and USD. AIAC was also one of the few arbitration centres in the world, which accepts payment in more than two currencies.

The AIAC Arbitration Rules 2018 also allow for the joinder of third parties to the arbitration proceedings and emphasise the 'light touch approach' taken by the AIAC by providing for a technical review of awards not going beyond errors in form and calculations made in the award.

The AIAC Fast Track Arbitration Rules 2018 provide for shorter time limits to ensure the speedy resolution of disputes: arbitration proceedings under the Fast Track Rules are designed to last no longer than 180 days. The arbitral tribunal in principle has only 90 days from the start of the arbitration until the conclusion of the oral hearing. Thereafter, the arbitral tribunal has another 90 days to draft the award. This 90 days' time limit guarantees that the arbitral tribunal has the necessary time to deliberate and draft an arbitral award of the highest quality. The AIAC's Fast Track Arbitration Rules 2018 are only applicable if the parties agree to their application. The AIAC became one of the few arbitral institutions in the world to respect party autonomy – the approach by other institutions is typically to apply expedited rules automatically, even when the parties had not explicitly agreed to them.

The fully revamped AIAC Mediation Rules 2018 provide a flexible framework for the conduct of mediation, yet effectively deal with particularly complex situations that may arise (e.g. confidentiality concerns, non-cooperation by one of the parties, etc.), thus ensuring time and cost-efficient settlement. Pursuant to the AIAC

Arbitration Rules 2018, the parties are now free to commence mediation either where there is prior agreement to mediate, or, in the absence of such prior agreement, though the model submission agreement, or by making a proposal to mediate. The AIAC Mediation Rules 2018 cater most types of disputes or differences, including investor-State disputes. The AIAC is the first institution worldwide to model its mediation rules after the IBA Rules for Investor-State Mediation.

The AIAC was the first arbitral institution to have Shariah-compliant arbitration rules, The i-Arbitration Rules. The new AIAC i-Arbitration Rules (effective as of 9th March 2018) reflected the rebranding of the KLRCA to the AIAC. It also introduced a new provision under which the tribunal may award a late payment charge determined by the Islamic principles of ta'widh and gharamah. The I-Rules maintain all other Shariah-compliant provisions and other features.

The 2018 Rules were translated into seven languages including Malay, Indonesian, Arabic, Spanish, Russian, Chinese and Korean to ensure a global reach. I had planned to have further translations in German, French, Portuguese and Japanese. I am not sure if this plan is being followed through any longer.

On 6th April 2018, the AIAC launched the Standard Form of Building Contracts (AIAC's SFC) 2018 Edition and the newly revamped web portal "sfc.aiac.world". The earlier inaugural 2017 Edition of the AIAC's SFC was an immense success being downloaded by both domestic and international users. In 2017, the AIAC launched its Standard Form of Contracts (SFC) – a suite of standard form contracts that are customisable and freely available for print and download. The AIAC's SFC was inspired by the prevalent issues plaguing the Malaysian construction industry. It was aimed at filling the gaps of existing standard form building contracts in governing relationships, rights and duties of parties to a building construction project. It is user-friendly, incorporates plain English drafting, and includes clearer provisions to guide users in interpreting the contract.

The 2018 Edition of the SFC. While retaining the guiding principles set out in the original edition, the 2018 Edition includes enhancements that add clarity, improve certainty, and clear ambiguity where obligations and accountability of parties to the construction contract are concerned.

The revamped SFC web portal has features to increase user-friendliness based on public feedback including personalised login credentials, and the ability to customise, save, store and share completed contracts. Registered users may also save incomplete contracts for later completion. Users will further benefit from the new Help Text feature which guides users in customising AIAC's SFC. The SFC portal has altered access to information and has made it readily available to the stakeholders of the construction industry. As of July 2018, the portal has seen over 4000 users and many contracts customised and downloaded.

Additionally, in July 2018, the AIAC launched the Standard Form of Design and Building Contracts (Design & Build SFC). The Official Launch of the Design & Build SFC was attended by 300 construction professionals, lawyers, quantity surveyors, academicians and other interested stakeholders. The Design and Build SFC is intended to be more user friendly than its predecessors, drafted in plain English and contains a number of novel provisions, such as clearer consequences upon termination and corruption as one of the grounds to terminate. The Design & Build SFC innovatively addresses problems in the construction industry from grassroots. It incorporates the principles of contractual predictability as well as time and cost-efficiency which will prevent deadlocks in construction projects. In turn, this will encourage the continuity of works and working relationships in spite of any differences arising during a construction project.

Between 5th and 7th May 2018, the AIAC hosted the inaugural edition of the Asia ADR Week 2018. The 3-day conference delivered an

"Asian experience" with guest speakers of diverse cultures and specialisations from all across Asia who focussed on the demands and needs of Asian businesses as well as on the resolution of disputes. The event attracted over 200 participants and more than 90 speakers and was made up of 11 sessions, 9 breakout sessions, and 2 impressive social events. The topics covered in the sessions during the first two days included: "Building a New Asia: A Spectrum of Opportunities" – a discussion on the future of ASEAN and beyond; "Business in Malaysia: Sharing Solutions, Getting the Deal Through"– discussion on the critical steps Malaysia must take to remain an attractive business hub; : "Innovation in Effective Cross-Border Contract Management" – a discussion on core competencies and innovations in contract management, such as contract automation; Rapid Fire Debate on the topic "Real Money, Real Investors, Real Time, Real Talk – What ADR Can Do For You"; "The AIAC Rules, Your Partner Throughout the Proceedings" – a session on sing the AIAC Rules to manage the costs of arbitration proceedings; "The Dawn of the Digital Era of ADR" – a discussion of the trends of digitisation and artificial intelligence and their applicability to dispute resolution. The final day marked the 2018 CIPAA Conference and the release of the AIAC's 2018 CIPAA Report titled "Sharing Solutions". The three days saw over 90 speakers and 250 participants attend the event.

On 6th May 2018, the AIAC launched the Asian Institute of Alternative Dispute Resolution ("AiADR") at the AIAC's 40th Anniversary Gala Dinner. The launch was officiated by H.E Prof. Dr. Kennedy Gastorn, Secretary-General of the Asian-African Legal Consultative Organization ("AALCO"). The AiADR is the first not-for-profit member-based Asian centre for ADR. I am still the President of the Institute. The AiADR is the first not-for-profit member-based Asian centre for ADR. Its motto is "Providing excellence in ADR" and the AiADR will provide affordable and education in the field of ADR – from Malaysia to the rest of Asia and other parts of the world.One of the factors typically overlooked regarding global ADR development is the limited spending capacity of professionals from less developed countries, both young and experienced, on education. This hinders not only the wider participation in ADR development, but also precludes this particular demographic from gaining the qualifications and experience they deserve. I decided to set up AIADR which will become the bridge that crosses jurisdictional boundaries, particularly across Belt Road regions. The AIADR is planning to offer a series of affordable online courses in various fields of alternative dispute resolution and allow everyone interested in alternative dispute resolution to join as a member at a highly competitive rate – all while offering its programmes at global standards.

Between 21st and 22nd July 2018, the AIAC hosted the "The Asian-African Legal Consultative Organisation (the AALCO) Annual Arbitration Forum 2018". This forum coincides with the 40th year anniversary of the AIAC. The AALCO Annual Arbitration Forum is the first event of its kind that brought together all five Arbitration Centres established under the auspices of AALCO: the Asian International Arbitration Centre (the AIAC), the Cairo Regional Centre

for International Commercial Arbitration (the CRCICA), the Lagos Regional Centre for International Commercial Arbitration (the LRCSCA), the Tehran Regional Arbitration Centre (the TRAC) and the Nairobi Centre for International Arbitration (the NCIA).

The theme was Connecting Asia and Africa, Connecting Investment and ADR: Opportunities and Challenges. In light of the rapid development of foreign investment and alternative dispute resolution in emerging markets such as Asia and Africa, the AALCO Annual Arbitration Forum could not have been more timely. The event explored salient topics, among others: the role of AALCO Arbitration Centres in facilitating investment and promoting the use of ADR, investment opportunities, the Belt and Road Initiative, and developments in the field of ADR in Asia and Africa.

Gracing the occasion was AALCO Secretary-General HE Dr. Prof. Kennedy Gastorn; the Honourable Chief Justice of India Dipak Misra; the Honourable Professor Palamagamba John Aidan Mwaluko Kabudi, Minister of Constitution and Legal Affairs of Tanzania; YB Datuk Liew Vui Keong, Minister in the Prime Minister's Department (Law) of Malaysia; Professor Dato' Dr. Rahmat Mohamad, Eminent Persons Group of AALCO; Court of Appeal Judge of Malaysia, YA Datuk Nallini Pathmanathan; and Chief Justice of Zambia, Irene Chirwa Mambilima. The event garnered active participation from stakeholders in Asia and Africa. The Speakers of this event were mainly practitioners and academics based in Asia and Africa with expertise in ADR mechanisms and investment law. Close to 300 participants attended this event.

The centre held its third AIAC Certificate in Sports Arbitration course in September 2018. AIAC also dedicated the whole month of September, hosting Sports Law related events that included a documentary on, "The War on Doping", "The Great Sports Debate" featuring CAS arbitrators and "AIAC's International Sports Law Conference". The AIAC was named as the dispute resolution body for sporting disputes at the 2017 South East Asian Games and is currently spearheading efforts to establish the first Asian Sports Tribunal.

As in 2017, 2018 saw the AIAC engaging with local and international students in an attempt to disseminate information pertaining to ADR and to ensure that the future practitioners are exposed to ADR from the time they are in law school. In accordance with its MoUs with the University of Malaya and many other universities, the AIAC has offered many internships for local aspiring talents in 2018. Between March 2017 and May 2018, the AIAC YPG conducted more than 70 successful events, including

two impressive pre-moots for the Willem C. Vis International Commercial Arbitration Moot. As of July 2018, the AIAC YPG has over 1,000 members both locally and internationally and it continues to grow from strength to strength.

Since March 2018, all newly registered cases have been managed electronically through the AIAC's Case Management System. From July 2018, the AIAC's Case Management System will have the capability of sending and receiving emails. It was part of the AIAC's process improvements, which among others includes the digitisation of all incoming and outgoing documents relating to all adjudication proceedings registered at the AIAC and thus, ultimately, establish a "paperless" record system.

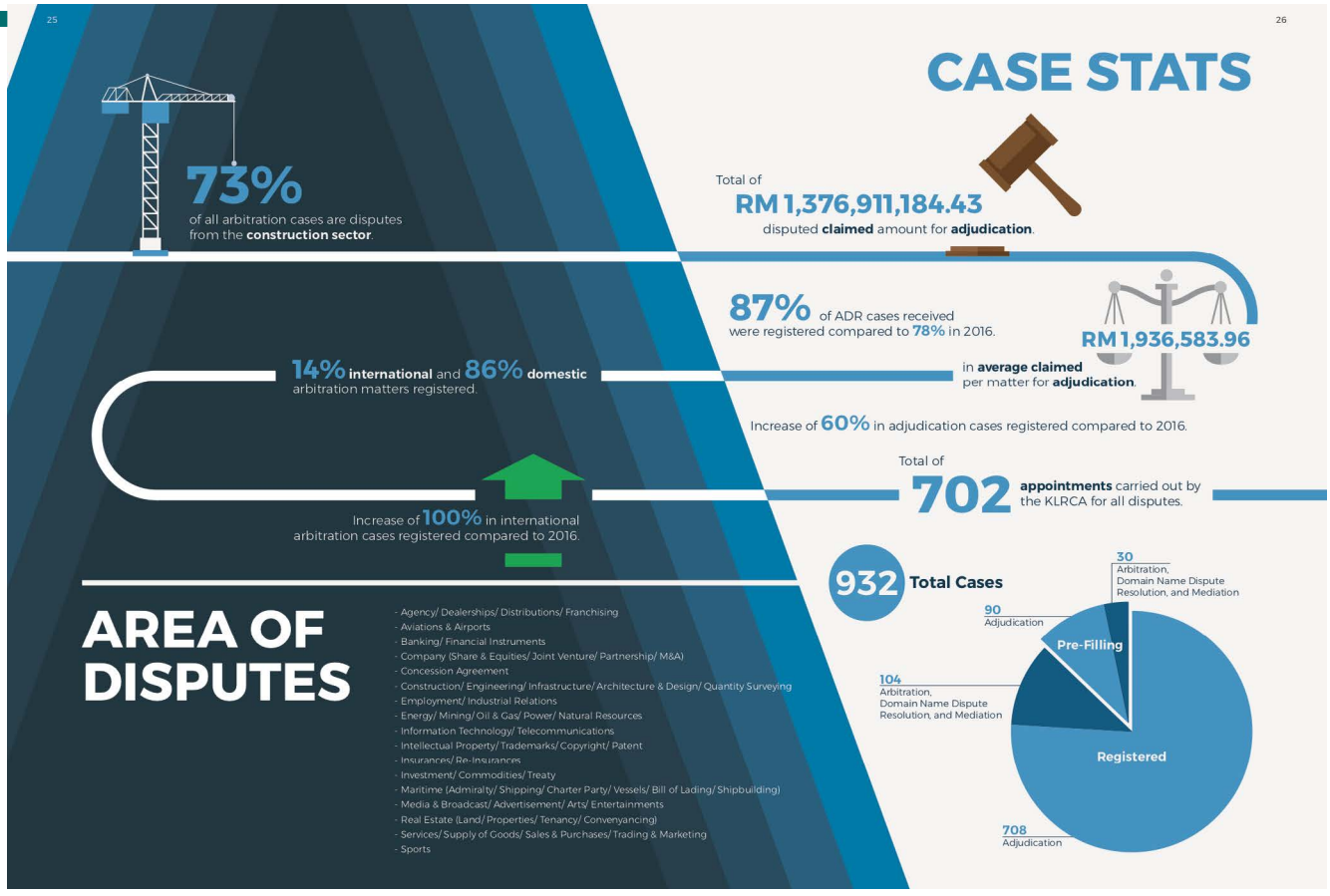
Arbitration is generally considered to be an efficient and cost-effective method of dispute resolution. In recent years, however, arbitration has faced criticism for being too costly: hourly rates for top-notch lawyers may exceed USD 1,000, interpreter fees are exorbitant and the costs for seminar rooms in hotels transformed into hearing and break-out rooms can easily reach USD 50,000 for one hearing alone. Many arbitral institutions have addressed these concerns by providing their own facilities for hearings. The better equipped they are, however, entails a greater cost to be borne by the Parties; this often negates the difference between arbitral institution's own hearing rooms and that of luxury hotels offering similar services.

The old adage that quality comes at a (high) price does not hold true. One of my first projects in 2010 was to create a state of art hearing facilities. We moved from out old premises to Bangunan Sulaiman towards the end of 2014. It houses AIAC and has the following facilities:

- Extra Large Hearing Room with Court Recording & Transcription System (CRT)
- World-Class Hearing Rooms
- 2 Extra Large Hearing Rooms (Seating capacity: 50 pax)
- 3 Large Hearing Rooms (Seating capacity: 22 pax)* (1 large hearing room with Court Recording Transcription (CRT))
- 10 Medium Hearing Rooms (Seating capacity: 14 pax)* (1 medium room with CRT)
- 6 Small Hearing Rooms (Seating capacity: 10 pax)
- 3 Extra Small Hearing Rooms (Seating capacity: 6 pax)
- 12 Breakout Rooms
- 2 Discussion Rooms
- Auditorium (Seating capacity: 182 pax)
- Pre-Function Room
- Seminar Room (Classroom seating: 50 pax; Theatre seating: 80 pax)
- Garden Pavillion
- One Stop Business Centre
- Arbitrators' Lounge
- Private Dining Room
- Outdoor Dining Area
- Ample Covered Car Park Spaces
- Specialised Alternative Dispute Resolution (ADR) and Construction Law Library (Open to the public)
- Ultra-modern Video Conferencing Equipment

It offers state of the art hearing centres at only a fraction of the costs of other arbitral institutions (or compared to hotel seminar rooms), as was shown in a survey by the Global Arbitration Review. It is the most affordable hearing facilities among arbitral institutions. Global Arbitration Review Guide to Regional Arbitration (Volume 6/2018) had also stated that "Bangunan Sulaiman has potential to be the best [arbitration hearing centre] outside the Peace Palace."

The extra-large, large and medium-sized hearing rooms with court recording transcription software that enables live recording and transcription of video conferences for merely USD 398.00 for medium sized hearing rooms and USD 455.00 for large hearing rooms per day. In contrast to many other hearing centres, AIAC has a well-equipped library with a broad array of authorities in arbitration and construction law in particular, as well as free access to all



Case statistics. KLRCA Annual Report 2017

prevalent online law databases, such as Kluwer Arbitration, Lexis Nexis, etc. There are no "hidden costs" when one conducts a hearing at the Bangunan Sulaiman. Should there be a need for IT technicians and video-conferencing specialists, it will be provided free of charge.

Another attraction of the AIAC and Bangunan Sulaiman lies in its strategic location. Malaysia is at the heart of South-East Asia, with numerous other countries in the region such as Bangladesh, Brunei, Cambodia, Hong Kong, India, Indonesia, Laos, the Maldives, Myanmar, Nepal, the Philippines, Singapore, Sri Lanka, Taiwan, Thailand and Vietnam, being just four hours or less away by flight. The Kuala Lumpur International Airport is less than an hour away and the KLIA Express train connecting Kuala Lumpur and the Kuala Lumpur International Airport is in walking distance from the AIAC.

Booking a hotel for the full duration of a hearing can often be difficult due to the plethora of related issues such as expenses and availability, as noted in the above-mentioned Global Arbitration Review Survey. This is not the case at the AIAC: I arranged a partnership with The Majestic Hotel Kuala Lumpur, located just across the street from the Centre, allows participants of hearings to book rooms in the five-star Malaysian heritage hotel at the Centre's corporate rate of only roughly USD100 per night.

Comparing the price of AIAC's facilities with that of other institutions, as well as factoring in the cost of having a central location, state of the art rooms, quality transcription/IT services as well as affordable rates at a five-star hotel, I had calculated that participants can easily save up to USD5,000 or more per day when conducting an oral hearing at the AIAC. The AIAC's Bangunan Sulaiman is one of the highest quality arbitration centres in the region, without sacrificing cost-effectiveness.

I worked tenaciously towards the continued development of domain name dispute resolution both regionally and globally, by providing for an alternative hearing avenue to the World Intellectual Property Organisation (WIPO).

Currently, the AIAC represents the Asian Domain Name Dispute Resolution Centre by acting as its Kuala Lumpur Office. Under that umbrella, and as the exclusive dispute resolution

service provider for .my disputes, I developed a handbook that will simplify the time efficient procedures of matters administered under both the ADNDRC and MYNIC procedures. This handbook was distributed to law firms, legal practitioners (not limited to intellectual property practitioners), and lay persons to disseminate information about domain names and the resolution of disputes over domain names by the AIAC.

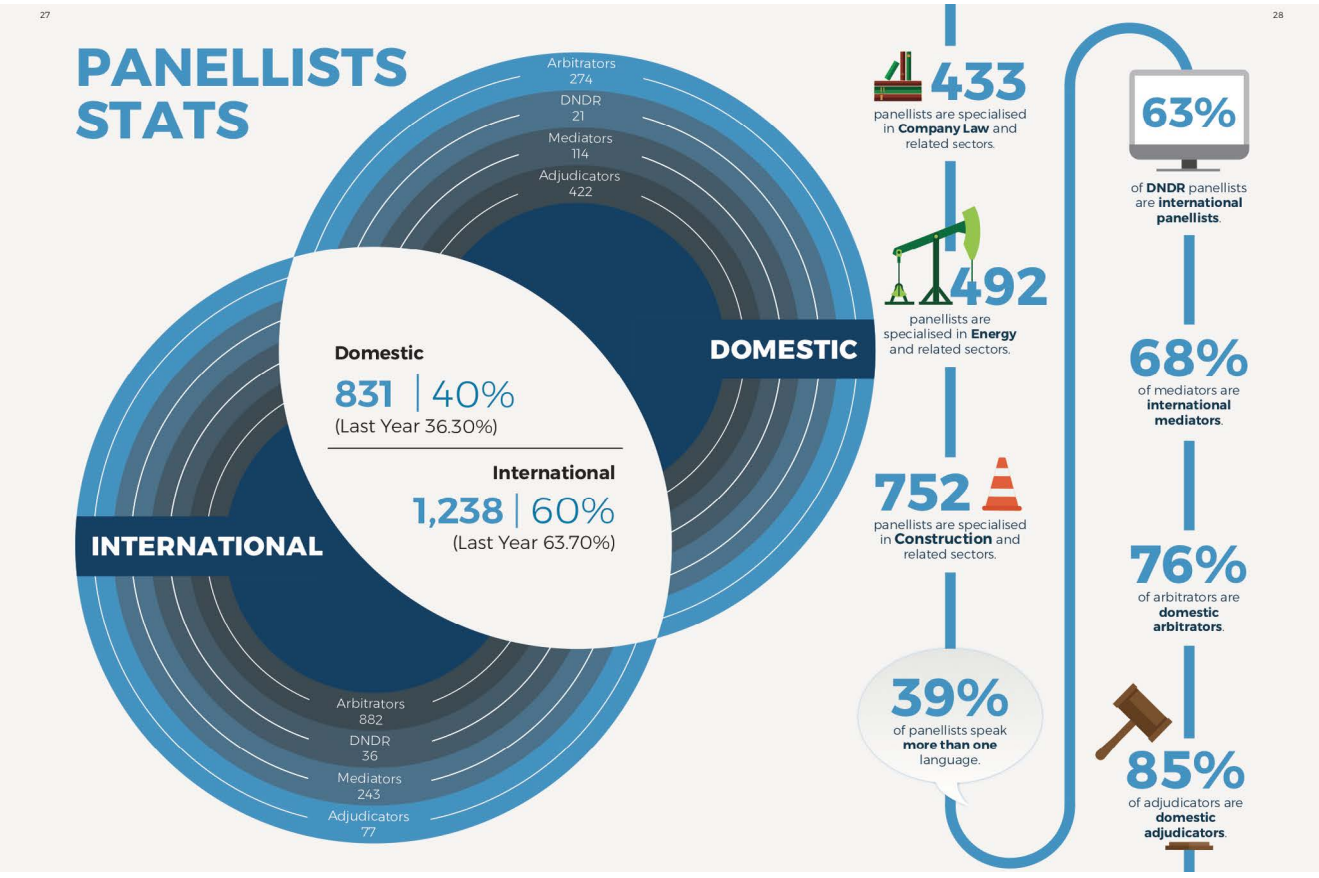
As part of the AIAC's drive to expand its administrative practice in domain name dispute resolution, the AIAC has ventured into the Singaporean market by identifying select law firms and other stakeholders to market its products and services. A similar exercise is also being carried out with selected Malaysian law firms.

The AIAC had also submitted an application to the Internet Corporation for Assigned Names and Numbers (ICANN) to be an independent dispute resolution service provider and is currently waiting for ICANN's feedback.

The AIAC was also accepted as the exclusive domain name dispute resolution provider for .bn disputes.

To raise awareness of its domain name dispute resolution services, I arranged various endeavours. Select AIAC staff have attended conferences in Seoul and Kuala Lumpur to showcase the AIAC's structured administrative process of settling domain name disputes. Additionally, the AIAC has organised evening talks and workshops on domain name dispute resolution events to train its stakeholders. This included a half-day introductory workshop on the UDRP Rules in Manila (Philippines) in July 2018 attended by an array of international professionals working or interested in domain name dispute resolution.

Malaysia has the potential to gain the maximum benefit from Asia's traction as the future playground for sporting events and dispute resolution. Strategically located in the heart of Asia and tapping from the Court of Arbitration for



Number of panellists. KLRCA Annual Report 2017

Sport's (CAS) recognition of the Centre as its only official Alternative Hearing Centre in Asia, Malaysia is set to become the go-to place for sports dispute resolution. I proactively promoted capacity building in this niche area of the law. This has been achieved by organising three editions of the AIAC's Certificate Programme in Sports Arbitration and creating a pioneering batch of specialised sports dispute resolution experts. I worked closely with the Olympic Council of Malaysia (OCM). Develop a mechanism for the resolution of sporting disputes in Asia through arbitration. The proposed dispute resolution model is based on the CAS. AIAC was the independent ad-hoc body for the adjudication of disputes during the 29th Southeast Asian Games 2017.

The Sports Law Association of Malaysia (SLAM) was established as a professional body to inspire leadership, reform and interest in sports law. I was its first President and created a knowledge-sharing platform for communication amongst sports lawyers and other stakeholders to achieve best practices amongst practitioners and share experiences with newcomers. It was intended to be a unifying platform for the interaction between sports and the law, extending beyond dispute resolution. With the impending formation of the Malaysian Sports Tribunal, SLAM will strive to bring together the ministry and sporting associations alike to deal with the intricacies of arbitration in sports whilst promoting the resolution of sporting disputes. This will range from conflicts involving jus ludorum (law of games) to that of commercial sporting disputes. Until recently, SLAM was located in Bangunan Sulaiman.

The AIAC is a longstanding partner of the International Centre for Settlement of Investment Disputes (ICSID). ICSID is the world's leading institution devoted to international investment dispute settlement. It has extensive experience in this field, having administered the majority of all international investment cases. States have agreed on ICSID as a forum for investor-State dispute settlement in most international investment treaties and in numerous investment laws and contracts.

Cognisant of the importance of dispute settlement under bilateral and multilateral investment treaties, the AIAC signed its first collaboration agreement with ICSID in 1979. The two institutions decided to further strengthen their collaboration by signing a new agreement in 2014 ("2014 agreement"). In addition to fostering cooperation between the AIAC and ICSID, the 2014 agreement provides, inter alia, that the AIAC can be used as an alternative hearing venue for ICSID cases and participate in the administration of case, should the parties to proceedings conducted under the auspices of ICSID desire to conduct proceedings at the seat of the AIAC.

In addition to their numerous bilateral and multilateral arrangements, certain Asian States played a major role in the negotiation of the Comprehensive Investment Agreement that was signed by the members of the Association of Southeast Asian Nations in 2009 ("2009 ASEAN Agreement"). The objective of the 2009 ASEAN Agreement is to further intensify the economic cooperation between and among the ASEAN Members States. The agreement's provisions on investment protection are in line with those included in the bilateral and multilateral investment treaties signed by Asian States. These include the assurances of national treatment, most-favoured-nation treatment, fair and equitable treatment, full protection and security, provision in respect of expropriation and compensation, and dispute settlement provisions. Section B of the said agreement provides for the resolution of investment disputes between an investor and a member State. In particular, article 33 of the same section allows for such disputes to be referred, inter alia, to the AIAC.

Should parties to a dispute decide to resolve their investment disputes by referring the case to an ad hoc tribunal under the rules developed by United Nations Commission on International Trade Law ("UNCITRAL Rules"), the AIAC has the experience to administer such a case. The AIAC Arbitration Rules draws ex-

tensively on the UNCITRAL Rules by including the UNCITRAL text in its entirety.

The AIAC, being an independent international body established under the auspices of the Asian African Legal Consultative Organisation (AALCO), is able to cover all needs of the parties involved in investor-State arbitrations. The Centre held its first International Investment Conference at the Bangunan Sulaiman in the first quarter of 2016.

AIAC successfully registered with the International Malaysian Society of Maritime Law (IMSML) on 29th October 2015. The IMSML launched in April 2016 to address a perceived need within Malaysia for a forum that would promote dispute resolution and information dissemination in the maritime law industry.

IMSML is a platform that brings together various stakeholders in the Maritime industry within Malaysia and the region, and is open to all sectors of the industry including lawyers, in-house counsels, corporate representatives, and arbitration practitioners.

Ever since its launch, the IMSML has been proactive in organising seminars conducted by maritime law experts, whilst marketing Malaysia as a hub for resolving maritime disputes.

A milestone for the IMSML was the creation of the "Certificate Course as an Introduction to Maritime Law" in collaboration with the AIAC. This dynamic three day course provided attendees with an informative introductory insight into the principles and practice of maritime law. Due its success, the IMSML and the AIAC have collaborated to once again offer this course between 24th July and 26th July 2018.

The AIAC was collaborating with the Companies Commission of Malaysia to create a dispute resolution system for Intra-Companies Dispute. The AIAC is also in the process of creating and conducting a training program in association with the Companies Commission for Directors and other officials on the theme of "Corporate Dispute Resolution Policy for Companies." This training program was to be conducted in mid-2016.

When the mandatory adjudication was introduced in Malaysia? Can you explain the mechanism of it?

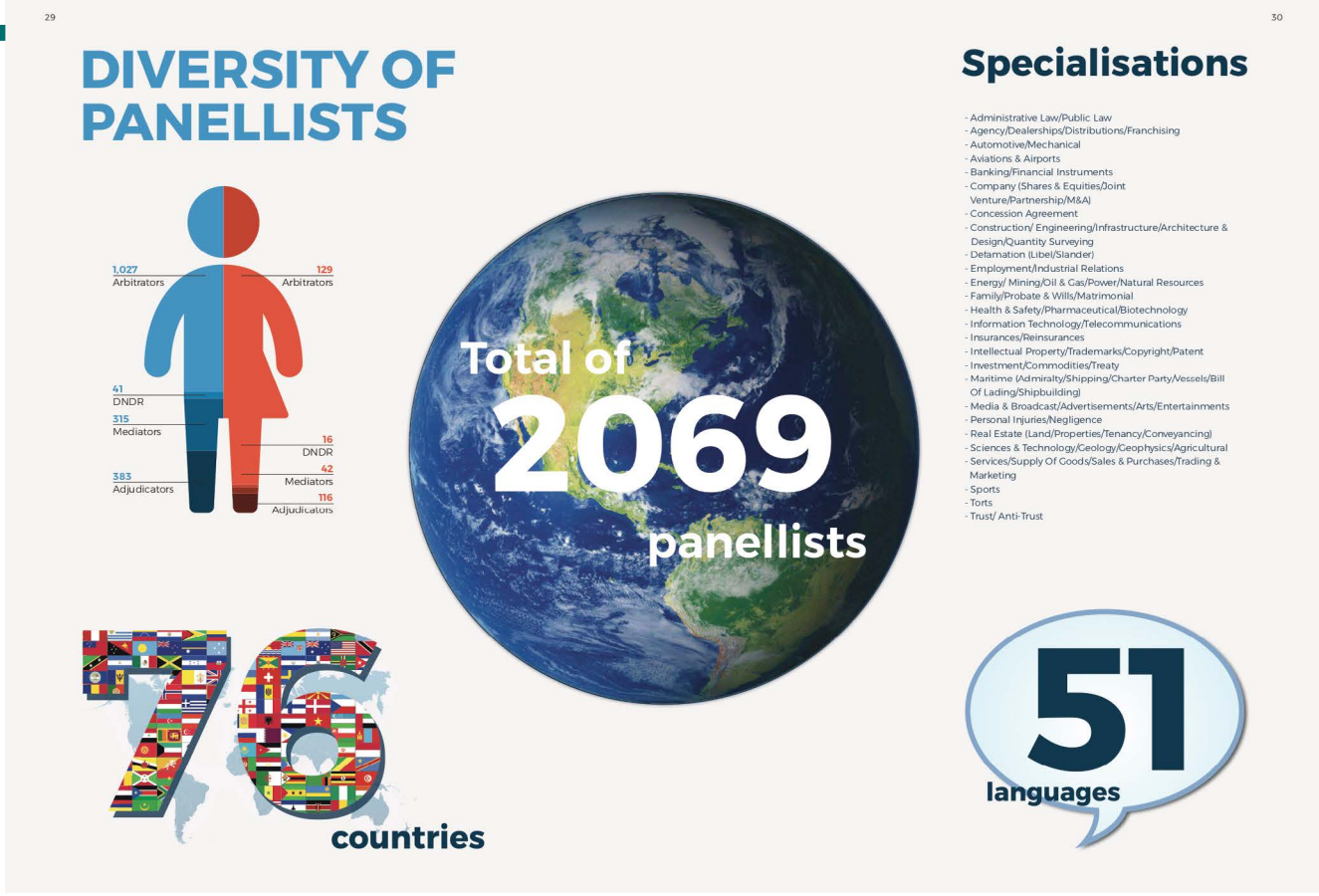
Adjudication is a rights-based dispute resolution mechanism with a strict time line to resolve payment disputes in the construction industry. With the naming of the AIAC as the adjudication authority by virtue of Part V of the Construction Industry Payment & Adjudication Act 2012 ("the CIPAA"), the centre has a key role to play in its capacity as the default appointing and administrative authority under the CIPAA.

In line with the coming into force of the CIPAA on 15th April 2014, the AIAC has come up with the AIAC Adjudication Rules & Procedure to supplement the CIPAA and to enable the centre to provide administrative support for the efficient conduct of adjudication proceedings.

The AIAC Adjudication Rules & Procedure also assist both adjudicators and parties in understanding the adjudication process.

Pursuant to the provisions of CIPAA and the AIAC Adjudication Rules & Procedure, the AIAC carries out the following responsibilities, inter alia:

- Setting the competency standard and criteria of an adjudicator. This is done by providing the relevant training courses to parties who are interested in becoming certified adjudicators.
- Certifying qualified adjudicators and listing them on the AIAC's panel of adjudicators.
- Determining the standard default terms of appointment of an adjudicator and the fees for the adjudicator's services. The AIAC Adjudication Rules & Procedure sets out the Standard Terms of Appointment and incorporates a Recommended Fee Schedule which can be adopted by the parties when negotiating the terms of the appointed adjudicator.
- Providing administrative support for the conduct of adjudication proceedings under the CIPAA. The AIAC administers all adjudication cases accord-



Diversity of panellists. KLRCA Annual Report 2017

ing to the AIAC Adjudication Rules & Procedure.

- Undertaking any other duties and functions as may be required for the efficient conduct of adjudication under the CIPAA.
- Making recommendations to the Minister on any application for exemptions. The application for exemption must comply with the procedure set out in Part B of the AIAC Adjudication Rules & Procedure.
- The AIAC maintains a copy of each and every adjudication decision delivered to it pursuant to Section 12 of the CIPAA and Rule 10 of the AIAC Adjudication Rules & Procedure.

In May 2018, I released the AIAC CIPAA Report 2018 titled "Sharing Solutions". Through this report, the AIAC disseminated its administrative observations and statistical analysis of the overall changes and emerging trends in the construction industry. Notable statistics for the 2018 fiscal year (from 16 April 2017 to 15 April 2018) are as follows:

- Caseload – with 779 new cases received during the 2018 fiscal year, the AIAC saw an increase of around 39% in the number of adjudication cases. At this rate, the total number of cases is anticipated to reach 882 in the 2019 fiscal year.
- Number of adjudicators – the AIAC has empanelled 466 new adjudicators as at the end of the 2018 fiscal year. The AIAC also regularly conducts its Adjudication Certification Programme, which resulted in an approximate 25% increase in the number of Malaysian adjudicators empanelled.
- Efficiency (duration of the proceedings) – it is generally accepted that an increase in caseload will inevitably result in a decrease in efficiency. However, 48.83% of all adjudication cases administered by the AIAC were resolved in approximately 5 months. Additionally, 97.83% of adjudicators delivered their decisions within the time limit set forth in Section 12(2) of the CIPAA.

I expect with the implementation of the online case management system, there should be greater administrative efficiencies in the conduct of adjudication proceedings during the 2019 fiscal year.

With the advent of the Construction Industry Payment & Adjudication Act 2012 [CIPAA 2012], a new profession of Adjudicators has emerged. I set up and was the first president of the Malaysian Society of Adjudicators (MSA). The idea was to have a professional body to promote ethical & professional standards of service & conduct of adjudicators in Malaysia.

The Society is also set up to promote resolution of construction disputes by means of adjudication. It was formed for the Malaysian Construction Industry to benefit from the wealth of experience of the adjudicators associated with the introduction of CIPAA 2012. The Society's purpose is to encourage and develop adjudication as a method of resolving construction disputes (without denouncing other dispute resolution methods, such as arbitration, mediation and conciliation) and also to provide a communication channel for which adjudication practices may be discussed among professionals. The Society publishes newsletters and other information materials as means of promoting the study of the law and practice relating to adjudication. Its membership is open to persons whose work, business and/or services are related to the area of law and/or practice relating to adjudication.

We know that under 1981 Agreement between the Government of Malaysia and the AALCO the Malaysian Government agreed to establish a regional centre of commercial arbitration in Kuala Lumpur and to provide the facilities for the establishment and functioning if such a center. At that time it was agreed that in addition to the Director and 3 members of the professional staff, the center would also have 7 junior staff members, including typists, "office boys", a driver and a gardener and all these costs were covered by the Government of Malaysia. However, the number of support staff has grown significantly since that time. To which extend the AIAC is relying on own funding, and which portion of the budget is covered by AALCO and the Malaysian Government?

Yes, our success had fuelled our growth. Last year, we (AIAC) generated about income to cover 40% of our expenditure from case administration, room bookings, courses and events, management of our fixed deposits, etc. The Malaysian Government provides a yearly grant which varies based on our proposed activities and initiatives approved by the Malaysian Cabinet once every three years. The Centre works within the grant and its own generated income. Once the grant comes in, it is mixed with the Centre's own funds. Therefore, the funds are outside the reach of the Malaysian Government and under the supervision of AALCO.

As the Malaysian state was funding the KLRCA for many years, I would assume that there was a procedure in place, by which the KLRCA presented its planned budget to the Government for approval and reported about the spending, is it correct? Or how the procedure looked like?

Unlike Malaysian Government departments, KLRCA/AIAC gets an annual grant, not an annual allocation based on approval by the Cabinet (Council of Ministers) once in three years. By convention, the Attorney General is Chairman of the Centre's Advisory Board. The earlier Attorney Generals were quite hands on. Our once in 3 years budget application will be scrutinised and approved by him. The grant submission prepared on a spread sheet initiative as extracted from our externally audited accounts and projections supported with an explanation of the activities. It is then presented to the Minister's office. The Minister's officers will go through it to confirm that it is in order. The Minister will also direct the relevant department to prepare the Cabinet paper based on the Host Country Agreement. The Minister will present and get approval from the Cabinet. Every year the Centre will submit externally audited accounts with a report of its activities to AALCO and the Government of Malaysia.

We understand that you were accused for criminal breach of trust (CBT) relating to properties in three transactions; RM89,700; RM621,172.50; and RM300,495. What particular is incriminated to you?

I am accused of criminal breach of trust (CBT) relating to the buying of my Law, Practice and Procedure Book based on those three transactions. The three charges relate to the purchase of the said books.

We understand that one of the charges is that KLRCA purchased for further free distribution a number of books "The Law and Practice of Arbitration", which you authored and which was published in 2016. Was this purchase envisaged by the KLRCA budget for the relevant year? Was the audited report for this year presented to the Government and approved by the Government?

The purchase was done as part of KLRCA/AIAC promotion strategy. Both AALCO and the then Attorney General as Chairman of the KLRCA Advisory Board were aware and approved the promotion strategy and budget which included the purchase and distribution of the books related to Malaysian arbitration and the Centre. The reason for choosing my book as it was the main/serious authority which discussed Malaysian law and KLRCA had become an authority much before all this. The book also benefited KLRCA/AIAC in bringing up its brand and name around the world. The audited accounts presented to the Government recorded the purchase of books under the relevant heads.

Did you personally benefit from this transaction (purchase of your book)?

I did not financially benefit from the purchase of the books because payment for the books were made to the publisher. I have waived my entitlement to royalties and even obtained an author's discount for the transactions. The allegation is that I personally benefited from the purchase of the books suggesting that the books have no intrinsic value. AALCO disagrees and has taken the view that the purchase of my book on arbitration from a Malaysian perspective is a valuable contribution both to Malaysia and internationally especially given its recognition as a sound authority on the subject.

I have some difficulty of understanding what is the nature of this personal benefit and how to measure it. Such benefit must be concrete and not abstract such as a potential increase of my reputation as an arbitration specialist. I believe it is not really the case as I was already well known in the world of arbitration before I became Director of KLRCA and the Centre then was insignificant. When I first started on the job, I was the brand and the Centre benefited from it. It is difficult to say when the Centre become detached from my branding. The reason why the Centre has become known is the hard work that was done holistically starting from 2010 when I became Director. The various books that I had written while in the Centre, facilitated the process.

Your arrest was trigged by Malaysian Anti-Corruption Commission (MACC) investigation based on anonymous letter, in which it was alleged that you used public funds to influence ministers to get your term extended. Does MACC still pursue these charges? What is the basis for these allegations?

Yes, my arrest was trigged by Malaysian Anti-Corruption Commission (MACC) investigation based on anonymous letter in that I used public funds to influence ministers to get my term extended. I have identified the persons involved writing of the letter which included my former PA and ex-staff of KLRCA who were encouraged and assisted by some detractors involved in the takeover. MACC has not pursued these charges. I am not sure what is the basis for these allegations. I have explained in my affidavits why it is wrong and that the anonymous letter is baseless and totally false. Perhaps, the rapid success and speed of change in the Centre and my longevity as Director maybe have been construed by some that that I must be doing something extraordinary. Also, it is a way of ensuring that I was removed. The strategy succeeded.

As you, of course, know, many arbitration centers in order to promote them to international arbitration community, fund various activities, including organizing conferences (which could be attended free of charge), distributing hard copies of their rules, various guidelines, and even producing and broadcasting films promoting these institutions. Thus, buying for later free distribution books with the aim to promote arbitration in KL does not strike as something unusual for arbitration institution. Is there is a story behind the scene which was a real reason for all these unfortunate events?

You are correct to observe that many arbitration centres in order to promote them to international arbitration community, fund various activities, including organizing conferences (which could be attended free of charge), distributing hard copies of their rules, various guidelines, and even producing and broadcasting films promoting these institutions. Thus, buying for later free distribution books with the aim to promote arbitration in KL does not strike as something unusual for arbitration institution. I believe the real story is based on the simple fact that success bears envy and jealousy. Also, once something is set up and functioning well, the lazy and powerful will want to take over and enjoy the fruits. It happens in every society and age. The only problem that those who do that have very little regard to the consequences of their action and oblivious to the damage caused to individuals, institution and country. I only pray that now they have taken over, they maintain the momentum and don't let the Centre drift back what it was before 2010.

ARBITRATION IN MALAYSIA

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INTRODUCTION

The importance of the history and origin of arbitration cannot be overstated. Pearl S Buck has stated that "[i]f you want to understand today, you have to search yesterday". An examination of the background presents a platform for understanding the prevalence of certain practices in present-day Malaysia as compared to the position globally.

Similar to the ancient use of the mediation process in China and the panchayat system of village justice in India, the customary method of dispute resolution in Malaysia is associated with adat. It represents an archaic system of dispute resolution practised as customary rites.

The Shariah in Malaya dealt with personal and family law in Malaya and the coastal areas of Borneo. During the fifteenth century, it evolved into Islamic dispute resolution practices like shafa'a and tahkshim. This form of a peremptory type of arbitration used for dispute resolution was part of the long- standing arrangement of resolution of differences in the community.[1]

The Quran, Sunnah (the sayings and practices of Prophet Muhammad), Ijma' (consensus among recognised religious authorities) and Qiyas (inference by precedent) combine to form the Shariah. The Shariah provides a foundation of principles that apply to arbitration as well. Peremptory-like prescription for arbitration can be derived from the Quran and Prophetic traditions.

For example, in the following Quranic verse, arbitration was prescribed as the primary method to resolve a marital dispute:

> ***If you fear a breach between them twain (husband and wife), appoint (two) arbitrators, one from his family and the other from her (family); if they both wish for peace, Allah will cause their reconciliation. Indeed, Allah is ever All-Knower, Well- Acquainted with all things. (Surah al-Nisa' (4):35).***[2]

Arbitration in Islamic Law is limited essentially to property and personal matters where private rights are involved. Parties to a dispute relating to property can go for arbitration. The arbitration agreement has to be fulfilled as a matter of principle. Arbitration clauses are valid as they are necessary for the efficacy of the contract and are beneficial to both the parties.

In Malaya, the origin of the common law legal framework for arbitration as enacted by the dominant colonial power started with the Arbitra-

[1] *See Abdul Hamid El-Ahdab, Arbitration with the Arab Countries, 2nd edn (Kluwer Law International, 1999).*

[2] *Dato Syed Ahmad Idid and Umar A Oseni, "Appointing a Non-Muslim Arbitrator in Tahkim Proceedings: Polemics, Perceptions and Possibilities" [2014] 5 MLJ xvi.*

tion Ordinance XIII 1809 in the British- controlled Straits Settlement of Penang, Malacca and Singapore. Thereafter, all states of the Federation of Malaya adopted the Arbitration Ordinance 1950. This was subsequently replaced by the AA 1952 and later the AA 2005 followed by subsequent amendments in 2011 and 2018.

While arbitration is reflective of the developments in dispute resolution in Malaysia, the growth of other areas of ADR cannot be overlooked. They are indeed equally important. With the world of commerce rapidly innovating at a fast pace, dispute resolution has also had to evolve from dispute avoidance, dispute prevention, dispute management and finally when all fails into dispute resolution.

When arbitration is considered as conventional and rigid, there have been attempts to seek alternatives to it. Normally such ADR methods like mediation, conciliation and adjudication preceding arbitration are used as part of a multi-tiered dispute resolution regime. Such regimes were either set up by way of legislation or through institutional structures.

Even though in the international domain frameworks for domestic legislation are provided by international texts such as the UNCITRAL Model Law on International Commercial Conciliation (2002), this has not been necessarily the case in Malaysia. For example, the Mediation Act 2012 is a mere facilitative legislation without any bite.

Most commercial disputes often resort either to court or to arbitration. Other forms of ADR are gaining popularity. Although the AIAC is the leading arbitral body and ADR provider in Malaysia, it operates in a competitive environment where arbitrations, both domestic and international, and other niche forms of ADR, are also administered by other associations and professional bodies.

They include the Malaysian Institute of Architects ("PAM"), the Institution of Engineers Malaysia ("IEM"), the Institution of Surveyors Malaysia, the Malaysian International Chamber of Commerce, and the Kuala Lumpur and Selangor Chinese Chambers of Commerce, as well as commodity associations like the Malaysia Rubber Board and the Palm Oil Refiners Association of Malaysia ("PORAM").

With the rise in transactions in the capital markets, the Security Industry Dispute Resolution Centre ("SIDREC") was constituted to cater to the needs of disputes related to unit trusts, derivatives and other capital market products. Presently, all capital market intermediaries, which are corporations holding licences under the Capital Markets and Services Act 2007 to deal in securities and futures and engage in fund management, are members of SIDREC. SIDREC offers an evaluative dispute resolution mechanism. It is efficient and effective, based on the principles of fairness and reasonableness.

Another prominent ADR provider in Malaysia is the Financial Mediation Bureau ("FMB"), which was set up under an initiative taken by Bank Negara Malaysia to resolve disputes between financial service providers and their customers. The FMB's jurisdiction is limited to conventional and Islamic banking products and services, as well as insurance and takaful products and services.

Islamic finance, as an alternative to conventional banking, is a growing financial industry, with a unique set of commercial challenges and issues. The different basis and nature of Islamic finance mean that there are far fewer legal experts and judges with the requisite training and knowledge than in conventional finance.

The AIAC emerged as the first institution to constitute "i-Arbitration Rules" to balance the principles of Islamic finance with arbitration. The AIAC's i-Arbitration Rules 2018 are Shariah-compliant and provide for, amongst other provisions, the power for the arbitral tribunal to seek reference from the Shariah Advisory Council or a Shariah Expert.[3]

The rise of sports in Malaysia has seen the emergence of multiple professional and amateur associations being formed to advocate and uphold the interests and well-being of their respective fields. The Sports Law Association of Malaysia which has no restrictions on foreign membership was formed to support the study and practice of sports law.

[3] *See AIAC i-Arbitration Rules 2018, r 11. The Shariah Advisory Council was established in May 1997 as a part of Bank Negara Malaysia. The Central Bank of Malaysia Act 2009 (Act 701) stipulates the roles and functions of the Shariah Advisory Council.*

While the Sports Development Act 1997 was amended in 2018 to provide for a Sports Dispute Committee, the AIAC had been providing sports arbitration training with the attendant aim of encouraging the use of arbitration in sports-related disputes. It has also proposed an Asian Sports Arbitration Tribunal with its own arbitration rules and panel of sports law trained arbitrators to provide sports dispute resolution services.

Malaysia's maritime sector has a well-defined set of domestic and international maritime laws, regulations, standards and practices. However, the increasing complexity of the maritime sector has demanded a system that has a good grasp of the law to enable governments, industry players and other maritime stakeholders to ensure their interests are protected and not be overwhelmed by the vast and complex ecosystem of the maritime sector.

The Malaysian maritime community welcomed the establishment of the International Malaysian Society of Maritime Law ("IMSML") in 2015. The idea of IMSML was mooted and promoted by AIAC, which now provides the premises for the IMSML's secretariat. The eventual aim is to build capacity and provide ADR services for maritime disputes.

Malaysia has introduced statutory adjudication for payment disputes in the construction industry in the form of the Construction Industry Payment and Adjudication Act 2012 ("CIPAA"). It came into force on April 15, 2014. It has been a runaway success. The number of disputes being resolved under the CIPAA has continued to increase year by year.

The CIPAA applies to all construction contracts made in writing after June 22, 2012 including those entered by the Government of Malaysia. The procedure applies to construction contracts, and adjudicators are appointed by the AIAC unless otherwise chosen by the parties.

The adjudicator has 45 working days after the issue of a response to an adjudication claim (or a reply) in order to issue a written decision. The CIPAAhas absorbed the most successful features of adjudication and security of payment legislation that have been enacted around the world.

Mediations are conducted by the FMB, the Malaysian Mediation Centre ("MMC"), the AIAC and the Biro Bantuan Guaman ("BBG"). Not all types of complaints can be referred to the FMB. Only claims involving Islamic banking and financial matters not

exceeding RM100,000, and insurance and takaful product and services, can be referred.

The MMC offers a comprehensive range of services including professional mediation services, training in mediation, accreditation and maintenance of panel mediators, and the provision of consultancy services.

The BBG only provides mediation services for civil and Shariah cases. The Mediation Act 2012 came into force on August 1, 2012, with the main aim of promoting and facilitating the mediation of disputes for settlement in a fair, speedy, and cost-effective manner.

The Mediation Act 2012 does not provide for mandatory mediation. Parties can mediate concurrently with any civil court action or arbitration. The judiciary has set up its own mediation centre to cater for court-annexed mediation as set out in the Chief Justice's Practice Direction.

The AIAC, apart from arbitration, also provides mediation services under the AIAC Mediation Rules 2018. The AIAC Mediation Rules 2018 is a set of procedural rules covering all aspects of the mediation process to help parties resolve their domestic or international disputes.

As part of its improved services, the AIAC has produced the updated Arbitration Rules 2018 with the name change from KLRCA. The Rules are modern and up-to-date. It caters for most types of disputes or differences including investor-State disputes. As a result, it is one of the institutions in the region and globally to model its rules after the IBA Rules for Investor- State Mediation.

One of the more recent developments in ADR is that of Domain Name Dispute Resolution. The Asian Domain Name Dispute Resolution Centre ("ADNDRC") is one of only four providers in the world, and the first and only one located in Asia, to provide dispute resolution services for generic top-level domain names.

The ADNDRC (Kuala Lumpur office) is governed by the Uniform Domain Name Dispute Resolution Policy ("UDRP") and the Uniform Domain Name Dispute Resolution Policy Rules as well as the ADNDRC Domain Name Dispute Supplemental Rules adopted by the ADNDRC.

Only disputes over ".my" country code top-level domain name can be settled through domain name dispute resolution proceedings in Malaysia. This is because only ".my" country code top-level domain names can be registered in Malaysia with the Malaysian Network Information Centre ("MYNIC").

All domain name disputes are governed and administered in accordance with MYNIC's Domain Name Resolution Policy ("MYDRP"), Rules of the MYDRP and the AIAC Supplemental Rules. The Malaysian model of the UDRP is the Malaysian Network Information Centre's Domain Name Dispute Resolution Policy succinctly known as MYDRP. MYDRP was designed by MYNIC together with the Rules of the MYDRP and the Supplemental Rules for the AIAC.

THE DEVELOPMENT OF ARBITRATION LEGISLATION

During the nineteenth century, the English Common Law was introduced in what was then called Malaya. It began in the Straits Settlements of Penang, Malacca and Singapore and spread into the Federated and Unfederated Malay States as English colonial power expanded.

Likewise, the English Common Law followed British privateers and commercial trading companies that colonised the northern states of Borneo of Sarawak and Sabah. Later, the administrations of these states were taken over by the British authorities.

The 1809 ordinance was replaced by the Arbitration Ordinance of 1890. Later in 1950, the Arbitration Ordinance 1950 (No 12 of 1950), which was based on the English Arbitration Act 1889 replaced the Arbitration Ordinance of 1890 for all Malayan states. The Arbitration Ordinance 1950 remained in force after the Declaration of Independence in 1957.

Subsequently, the English Arbitration Act 1950 was adopted by British North Borneo (now known as Sabah) in 1952 as its primary legislation on arbitration. The same was enacted as the Sarawak Ordinance No 5 of 1952. North Borneo (now known as Sabah) and Sarawak were incorporated into the Federation of Malaysia on September 16, 1963. Thereafter, the arbitration laws of Sabah and Sarawak became the backbone of Malaysian arbitration legislation.

This is because, pursuant to the Revision of Laws Act 1968, the Sarawak Ordinance No 5 of 1952 was extended to the rest of Malaysia and became the Malaysian AA 1952. The AA 1952, like its English precursor, was a model of clarity and simplicity. It was the lex arbitri until 2005.

Unfortunately, such longevity in an era of relentless economic change and growth revealed its shortcomings. The AA 1952 failed to maintain its early usefulness as promised by its simplicity and clarity. By the early 2000s, the general view was the need for reform.

The AA 1952 was decried as a product of a bygone era. Complaints arose regarding excessive court supervision which was viewed as a negative interference in the arbitral process (including in case management and the enforcement of the award). The net result was that the interweaving of court processes undermined the arbitral process.

In addition, the 1952 Act itself was deficient in promoting party autonomy, not providing the arbitral tribunal with sufficient powers to carry out its functions effectively. It did not deal sufficiently with interim measures. Its test for the challenge against the arbitral tribunal was couched in terms of misconduct of the arbitral tribunal itself or misconduct in conducting the proceedings.

The notions of equality and due process were implied but not explicitly laid out. The grounds to challenge the arbitral tribunal were not rooted in the notions of justifiable doubts arising out of partiality or the lack of independence. This had to be constructed in the light of the availability of the UNCITRAL Model Law recommended for enactment as an adjunct to the New York Convention.

Malaysia's ratification of the New York Convention in 1985 constituted a milestone in that it became a modern arbitral jurisdiction for the enforcement of foreign arbitral awards. By then, the AA 1952 was an archaic anomaly. This did not dampen the increasing popularity of arbitration as arbitration agreements were being inserted in standard form contracts domestically and in international commercial matters involving transnational arrangements.

In turn, this led to more court applications and the resulting case law while generally, pro-arbitration did regularly throw up decisions which exposed the shortcomings of the AA 1952 for a modern economy. In addition, there were two separate enforcement regimes for domestic and international awards.

In 1978, the AIAC, then known as the Regional Centre for Arbitration, Kuala Lumpur ("RCAKL") was established under the auspices of the Asian-African Legal Consultative Organization ("AALCO"). It was the first regional centre established by AALCO in the Asia Pacific Region to provide institutional support as a neutral and independent venue for the conduct of domestic and international arbitration proceedings.

RCAKL was also established pursuant to a host country agreement with the Government of Malaysia. Being a non- profit, non-governmental and independent international body, interestingly, it was also the first arbitral centre in the world to adopt the UNCITRAL Arbitration Rules 1976.

At this point, it is pertinent to highlight that there was a solitary amendment in 1980 to introduce a new section 34 to the AA 1952, which created an odd divide based on the choice of regime dictated by the arbitration agreement ("1980 Amendment"). Section 34(1) of the AA 1952 stated:

> ***Notwithstanding anything contrary in this Act or in any other written law but subject to subsection (2) in so far as it relates to the enforcement of an award, the provisions of this Act or other written law shall not apply to any arbitration held under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 or under the United Nations Commission on International Trade Law Arbitration Rules 1976 and the Rules of the Regional Centre for Arbitration.***

The 1980 Amendment totally excluded the operation of the AA 1952 and any written law for the two categories of arbitrations named in the section. All other institutional arbitrations, whether conducted under other institutional rules such as HKIAC, SIAC, ICC, and LCIA or conducted ad hoc, remained subject to the full supervisory jurisdiction of the Malaysian courts under the AA 1952. In effect, it re-emphasised the dichotomy between arbitrations

conducted under the Centre and other types of arbitration.

The purpose of the 1980 Amendment was clearly to try to encourage the use of RCAKL by parties who did not want the Malaysian courts to be involved in any form in their arbitral process except for enforcement.[4] There was then no opportunity for any party to invoke the court's jurisdiction, thereby causing delay and escalation of costs. There was no issue regarding interference by the court either in support of or in supervising the arbitral process.

In effect, the statutory exclusion of the AA 1952 under section 34 was based on the choice of arbitration rules provided for in the arbitration agreement. It did not require the parties to agree on the exclusion specifically. It was not only the AA 1952 which was not to apply but also "other written law".

In practice, the court's jurisdiction was totally ousted. In turn, there emerged concerns on whether Malaysian courts could play a supportive role in the arbitral process which was the hallmark of modern arbitral regimes. As it then stood, the courts could not intervene nor assist.

The lacunae were highlighted by situations where the arbitral tribunal did not always possess the powers like the court to ensure the arbitral proceedings were conducted properly and led to a fair and just award. An example of this was the production of witnesses by way of subpoena of the court in aid of arbitration.

This odd divide introduced by section 34 as per the 1980 Amendment did not follow the normal and logical divide between "domestic" and "international" arbitration, it followed the choice of regime in the arbitration agreement.

The decision in Jati Erat Sdn Bhd v City Land Sdn Bhd[5] confirmed that the 1980 Amendment applied to any arbitration held under the then RCAKL Rules regardless of whether the parties were local or international (as compared to the earlier curiously reasoned decision of Syarikat Yean Tat (M) Sdn Bhd v Ahil Bina Pamong Sari Sdn Bhd[6] which seemed to suggest otherwise).

The uncertainty coupled with the anomalous dichotomy away from arbitral regimes in other developed jurisdictions set the stage for a wholesale reform of the arbitral regime itself.

THE ARBITRATION ACT 2005

On December 30, 2005, Parliament enacted the AA 2005 (Act 646) which was based on the UNCITRAL Model Law. The AA 2005 repealed and replaced the AA 1952. It also incorporated provisions of the New York Convention relating to the recognition and enforcement of international awards. The AA 2005 came into force on March 15, 2006.

Thus, since March 15, 2006, all arbitral proceedings have been conducted under the AA 2005 which applies to all arbitrations commenced after its commencement date, including matters relating to the setting aside, recognition and enforcement of awards.

The AA 2005 categorised arbitrations into two types, namely international and domestic arbitrations.

While the AA 2005 applies to both international and domestic arbitrations, Part III of the AA 2005 contains provisions that only apply to all domestic arbitrations. The default position is that Part III does not apply to international arbitrations. The parties will have to by way of an agreement opt-in for Part III to apply to international arbitrations. For domestic arbitrations, the parties can nevertheless agree expressly to opt out of Part III. This is regardless of whichever arbitration rules are involved.

Despite the change in the law, the High Court in Putrajaya Holdings Sdn Bhd v Digital Green Sdn Bhd[7] decided that parties may choose whether to be governed by the previous enactment or the prevailing enactment. Unfortunately, it can be said that this is an example of the court's intervention in arbi-

[4] See PG Lim, "Practice and Procedure under the Rules of the Kuala Lumpur Regional Centre for Arbitration" [1997] 2 MLJ lxxiii.
[5] [2002] 1 CLJ 346.
[6] [1995] 2 AMR 2058; [1995] 5 MLJ 469.
[7] [2008] 3 AMR 177; [2008] 7 MLJ 757.

tration proceedings that appears not to be supportive of the AA 2005.

The facts show that the defendant in Putrajaya Holdings had carried out some works for the plaintiff company, and since the plaintiff defaulted in making payment and owed a debt to the defendant, the defendant commenced winding-up proceedings against the plaintiff, to which the plaintiff objected. The defendant then filed a defence and counterclaim.

There was an arbitration clause in the agreement. The plaintiff sought to stay the court proceedings, as it wanted to proceed to arbitration. Since the arbitration was commenced in 2007, the plaintiff naturally assumed that the AA 2005 would be the governing law. The defendant contended that the matter should be governed by the AA 1952.

The issue before the court was which statute was applicable. The salient issues to be considered were as follows: If the AA 2005 was to apply, then the defendant would not have been able to proceed with its court proceedings, and the matter would have had to go to arbitration. There was no provision under the AA 2005 for the court to set aside the proceedings, or to revoke the power of the arbitrator as provided for in section 25 of the AA 1952.

Under the AA 2005, the court could only stay proceedings if there was no arbitration agreement, or if there was no dispute that could be arbitrated. It appears that the High Court was dissatisfied with the removal of section 25 of the AA 1952 from the AA 2005. The court explained:

> ***The changes in the new 2005 Act is very substantial as it oust [sic] the court's jurisdiction to interfere when the parties agree in writing to refer the dispute to arbitration and there is no similar provision to s 25(2) of the 1952 Act in the new 2005 Act. The defendant shall have not entered into the arbitration agreement with the plaintiff if the defendant were aware that it cannot refer the dispute to the court as provided under s 25(2) of the 1952 Act.***

Although this reasoning seems inconsistent with the provisions of the AA 2005, it is tied back to a translation error perhaps because of misunderstanding or incompetency in translating ability as shown in the Bahasa Malaysia version when compared to the English version. The result was there was a discrepancy between the Bahasa Malaysia version and the English version of the AA 2005 as regards the commencement date.

Unfortunately, the court failed to appreciate that the English version of the AA 2005 was the authoritative text as it was declared so by the then Prime Minister under the National Language Act 1963/67.[8]

An English representation of the Bahasa Malaysia version of section 51(2) of the AA 2005 would read as follows:

> ***Where the arbitration agreement was made or the arbitral proceedings were commenced before the coming into operation of this Act, the law governing the arbitration agreement and the arbitral proceedings shall be the law which would have applied as if this Act had not been enacted.***

The court held that an arbitration even if commenced today, may fall within the ambit of the AA 1952 so long the arbitration agreement was executed before the coming into force of the AA 2005.

However, the approach has been remedied in Majlis Ugama Islam dan Adat Resam Melayu Pahang v Far East Holdings Bhd & Anor,[9] where the court held that although the subject arbitration clause referred to the AA 1952, the applicable legislation was the AA 2005. The ratio is that section 51 of AA 2005 provided for the repeal of the AA 1952.

The enactment of the AA 2005 was a reform which was overdue. The AA 2005 at its original enactment was modelled extensively on the UNCITRAL Model Law and, for the most part, is applicable to both international and domestic arbitrations except for Part III. Although the AA 2005 was based on the UNCITRAL Model Law, the level of court intervention that was maintained by sections 41, 42

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[8] *PU(B) 61/2006; see also Sundra Rajoo, "Law Practice and Procedure of Arbitration – The Arbitration Act 2005 Perspective" [2009] 2 MLJ cxxxvi.*

[9] *[2007] 10 CLJ 318, HC.*

and 43 in Part III was primarily aimed at domestic arbitrations. By so doing, it distinguished international and domestic arbitrations.

Given that it has been more than a decade since the commencement of the AA 2005, the jurisprudence surrounding the legislation has evolved as the courts have interpreted the various provisions of the AA 2005. Also, the AA 2005 was amended in 2011 and 2018. These amendments affect the law and practice of arbitration in Malaysia. This book analyses and comments on the various provisions of the AA 2005 as it stands with all amendments as of May 8, 2018.

THE 2011 AMENDMENTS TO THE ARBITRATION ACT 2005

The Arbitration (Amendment) Bill 2010 was passed as the Arbitration (Amendment) Act 2011 (Act A1395). It came into force on July 1, 2011 ("2011 Amendments").

The amendments dealt largely with areas of ambiguity and inconsistency in the interpretation of the provisions of the AA 2005, bringing the clarity sought by the arbitral community. The 2011 Amendments modified sections 8, 10, 11, 30, 39, 42 and 51 of the AA 2005.

Section 8 was recast to restrict court intervention. The amended section 8 makes it clear that court intervention should be confined to situations specifically covered by the AA 2005. This thus excludes the application of common law or the inherent powers of the court.

The amendment to section 10 removes the court's power to stay arbitration proceedings where the court is satisfied that there is no dispute between the parties with regard to the matters to be referred to arbitration. The old provision placed an undue restriction on the arbitration process which was not contained in the UNCITRAL Model Law or the New York Convention.

In line with Article 8A of the UNCITRAL Model Law, under the current section 10 of the AA 2005 the High Court is under the obligation to refer the parties to arbitration unless the High Court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed. A further amendment was made through the inclusion of sections 10(2A) to 10(2C) to deal specifically with admiralty proceedings.

This amendment enables the court to order that any property arrested, or bail or other security given, is to be retained as security for the satisfaction of any award that may be given in the arbitration proceedings, or to order that a stay of court proceedings be conditional upon equivalent security being provided for the satisfaction of any award that may be given in the arbitration proceedings.

The 2011 Amendments also introduced section 10(4), making it clear, in line with the UNCITRAL Model Law, that the curial powers of the High Court apply not only to Malaysian seated arbitrations but also to foreign seated arbitrations.

Section 11 of the AA 2005 was similarly amended to recognise the court's powers to order interim relief (particularly in admiralty proceedings) and to clarify that those powers applied both to arbitrations seated in Malaysia and elsewhere.

The 2011 Amendments to section 30 dispensed the arbitral tribunal from applying Malaysian law to the merits of the dispute where the parties to the dispute had agreed that the dispute was to be governed by the laws of a jurisdiction other than Malaysia. This amendment removed the mandatory imposition of Malaysian law in domestic arbitrations and upheld party autonomy to choose the substantive law applicable to the dispute.

The 2011 Amendments to section 42 of the AA 2005 imposed an obligation on the court to dismiss a question of law arising out of an arbitral award if the court finds that the question of law does not substantially affect the rights of one or more of the parties. This amendment created a threshold for reference to the High Court for appeals against arbitral awards on a question of law.

It has been found that the section 42(1A) requirement "substantially affects the rights of one or more of the parties" has proved insufficient to restrict the use of the court system by parties to challenge the award issued in domestic arbitration.

In practice, the High Court and the Court of Appeal have valiantly attempted to interpret the scope of section 42 restrictively. However, it was ineffective in reducing litigation in challenging the finality of

arbitration awards through the three tiers of appeal to the High Court, the Court of Appeal and the Federal Court. There have been complaints that domestic arbitration had effectively become the first instance hearing from which all awards can be challenged until the Federal Court.

The Federal Court in Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and Other Appeals[10] decisively confirmed the same by expanding further the scope of matters which can be referred to the High Court pursuant to section 42 of the AA 2005. It essentially meant that every question of law arising out of an award could now be ventilated at and revisited by the courts starting from the High Court and moving up to the Federal Court.

There have been even further suggestions that there existed now the concurrent jurisdiction of the courts to set aside arbitral awards: both under section 37 and section 42.[11] The existence and the exercise of such concurrent jurisdiction undermined the principles of finality of awards and minimum court intervention which underpinned the enactment of the AA 2005.

As such, it was no surprise that, with the support of the Bar Council, various arbitral bodies and business institutions, Parliament dealt with the difficulties by passing the Arbitration (Amendment) (No 2) Act in 2018. It became operative on May 8, 2018.

THE 2018 AMENDMENTS TO THE ARBITATION ACT 2005

In December 2017, Parliament passed the Arbitration (Amendment) (No 1) Act 2018 to change the name of KLRCA to the Asian International Arbitration Centre (AIAC). Parliament later passed the Arbitration (Amendment) (No 2) Act 2018 in April 2018. Both the Amendment Acts received royal assent and came into operation on February 28 and May 8, 2018 respectively ("2018 Amendments")

It is necessary to consider the background to the 2018 Amendments.

Pursuant to the 2018 Amendments, the definition of "arbitral tribunal" in section 2 of the AA 2005 has been amended to include emergency arbitrators. Emergency arbitrator applications have become common practice in international arbitration. This is consonant with Schedule 3 to the AIAC Arbitration Rules and the AIAC i-Arbitration Rules which set out the procedure for emergency arbitrator proceedings.

With these amendments, it is expected that emergency arbitrator proceedings will be made more efficacious as the status of an emergency arbitrator and its orders or awards in relation to emergency relief is now recognised in the AA 2005 itself.

Following the coming into force of the amendments to section 2 of the AA 2005 and the introduction of the new section 19H into the AA 2005, the orders or awards granted by an emergency arbitrator would become enforceable.

Foreign lawyers are allowed under an unrestricted fly in and fly out provision in the Legal Profession Act 1976 to represent parties in arbitrations seated in Malaysia. According to section 37A of the Legal Profession Act 1976 introduced by the Legal Profession (Amendment) Act 2014 that came into force on June 3, 2014:

Sections 36 and 37 [of the Legal Profession Act that does not allow non-Malaysian qualified lawyers to practise] shall not apply to –

- any arbitrator lawfully acting in any arbitral proceedings;
- any person representing any party in arbitral proceedings; or
- any person giving advice, preparing documents and rendering any other assistance in relation to or arising out of arbitral proceedings except for court proceedings arising out of arbitral proceedings.

The 2018 Amendments also introduced a new section 3A into the AA 2005 that provides for parties' freedom to choose any representative, not just a

[10] *[2017] 8 AMR 313; [2018] 1 MLJ 1.*

[11] *See Huawei Technologies (Malaysia) Sdn Bhd v Maxbury Communications Sdn Bhd (Court of Appeal No W-02 (NCVC) (A)-776- 04/2017) and Bijak Teknik Sdn Bhd v Lembaga Pertubuhan Peladang (Court of Appeal No W-02 (NCC)(A)-1429-07/2017).*

Malaysian lawyer or any foreign lawyer, to advise and represent their case in arbitral proceedings.

Such flexibility is necessary for commercial arbitrations. There may be situations where a party would prefer a representative with practical subject-matter expertise or even a foreign lawyer with whom they are more comfortable.

Such foreign representatives would be adept at responding to the queries of the arbitral tribunal. This can provide more choice to the parties when selecting their representative as opposed to appointing someone who is trained in the legal arts but requires the support of an expert witness to address such queries.

Section 3A of the AA 2005 can be considered to have enhanced the concept of party autonomy in arbitration – that is, the generally recognised concept that parties to an arbitration agreement are free to choose for themselves the law (or legal rules) applicable to that agreement. The new section 3A would also allow parties to arbitrations seated in Sabah or Sarawak to be represented by foreign legal practitioners or West Malaysian legal practitioners.

Section 4 of the AA 2005 has also been amended to make it explicit that the question of arbitrability not only requires consideration of public policy but also requires a consideration of whether the subject matter of the dispute is capable of settlement under the laws of Malaysia.

These amendments bring section 4 in line with the New York Convention and section 39 of the AA 2005, according to which the enforcement of an arbitral award may be refused, if the subject matter of a dispute is not capable of being settled by arbitration.

The writing requirement in section 9 of the AA 2005 has been expanded to include arbitration agreements concluded orally or otherwise, provided that the contents are recorded in any form. The definition of writing has also been broadened to include electronic communication.

The inclusion of electronic communications in the definition of written arbitration agreement promotes alternative dispute resolution as a go-to method for parties engaged in the business of electronic commerce (i.e. e-commerce), especially those with businesses in the recently established Malaysian Digital Free Trade Zone.

Historically, powers to order interim measures were reserved to national courts only. However, one of the most important improvements in the 2006 revision of the UNCITRAL Model Law was the introduction of the comprehensive framework for interim measures to balance the powers of arbitral tribunals and national courts and to ensure efficient and effective resolution of disputes.

The 2018 Amendments follow the UNCITRAL Model Law framework by amending sections 11 and 19 of the AA 2005 and adding new sections 19A to 19J. Now, arbitral tribunals will be able to issue the specified interim measures, just as the Malaysian courts are able to do so. However, these changes make it clear that the power of arbitral tribunals cannot and do not exceed the power available to the courts.

To the contrary, the courts retained additional powers to grant interim measures, namely, arrest of property or bail or other security pursuant to the admiralty jurisdiction. This deviation from the UNCITRAL Model Law regime, albeit minor, is of great importance to the development of the Malaysian maritime industry.

The overhauled provisions on interim measures do also deal with the issue of recognition and enforcement of interim measures and provide for safeguards for parties against whom such measures are sought. As noted above, this brings much greater clarity in the enforcement process of interim measures, including those granted by an emergency arbitrator.

Section 30 now follows Article 28 of the UNCITRAL Model Law. This is a significant departure from the former expression of this provision. The wording of the AA 2005 prior to the amendments was restrictive and questioned the parties' right to apply foreign law in arbitration proceedings.

Section 30 now does not distinguish between domestic and international arbitrations. It requires the arbitral tribunal to decide disputes in accordance with the rules of law chosen by the parties to govern the substance of the dispute.

It has become the norm that a party is entitled to be compensated for the loss of opportunity to use money that is not paid in the form of interest (both pre- and post-award).

However, the Federal Court in Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam

Melayu Pahang[12] upheld the Court of Appeal's judgment that the AA 2005 does not empower the arbitral tribunal to give pre-award interest. As such, the right to pre-award interest is restricted to situations where the arbitral tribunal is empowered by the arbitration agreement or by arbitral institution rules.

The amended section 33 of the AA 2005 reinstates the powers of the arbitral tribunal to award interest. It is in line with the law in England, Singapore and Hong Kong.

The arbitral tribunal is now explicitly empowered to award either simple or compound interest at such rate and with such rest as considered appropriate for any period prior to the date of payment of (a) the sum ordered by the arbitral tribunal; (b) the sum in issue before the arbitral tribunal but paid before the date of the award; or (c) costs awarded or ordered by the arbitral tribunal.

The 2018 Amendments have also introduced confidentiality provisions, analogous to Hong Kong's Arbitration Ordinance (Cap 609), through the new sections 41A and 41B.

Finally, and most importantly, the 2018 Amendments have repealed sections 42 and 43 of the AA 2005. The repeal of section 42 of the Act has two important implications.

Firstly, parties will no longer be able to bring questions of law before the High Court after an award has been rendered. Rather, if the parties, or the arbitral tribunal, require clarification on a question of law, they will have recourse to the High Court during arbitral proceedings pursuant to section 41 of the AA 2005.

Secondly, section 37 of the AA 2005 is now the only recourse parties may have in seeking to set aside an award. This is the provision which has been used by Malaysian courts to set aside arbitral awards. The grounds for setting aside an award under section 37 is similar to the grounds under Article 34 of the UNCITRAL Model Law and the relevant provision of the New York Convention.

CONCLUSION

Arbitration in Malaysia is here to stay. The recent developments are indicative of the approach taken by the jurisdiction to address shortcomings, improve the arbitral process and strengthen the finality of arbitral awards.

The 2018 Amendments make Malaysia a safe seat for domestic and international arbitration. Ultimately, it is hoped that more international commercial arbitration will be attracted to Malaysia. Also, it will be more attractive to use arbitration domestically to resolve disputes thereby reducing the case burden in the courts and bringing tangible benefits to the country.

Also, the name change of KLRCA to AIAC is intended to enable the Centre to take a more international approach in offering its services. Given that the arbitral regime has now been overhauled and Malaysia is in tandem with the leading arbitral seats, it is likely that both domestic and international commercial arbitrations will thrive in Malaysia.

[12] *[2017] 8 AMR 313; [2018] 1 MLJ 1.*

ARBITRATION IN MALAYSIA

(from Baker McKenzie International Arbitration Yearbooks for 2017-2019)

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Legislation

Arbitration law in Malaysia is governed by the Arbitration Act 2005 (also the "AA"). This came into force on 15 March 2006, and repealed the outdated Arbitration Act 1952. In a significant departure from its original framework, the AA is modeled on the UNCITRAL Model Law.[1]

Malaysia has also been a signatory to the New York Convention since 1985. The New York Convention was passed into domestic law in Malaysia through the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985. However, the 1985 Act was also repealed on 15 March 2006, as the AA now sets out a uniform procedure for the recognition and enforcement of both local and foreign arbitral awards.

Consistent with the Model Law, the AA distinguishes between domestic and international arbitrations. An "international arbitration" is defined in the same way as it is defined in the Model Law. Unlike Article 1(2) of the Model Law however, Section 3 of the AA provides generally for the application of the Act to domestic and international arbitrations only where the seat of arbitration is in Malaysia, with no exceptions.

In 2008, the High Court had the opportunity to interpret Section 3 of the AA in Aras Jalinan Sdn Bhd v. Tipco Asphalt Public Company Ltd. & Ors.[2] The Aras Jalinan case involved an application by the plaintiff for an interim injunction pending the determination of an arbitration between the parties in Singapore. In opposing this application, the defendants argued that the court had no jurisdiction to grant the orders sought, as the seat of arbitration was in Singapore, citing Sections 3 and 8 of the AA.[3]

The High Court agreed with the defendants and dismissed the plaintiff's application. It held that on a strict construction of Section 3 of the AA, read together with the provision on the restricted extent of court intervention in Section 8 of the AA, the High Court had no inherent or residual powers to intervene in arbitrations where the seat was outside Malaysia. It was also held that such jurisdiction could not be conferred by the agreement of the parties.

The effect of the Aras Jalinan decision, which was approved by the Court of Appeal in an unreported decision, left in serious doubt the ability of the High Court to exercise any powers in aid of arbitrations seated outside Malaysia, including the power to observe Malaysia's treaty obligation to enforce all valid arbitration agreements by ordering a mandatory stay of parallel court proceedings brought in breach of such agreements.

The AA was subsequently amended to address the implications of the Aras Jalinan decision, and other shortcomings of the AA.[4] Key amendments that came into force on 1 July 2011 can be summarized as follows:

1. Clarification of Section 8 of the AA that all sources of jurisdiction of the courts other than the AA itself, including the inherent jurisdiction of the courts, are excluded, to clearly limit the ability of the courts to intervene in matters governed by the AA
2. Inclusion of express provisions in the AA on the application of the powers of the court to grant relief in aid of arbitration under Section 10 of the AA (stay of parallel court proceedings) and Section 11 of the AA (interim measures and other relief) to foreign-seated arbitrations
3. Introduction of specific provisions under Sections 10 and 11 of the AA to govern admiralty disputes in arbitration, such as provisions on the arrest of vessels and the securing of the amount in dispute
4. Removal of the ground that there is no dispute between the parties with regard to the matters to be referred to arbitration, as a reason for refusal to stay parallel court proceedings
5. Reinstatement of party autonomy in choice of governing law clauses for domestic arbi-

[1] *Original 1985 version.*
[2] *[2008] 5 CLJ 654.*
[3] *Section 8 deals with the extent of court intervention in matters governed by the AA.*
[4] *Arbitration (Amendment) Act 2011.*

trations to enable parties to apply laws other than the laws of Malaysia

6. Additional requirement for the reference on questions of law arising out of an award that the question of law substantially affects the rights of one or more of the parties.

The amendments reflected a clear policy decision by all major stakeholders to harmonize Malaysian arbitration laws with that of the international arbitration community in order to promote Malaysia as a regional center for arbitration in the Asia Pacific region.

2018 saw another major amendment made following the Arbitration (Amendment) (No. 2) Act 2018 ("Amendment Act 2018").

The lacuna in respect of pre-award interest (the 2005 Arbitration Act did not empower arbitrators to award pre-award interest, a position confirmed by the Federal Court in case of Far East Holdings Bhd & Anor. v. Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals) was rectified by section 10 of the Amendment Act 2018 such that the arbitral tribunal is now empowered by the act to grant pre- and post-award interest on any sums that are in dispute.

Further changes that the Amendment Act 2018 had introduced to the Arbitration Act 2005 include:

- inclusion of an emergency arbitrator in the arbitral tribunal and recognition of the orders and/or awards granted by an emergency arbitrator (section 2 and new section 19H);
- recognition of parties' right to choose any representative, not limited to just lawyers (new section 3A);
- enhancement of the court's power to not only look at the subject matter of the dispute in the event that the arbitration agreement is contrary to public policy, but also if the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia (section 4);
- clarification of the definition and form of an arbitration agreement, including that an arbitration agreement should be in writing and the recognition of electronic communication (section 9);
- recognition of powers of the High Court and arbitral tribunal to grant interim measures (section 11, section 19 and new sections 19A-19J);
- restoration of parties' right to choose any law or rules of law applicable to the substance of a dispute and recognition of arbitral tribunal's right to decide according to equity and conscience, if expressly authorized by the parties (section 30);
- provisions ensuring confidentiality of arbitration and arbitration-related court proceedings (new sections 41A and 41B);
- reinforcement of principles of minimum court intervention and finality of arbitral awards by repealing sections 42 and 43 of the Arbitration Act 2005.

Major Malaysian Court Decisions on Arbitration Related Matters in 2017-2019

Limited role of the court in arbitration

The most notable Federal Court decision on the Arbitration Act 2005 (also "the Act") in 2016 is Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Berhad.[5] This case concerned an application for a stay of court proceedings under Section 10 of the Act, where the dispute related to a claim for insurance coverage for machinery breakdown and loss of profits due to a temporary shutdown of a plant following a power outage in Sarawak.

The appellant contended that there was no arbitration agreement in the placement slip for insurance coverage and that the dispute as to both liability and quantum of the insurance claim would, in any event, fall outside the scope of the arbitration agreement relied upon by the respondent in the expired policy.

The High Court found that there was a reference in the placement slip to the expired policy that con-

[5] *[2016] 9 CLJ 1.*

tained the arbitration agreement, which satisfied the requirements of an arbitration agreement in writing, and that the claim fell squarely within the ambit of the arbitration agreement.

Section 9(5) of the Act defines the form of arbitration agreements. The Federal Court first dealt with the interpretation of Section 9(5) of the Act in Ajwa For Food Industries Co. (MIGOP), Egypt v. Pacific InterLink Sdn Bhd.[6] It further clarified in the Press Metal case that there is imputed knowledge that the terms of the arbitration agreement in a document referred to in an agreement are binding, as if they were written in the agreement.

In confirming the decision of the High Court and Court of Appeal to stay court proceedings pending arbitration, the Federal Court also usefully restated the following principles:

The court must mandatorily stay court proceedings if the sole requirement of Section 10 of the Act is satisfied, namely that there is an arbitration agreement between the parties that is not null and void or incapable of being performed.

In determining whether to stay court proceedings in favor of arbitration, the court is not concerned with whether there is in existence a dispute between the parties with regard to the matter referred, so long as it is within the scope of the arbitration agreement in order to make it operative.

The Press Metal case is an important one for arbitration law in Malaysia, as the Federal Court applied the following key tenets of internationally recognized arbitration law principles for the first time:

- An arbitration clause ought to be interpreted widely, based on its express terms and the intention of the parties, taking into consideration the commercial reality and the purpose for which the agreement was made and to give effect, so far as the language used by the parties in the arbitration clause would permit, to that purpose.[7]
- The threshold to ascertain the validity of an arbitration agreement and whether the subject matter of a claim falls within its ambit is low, and it is only in the clearest of cases that the court ought to make a ruling on the inapplicability of an arbitration clause.[8]

The decision underscores the pro-arbitration attitude of the judiciary in Malaysia and the welcome consistency and harmonization with international arbitration law. This is important, since it provides certainty and comfort to users choosing Malaysia as a seat of arbitration.

No foreign counsel in arbitration proceedings in Sabah and Sarawak

The concerted efforts to propel Malaysia as an arbitration center saw other developments in 2013, such as the relaxation of immigration requirements for foreign arbitrators entering Malaysia for short periods to conduct hearings, and amendments to the Legal Profession Act 1976 ("LPA").

It had never been an issue for foreign arbitration practitioners in Malaysia with a supportive Bar Council, but amid steps to liberalize the legal profession, restrictions remained that prohibited unlicensed persons from practicing law in Malaysia.[9] The amendments to the LPA expressly excluded the application of such restrictions in the case of:

- Foreign arbitrators
- Any person representing any party in arbitral proceedings
- Any person giving advice, preparing documents and rendering any other assistance arising out of arbitral proceedings in Malaysia[10]

However, the LPA only applies in Peninsular

[6] *[2013] 7 CLJ 18.*
[7] *Fiona Trust & Holding Corporation & Ors v. Privalov & Ors [2007] 4 All ER 951.*
[8] *Tjong Very Sumito & Ors v. Antig Investments Pte Ltd. [2009] SGCA 41.*
[9] *Section 37 Legal Profession Act 1976.*
[10] *Legal Profession (Amendment) Act 2013 (Act 1456) and Legal Profession (Amendment) Act 2012 (Act 1444) which came into effect on 3 June 2014.*

Malaysia and not in the Borneo states of Sabah and Sarawak in Malaysia.[11] Until the issue of whether foreign lawyers could practice as arbitration counsel in Sabah was litigated in In Re Mohamed Azahari Matiasin (Applicant),[12] it was always assumed that there was a uniformity of practice for arbitration throughout Malaysia.

In 2011, Mohamed Azahari bin Matiasin applied to court for a declaration that his client could appoint a co-counsel from Kuala Lumpur for arbitration proceedings in Sabah. The High Court dismissed the application and ruled that only lawyers admitted to the Sabah Bar have the right to represent parties in arbitration proceedings. This was based on its interpretation of provisions in the Sabah Advocates Ordinance 1953, which gave such persons the "exclusive right to practice in Sabah."

On 24 September 2012, the Court of Appeal overturned the High Court's decision and ruled that foreign lawyers can appear in arbitration proceedings conducted in Sabah, without applying for permission to the High Court.[13] However, the Federal Court restored the High Court decision in a landmark unreported decision on 7 December 2015,[14] placing it beyond any doubt that all foreign lawyers, including lawyers from Peninsular Malaysia, are barred from appearing as counsel in arbitration proceedings in Sabah.

Since the corresponding provision in the Sarawak Advocates Ordinance 1953 is in pari materia with Section 8 of the Sabah Advocates Ordinance 1953, the same position also applies in Sarawak. Unless and until there is legislative change in Sabah and Sarawak, arbitration users should be especially circumspect when deciding on the seat and venue of arbitration in Malaysia where a potential dispute may have some connection to Sabah and Sarawak, and expressly exclude Sabah and Sarawak as a seat or venue in order to retain freedom of counsel.

The consideration to set aside an arbitral award

The ambiguous legal position of the grounds to set aside an arbitral award since the Arbitration Act 2005 came into force has finally been settled in the recent Federal Court decision in Far East Holdings Bhd & Anor v. Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals.[15]

This case arose from a domestic arbitration where the arbitral tribunal made an award in favor of the respondent (ie, the claimant in the arbitration) against the appellant (ie, the respondent in the arbitration). Thereafter, the respondent applied for recognition and enforcement of the award, whereas the appellant referred a series of questions of law arising out of the award under Section 42 of the Arbitration Act 2005, one of which is whether the grounds to set aside an arbitral award developed under the previous Arbitration Act 1952 are applicable to Section 42 of the Arbitration Act 2005.

Prior to the Arbitration Act 2005, an award could be set aside on the grounds that (i) the arbitrator has misconducted themselves or the proceedings; or (ii) an arbitration or award has been improperly procured.[16] Nevertheless, the Malaysian common law also accepted the common law ground of "error of law on the face of the award" although there was no such provision made in the previous legislation.[17]

After the coming into force of the Arbitration Act 2005, the application to set aside an award has to be made within 90 days of the date on which the party making the application has received the award

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[11] Sabah and Sarawak joined the Federation of Malaya in 1963 and the Federal Constitution accorded these states certain legislative autonomy and trade protection. The legal profession in Sabah and Sarawak is governed by the Advocates Ordinance 1953 (Sabah Cap. 2) and Advocate Ordinance Sarawak 1953 (Cap. 10) respectively.

[12] [2011] 2 CLJ 630.

[13] Mohamed Azahari bin Matiasin v. GBB Nandy v. Gaanesh & Samsuri Bin Baharuddin & 813 Ors [2013] 7 CLJ 277.

[14] Sabah to Lose Out on Arbitration Business, http://www.dailyexpress.com.my/news.cfm?NewsID=105277

[15] [2017] MLJU 1726.

[16] Section 24(2) of the Arbitration Act 2005.

[17] Shanmugan Paramsothy v. Thiagarajah Pooinpatarsam & ors [2001] 6 MLJ 305

or of the date on which the request to correct or interpret an award is disposed,[18] and that too will only be allowed if one of the prescribed circumstances is fulfilled.[19] The circumstances envisaged are given below for easy reference:[20]

- the party making the application provides proof that:
  - a party to the arbitration agreement was under any incapacity;
  - the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;
  - the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;
  - the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
  - the award contains decisions on matters beyond the scope of the submission to arbitration; or
  - the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

- the High Court finds that:
  - the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or
  - the award is in conflict with the public policy of Malaysia.

Nevertheless, Section 42 of the Arbitration Act 2005 provides that parties may refer to the High Court *"any question of law arising out of an award"* and the High Court can only dismiss such reference *"unless the question of law substantially affects the rights of one or more of the parties,"* where on determination, the High Court may confirm or vary the award, remit the award wholly or partly to arbitral tribunal for reconsideration, or set aside the award wholly or partly.

The Federal Court held that the common law ground of "error of law on the face of the award" and the considerations of "illegality," "manifestly unlawful and unconscionable," "perverse" and "patent injustice" are no longer applicable, and proceeded to hold that the only consideration is whether there is a question of law arising from the award and substantially affecting the rights of one or more of the parties.

The Federal Court also provided a non-exhaustive list of questions which constitute a *"question of law"* under Section 42 of the Arbitration Act 2005, which includes questions as to:

the law in relation to the identification of all material rules of statute and common law, the identification and interpretation of the relevant parts of the contract, and the identification of those facts that must be taken into account when the decision is reached;

- whether the decision of the tribunal was wrong;
- whether there was an erroneous application of law;
- whether the correct application of the law inevitably leads to one answer and the tribunal has given another;
- the correctness of the law applied;
- the correctness of the tests applied;
- the legal effect to be given to an undisputed set of facts;
- whether the tribunal has jurisdiction to determine a particular matter (which may also come under Section 37 of the Arbitration Act (2005); and
- construction of a document.

This non-exhaustive list of questions appears to undermine the finality of an award where a litigant who is dissatisfied with the award may seek to vary or set aside the award by referring the award to the High

[18] *Section 37(4) of the Arbitration Act 2005.*
[19] *Section 37(1) of the Arbitration Act 2005.*
[20] *Section 37(1) of the Arbitration Act 2005.*

Court, so long as there exists a question of law which substantially affects the rights of one or more of the parties.

In hindsight, it may also be a relief to the aggrieved party who obtained an award with some form of error but would not have been able to seek relief under the previous law as the error of law on the face of the award is not such that is "patent and obvious as to render the award manifestly unlawful and unconscionable to subsist."[21]

Be that as it may, Section 42 is only applicable to domestic arbitration unless otherwise agreed by the parties in writing, and will only apply to international arbitration if it is so agreed by the parties in writing.

In 2018 Section 42 of the Malaysia's Arbitration Act 2005 was repealed.

(4) Arbitrator's power to award pre-award interest

The Federal Court in Far East Holdings also held that an arbitrator is only empowered to award post-award interest, as the Arbitration Act 2005 does not contemplate the award of pre-award interest, unless otherwise agreed in the arbitration agreement.

Therefore, it is pertinent to enlarge the power of the arbitral tribunal in the arbitration agreement to include the power to award pre-award interest.

After the Federal Court's decision in Far East Holdings, the KLRCA revised Rule 12(10)(a) of the KLRCA Arbitration Rules to give the arbitrator discretion to award interest for the period between the time when the cause of action arose to the date of realization of the arbitral award, effectively empowering the arbitrator to grant pre-award interest.

However, Rule 12(10)(a) will only be applicable to arbitration agreements which adopt the 2017 revision of the KLRCA Arbitration Rules.

The lacuna in the Act was rectified in 2018 by Section 10 of the Amendment Act 2018 such that the arbitral tribunal is now empowered by the act to grant pre- and post-award interest on any sums that are in dispute.

Definition of International Arbitration

The anomalous decision of the Court of Appeal in *AJWA For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd & Anor*[22] ("AJWA case") on the definition of international arbitration is conclusively determined in the case of *Tan Seri Dato' Seri Vincent Tan Chee Yioun & Anor v. Jan de Nul (Malaysia) Sdn Bhd*[23] ("Jan de Nul case").

The dispute began when Central Malaysian Properties Sdn Bhd ("CMP"), controlled by Tan Seri Vincent Tan, defaulted in its payment to Jan de Nul (Malaysia) Sdn Bhd ("JDN") in respect of a construction project in Johor. As a result, JDN commenced arbitration proceedings against Tan Seri Vincent Tan, who personally guaranteed

the performance of CMP, for the sum due to JDN for the work completed for CMP. Subsequently, CMP and Sofidra (the ultimate holding company of JDN), were added into the arbitration proceedings. CMP counterclaimed against JDN for damages resulting from JDN's breach of contract and negligence in connection with the reclamation failure incident, which had unfortunately resulted in the loss of life. The arbitral tribunal held that JDN had validly terminated the contract, but JDN had also breached the contract which resulted in the reclamation failure incident. The claims of both parties were allowed and were set off against each other, with JDN and Sofidra ordered to pay, jointly and severally, CMP approximately USD 660 million ("Award").

Both parties challenged the Award, applying to refer to questions of law arising out of the Award pursuant to section 42 of the Arbitration Act 2005 ("the Act"). Sofidra and JDN raised preliminary objections that section 42 of the Act is inapplicable in this case as the arbitration between the parties was

[21] *SDA Architects (sued as a firm) v. Metro Millenium Sdn Bhd [2014] 2 MLJ 627*
[22] *[2013] 2 CLJ 395*
[23] *[2018] 1 LNS 1615*

an "international arbitration" within the meaning of section 2 of the Act. section 3(3) of the Act provides that section 42 of the Act (which is contained within part III of the Act) has no application unless the parties had agreed in writing for it to be applicable.

Section 42 of the Act essentially allows for the court's intervention by allowing the parties to refer to the court on questions of law arising out of an arbitral award. The court then had powers to confirm, vary, set aside, or to remit the award to the tribunal for reconsideration.

The counsel for Tan Sri Vincent Tan and CMP had relied on the AJWA case to support their contention that section 42 is applicable. In the AJWA case, the Court of Appeal held that section 42 of the Act is may be relied on if the arbitration agreement is governed by Malaysian law.

The Federal Court, however, reversed the AJWA decision and held that, notwithstanding that the agreement adopts Malaysian law as the governing law of the contract, such cannot be interpreted and equated to an agreement to include part III (and section 42) of the Act.

While this decision clarifies this point of law and ensures certainty, section 42 of the Act had been deleted by the Amendment Act 2018. Currently, the only recourse against an arbitral award is a setting-aside action under section 37 of the Act, which is contained within part II of the Act and will apply irrespective of it being a domestic or international arbitration.

Recourse against arbitral award

The dispute in the Jan de Nul case had also given rise to an appeal by JDN and Sofidra to set aside the Award under section 37 of the Act.

In dismissing JDN and Sofidra's appeal and upholding the decision of both the High Court and the Court of Appeal, the Federal Court affirmed the distinction between a section 37 application and a section 42 application held by the Court of Appeal in *Petronas Penapisan (Melaka) Sdn Bhd. v. Ahmani Sdn Bhd*[24] ("Petronas Penapisan"). In the Petronas Penapisan, it was held that a section 37 application relates to the award making process while a section 42 application relates to the award itself i.e. whether the award contains an error that substantially affects the rights of one or more of the parties.

While the Federal Court declined to comment if the test for the intervention of the court under section 37 of the Act is "one where the award suffers from patent injustice and/or where the award is manifestly unlawful and unconscionable," the court nevertheless explained that the test for intervention that was rejected in the Far East Holdings, i.e. "patent injustice" and "manifestly unlawful and unconscionable," applies only to a section 42 application and not a section 37 application, as the case may be.

In any case, with section 42 of the Act repealed, it is certain that parties may only seek the courts' intervention in very limited circumstances, that is when:

- the limited circumstances under section 37 of the Act are fulfilled;
- the subject matter of the dispute in the event that the arbitration agreement is contrary to public policy; or
- the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia.

[24] *[2016] 3 CLJ 403.*

FIGHTING INTERNATIONAL FRAUD: EVOLVING TOOLS OF ENGLISH COURTS

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The English courts have a powerful arsenal of tools available to assist victims of international fraud, whether domestic or foreign. This article examines the recent practice of the English courts, which shows a continued willingness to provide vital assistance in investigating fraud claims and concealed assets, even when the connection to the UK may be limited.

Freezing orders: the most powerful tool

A freezing order continues to be a fraud victim's "nuclear weapon" (*see article by S. Philippsohn and J. Gould in this section — Arbitration.ru*). It prohibits a person from dealing with or disposing of their assets, save as permitted by the order. It may apply to assets located in England and Wales, or, if those assets are insufficient, the court may grant a "worldwide freezing order" ("WFO").

Freezing orders may be granted in support of court litigation and arbitral proceedings and are available before or after commencement. It is necessary to show, among other things, there is a "real risk" the respondent's assets will be dissipated before judgment is obtained. Often in practice, this is the most difficult requirement to satisfy. However, recent cases suggest that if the underlying claim involves dishonesty, this may go a long way towards satisfying the court there is a risk of dissipation.[1] Freezing orders are therefore a particularly useful tool in fraud cases.

From an international fraud perspective, freezing orders are attractive because English courts may grant them in support of foreign proceedings if the respondent is resident in England or has assets located there. Further, in certain circumstances, the English courts may be willing to grant them in support of foreign proceedings even if the respondent is located abroad and has no assets in the jurisdiction. It will usually be necessary to show some other significant "connecting link" between the subject matter of the freezing order and the territorial jurisdiction of the English court.[2]

However, the recent case *ArcelorMittal USA LLC v Essar Steel Ltd and others* [2019] EWHC 724 (Comm) suggests that, in cases involving international

[1] *See e.g. Solid Property Grundstuck GmbH & Co KG v Singh [2018] EWHC 960 (QB).*
[2] *ICICI Bank UK plc v Diminco NV [2014] EWHC 3124 (Comm).*

fraud, the English courts may be willing to grant a WFO even if the subject matter of the order has only a relatively weak connection with England. The case concerned enforcement of a US $1.3 billion award of a Minnesota-seated ICC tribunal by ArcelorMittal USA (a Delaware company) against Essar Steel (a Mauritian company with no substantial assets in England). As part of its enforcement strategy, ArcelorMittal obtained permission to recognise and enforce the award in England and successfully sought a WFO, a Norwich Pharmacal order and search orders.

In another recent case, *CMOC Sales & Marketing Limited v Persons Unknown* [2018] EWHC 2230 (Comm), it was established that a freezing order may even be granted against "persons unknown". CMOC was the victim of an email account hack involving fake payment instructions to banks and further transfers to accounts around the world. The freezing order was granted even though the applicant could not identify all the relevant banks and account holders. The court also took a novel and pragmatic approach to service of the freezing order, allowing service by WhatsApp, Facebook and an on-line data room.

Asset disclosure orders: show me the money

A freezing order will almost always be accompanied by an asset disclosure order. However, the draconian nature of a freezing order means the courts will not grant one lightly. Victims of fraud should therefore not overlook the English Court's power under Civil Procedure Rights 25.1(1)(g) to order a respondent to disclose information about assets "which may be the subject of an application for a freezing injunction" in the future. The threshold for obtaining such orders is reasonably low, and they can be very helpful for gathering evidence needed to later obtain a freezing order. They can also be an effective way of putting pressure on a defendant who is sensitive about disclosing the nature and location of their assets.

The recent decision of the *Eastern Caribbean Supreme Court in Emmerson International Corporation v Vekselberg and others* (BVIHCM 2013/060, 29 October 2018) confirmed that the threshold for obtaining such an order under the identical provision in its Civil Procedure Rules is materially lower than the threshold for obtaining a freezing order. The decision highlights that provided the information sought is appropriately targeted and the jurisdictional test is satisfied, the balance of convenience will usually weight in favour of granting the asset disclosure order.

Norwich Pharmacal orders: discover the unknown

A Norwich Pharmacal order[3] ("NPO") is perhaps the most effective early stage evidence gathering tool available to parties investigating fraud. It requires a party that has been "*mixed up*" in wrongdoing to disclose information necessary for the applicant to seek legal redress. NPOs are available in support of English court proceedings as well as arbitral proceedings (both foreign and domestic).[4]

NPOs are useful in international fraud cases as provided the respondent to the application is in England, it is irrelevant where the wrongdoer is located. There is some recent case law suggesting the English courts may be willing to grant an NPO even if the respondent is located overseas. In *Sabados v Facebook Ireland* [2018] EWHC 2369 (QB), an NPO was granted against Facebook (domiciled in Ireland) on the basis that the applicant arguably suffered damage in England.

Ancillary relief in support of proprietary claims: follow the money

Under English law, the victims of fraud may often be able to assert a "proprietary claim" against specific assets (for example, if it is possible to trace proceeds of fraud to specific assets). The English courts can grant additional forms of ancillary relief in support of proprietary claims.

The most important is the "proprietary injunction", which freezes assets over which the applicant asserts a proprietary claim. A proprietary

[3] *Norwich Pharmacal v Commissioners of Custom & Excise [1974] UKHL 6.*
[4] *See e.g. Benhurst Finance Ltd v Colliac [2018] 6 WLUK 641.*

injunction is similar to a freezing order, but has two major advantages: first, the merits threshold is lower; and secondly, there is no requirement to prove a risk of dissipation of assets. The importance of this second point was illustrated in the recent case *Anthony McGarahan and another v Dickens Developments UK LLP and others* [2018] EWHC 3589 (QB) in which the court refused to grant a freezing order but was prepared to grant a proprietary injunction, which in this case had materially the same effect.

English Court assistance in aid of arbitral proceedings

Sections 43 and 44 the UK Arbitration Act 1996 also empower English courts to make orders to aid arbitral proceedings, including to secure witness testimony and documents and to preserve evidence. They provide users of arbitration with access to many of the procedural tools available in English litigation. Notably, these orders are not limited to UK-seated arbitration, but relief may be refused in cases of arbitration seated overseas if it is "inappropriate" to make the order.

New powers of UK enforcement agencies

In January 2018, the Criminal Finance Act 2017 created new enforcement tools available to enforcement agencies investigating the proceeds of crime, including Unexplained Wealth Orders ("UWOs"), Interim Freezing Orders and Account Freezing Orders ("AFOs").

Both UWOs and AFOs have recently been granted by the English courts. A UWO was granted against the wife of the former chairman of the International Bank of Azerbaijan who is wanted by the Azeri government on charges of embezzlement[5] (*see article by K. Kroll in the Russian section — Arbitration.ru*). An AFO was granted against the son of the former prime minister of Moldova, who was imprisoned for embezzlement, based on evidence the son's funds were the proceeds of his father's criminal conduct.

Although a private party cannot apply for these orders, they may assist by preventing fraudsters from dissipating the proceeds of fraud or by forcing them to disclose relevant information. It remains to be seen in the coming years whether these tools prove to be materially useful to private parties wishing to bring related civil proceedings.

Conclusion

Under English law there are a wide variety of tools available to assist victims of fraud gather the evidence they need to bring claims and track down and preserve the proceeds of fraud. The English courts are alert to the challenges faced by claimants in international fraud disputes, and they are constantly refining and developing their jurisdiction to grant effective ancillary relief to assist claimants overcome these challenges.

[5] *National Crime Agency v Hajiyeva [2018] 1 W.L.R. 5887.*

THE CURRENT APPROACH OF ENGLISH COURTS TO SUPPORTING INTERNATIONAL FRAUD INVESTIGATIONS

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At the heart of successful fraud litigation is creativity, flexibility and nimbleness. The recent approach of the English courts has further assisted international fraud investigations by adopting new tools and enhancing existing tools to assist with the investigation and recovery of fraudulently obtained assets. A few select examples are outlined below.

The English Court's nuclear and other weapons

Worldwide freezing orders and search orders are often described as the English Court's nuclear weapons in the fight against international fraud. Coupled with an array of disclosure and other orders available, they provide significant support to such cases.

Frequently such orders are obtained without notice to respondents, which brings with it a duty to provide full and frank disclosure and a fair presentation to the Court in the absence of those parties. In one recent £1 billion+ case in which we were involved, the liquidators wished to allege a number of claims in fraud which faced the possibility of becoming time-barred. However, there had not been enough time to investigate matters fully in order to be able to comply with the full and frank disclosure and fair presentation obligations. If the liquidators filed the claims to preserve the position before the limitation period might expire, but without seeking freezing and search order relief, then the respondent might have been tipped off and could have dissipated assets as a result.

The solution was to seek orders allowing to file claims against defendants with the parties' identities temporarily anonymised. This protected the claims from limitation defences and provided time for the liquidators to complete their investigations and satisfy themselves that the duties of full and frank disclosure and fair presentation could be met before applying (successfully) for freezing and search orders in support of the claims following the submission of a wealth of evidence including a 200+ page affidavit. This case therefore highlights the court's willingness to accommodate claimants in fraud cases with flexible solutions.

CMOC v Persons Unknown

In CMOC v Persons Unknown [2018] EWHC 2230 (Comm), the court grappled with a business email compromise fraud. The fraudsters were alleged

to have obtained access to CMOC's email server and simulated payment instructions from one of CMOC's directors to CMOC's bank in London resulting in twenty separate fraudulently induced payments totalling US$6.91 million and €1.27 million. Once discovered, CMOC applied to the English Commercial Court for worldwide freezing orders to freeze the fraudulent payments and a series of disclosure orders against banks to whom the payments had been made to identify the recipient account holders and trace payments onwards where necessary. The English court assisted CMOC by allowing two new approaches.

"Persons Unknown"

Using a consciously novel approach to freezing orders, the court in CMOC drew on a line of emerging authority in the field of publishing and data protection and granted the claimant freezing orders against "Persons Unknown" defined to include (a) those who had perpetrated the fraud, and (b) those who had received the stolen funds, subject to exceptions for those who had received the funds as part of a genuine business transaction.

Armed with the freezing orders, the claimants embarked on an iterative process of identifying recipient bank accounts, obtaining disclosure orders against the recipient banks and adding account-holders as named parties to the litigation. However, the list of recipient banks eventually grew to fifty banks in nineteen jurisdictions as well as thirty named defendants. As a result, the service obligations on the claimant for each additional application became immense.

Service by data room, Whatsapp and Facebook

The claimants therefore proposed, and were granted, orders for alternative service under which recipient banks and named defendants could be served through an online data room. This created enormous efficiencies and saved significant handling and delivery costs. Similarly, the court allowed service by alternative means on certain substantive defendants through both the Facebook Messenger service and Whatsapp. Signalling its flexibility, the court recorded that *"the short point ... is that the court will consider proactively different forms of alternative service where they can be justified in the particular case."*

Jurisdiction developments

The English Commercial Court showed a further willingness to extend jurisdiction in the recent case of ArcelorMittal USA LLC v Essar Steel Limited and others [2019] EWHC 724 (Comm). Here, the applicants sought recognition and enforcement of a £1.3 billion Minnesota arbitral award together with worldwide freezing orders, and search and disclosure orders against the respondents. Significantly, the court granted these orders despite the fact that neither the applicants nor respondents had a connection to England. Nor were the respondents shown to hold any significant assets in the jurisdiction.

The court was persuaded that although the respondents could not be said to have acted fraudulently the freezing orders were justified given the "solid" risk of dissipation of assets and the respondent's history of acting in bad faith to prejudice creditors. The respondents' line of argument boiled down to a suggestion that the English court *"should not become an international policeman, let alone an international detective agency."* However, the court recognised an incumbent willingness to intervene in cases involving "international fraud" and that "international fraud" ought not to be confined to cases where the underlying cause of action is a claim in deceit or a proprietary claim relating to the theft of assets.

Reflecting this expansionist approach, the English Court of Appeal in *Orexim Trading v Mahavir* [2018] EWCA Civ 1660 recognised the Court's power to permit service of a claim under section 423 of the Insolvency Act 1986 in the English Court out of the jurisdiction on foreign defendants. Under these claims a court may set aside a transaction undertaken at undervalue to put assets beyond the reach of creditors.

Setting aside judgments obtained by fraud

In *Takhar v Gracefield Developments Ltd & Ors* [2019] UKSC 13, a claimant had been unsuccessful in a claim against the defendants involving allegations of undue influence and unconscionable conduct relating to property transactions. Several years later, the claimant discovered evidence that suggested that the defendants had forged her signature on documents

relied on by the defendants in the original proceedings. She brought a fresh claim to have the original judgement set aside on the basis it had been obtained by fraud. After successive appeals, the Supreme Court held that where fraud is not in issue in original proceedings, a party should not be expected to test the veracity of documents relied on by the other parties at trial and on that basis set the original judgement aside. As a rule of general public policy, the Supreme Court held litigants should not have to conduct their affairs on the assumption that others would act fraudulently.

Expansion of search order and review jurisdictions

Lastly, the English courts have expanded the scope and effectiveness of search orders in two key respects. Firstly, the Chancery Court in *Abela and others v Baadarani (Third Party: Fakih)* [2017] EWHC 269 (Ch) granted the claimants search orders against third parties against whom no causes of action were pursued. Using materials obtained following third party disclosure orders, the claimant alleged that the third party had assisted the substantive defendant to forge documents and on that basis the court agreed the third parties were legitimate targets for search orders to obtain documents in their possession. This is an important confirmation which parallels the expansion of freezing orders to encompass non cause of action third parties under the *Chabra* jurisdiction. Secondly, in another case in which we were involved, the English court has also assisted a claimant by permitting a search and review of electronic documents stored on defendants' devices without notice to the defendants, as well as orders allowing them to run software programmes to "crack" password-protected documents.

Conclusion

The cases above reveal the English courts' continued willingness to provide flexibility and adjust to the new fast-moving, cross-border realities of fraud and enforcement evasion. Critical to the expansion and enhancement of judicial tools is a carefully crafted and well considered application, in particular when many of these in the fraud litigation world are made without notice to an opposing party and the duty of full and frank disclosure is engaged. Particularly in the cases of alternative service by unusual means or claims involving "Persons Unknown", judges are likely to insist on regular updates and will be heavily influenced by the conduct of the claimant's legal team. Reputation and track-record in the field can therefore be paramount.

INTERNATIONAL OIL AND GAS INDUSTRY DISPUTES

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Editor's note: Doran Doeh has pursued a successful legal career of over 40 years in the UK and Russia and was Senior Counsel in Dentons' Moscow office before returning back to London. He was named "Eminent practitioner in Energy and Natural Resources in Russia" by Chambers Global and Europe 2018. The editorial publishes his submission for Arbitration.ru in two parts due to its particular length. The second part of the article covering disputes relating to M&A/A&D in the industry, oil and gas pricing disputes, disputes over damages, as well as human rights and environmental disputes connected to exploration will be published in the next issue of Arbitration.ru.

This article gives an outline of the kinds of disputes that arise in the international oil and gas industry. The subject is potentially encyclopaedic in scope, so for an article of this kind I have had to be selective. My aim has been to give practitioners in Russia whose main focus is on general commercial practice (who have limited familiarity with activities of the international oil and gas industry), with a general overview of those aspects of the international oil and gas industry where a general practitioner might not be aware of particular issues that commonly arise in the legal affairs of the industry or where the practice of the international industry is materially different from that in Russia.

I have tried to do this in broad generic terms without going into detail or highlighting "latest" developments. Inevitably, this selection of subject matter is to some extent subjective and reflects my own experience and interests. However, in characterizing the areas in which disputes arise, I have kept in mind the topics covered by the joint conference put on the Association of International Petroleum Negotiations (AIPN) and London Court of International Arbitration (LCIA) conference on "Dispute Resolution in the Oil and Gas Business" in London in October 2018 and the similar conference they put on three years earlier. My focus is mainly on upstream – i.e. exploration and production – activities, as well as other related activities (e.g. oil and gas sales).

I have been more discursive with the first two topics - which fall under public international law – because they are likely to be less familiar to the general practitioner and therefore merit greater elucidation. By its nature, public international law is the same in Russia as everywhere else, but unless a practitioner has been engaged in matters involving public international law (or studied it as university) it is likely to be less familiar than the areas normally dealt with in commercial practice.

I would note for Russian readers that the way the international oil and gas industry is structured and regulated in Russia is different from that in many other parts of the world. Each country, of course, has its own laws and legal practices but the way of doing things in the international oil and gas industry has been greatly influenced by US and – especially – UK practice because so many of the global players have been engaged there.

Boundary Disputes between States

Disputes over the land boundaries of states are as old as mankind. Boundaries in western Europe have been stable since the Treaty of Versailles (1919),

while those in central and eastern Europe have been anything but so. Nonetheless, since WW2, the main oil and gas producing regions there have lain in places that are relatively remote from disputed areas. The break-up of the former Soviet Union into new states was relatively peaceful and the main oil and gas producing areas were little affected by disputes over boundaries, although there have been exceptions in Georgia and Crimea. These disputes however have involved major political issues of a kind that go much wider than boundary determination through legal processes. These may, of course, come into play at a future stage if the broader issues are resolved. The area where there have been issues within the former Soviet Union that might be resolved in this way concern the delimitation boundaries within the Caspian Sea, which is problematic because, being wholly enclosed, it is not subject to international public law of the sea (about which, see below) and, on the other hand, the countries concerned have been reluctant to treat it merely as a lake. Nonetheless, they have come to practical resolution (in some cases by bilateral agreements between adjacent states) that has enabled exploitation to take place in areas that would clearly belong to one country or another if a full delimitation were achieved (particularly in areas offshore Kazakhstan, Russia and Azerbaijan) and they may also be well on the way to resolution in the remaining areas.

However, the situation in many other parts of the world – especially the Middle East, Africa and Asia – in many cases have involved legal as well as political processes. In some cases – such as in the Empty Quarter of the Arabian quadrilateral - the boundaries have been ill defined because in the past there was no need to define them and the area was in common use by different tribes. In others, particularly where states have split up or otherwise been separated into different new states, the situation has been more complex. Settling such disputes involves reviewing historical antecedents and usage as well as geography. The situation inevitably becomes more complicated – and focus on the issues more intense – once oil or gas (or other valuable minerals) is found. It is, in practice, possible to exploit such resources without challenge in areas where there is unlikely to be any adverse claim. It is different, of course, where such a claim is likely or active.

In North America, the landward boundaries were settled in the 19th century. However, delimitation of seaward boundaries has been a different matter and initiated the development of public international law described below.

By contrast with the landward situation, the legal regime relating to offshore boundaries – particularly as regards the continental shelf - is relatively new. It began in 1945 when President Truman declared publicly that the United States intended to exploit the natural resources of the continental shelf beneath the seas contiguous to its coasts. The focus was particularly on the Gulf of Mexico, which is very rich in oil and gas deposits. Many nations joined in subsequent-

ly to assert claims in respect of their own continental shelf areas, and it quickly became evident that some sort of resolution was needed which would be effective in public international law. An International Law Commission worked between 1951 and 1958, and the United Nations held its first conference on the law of the sea in Geneva, Switzerland. This resulted in four treaties in 1958 which covered a broad range of public international law issues relating to the law of the sea and together constituted the Convention on the Continental Shelf. It had a high level of adherence amongst the major coastal states (although some registered reservations, i.e. their acceptance was qualified in relation to matters key to them).

The most contentious area concerns the dividing line separating areas of jurisdiction between adjacent or opposite states where the continental shelf is the natural prolongation of the land territory of both states.

The Convention set out principles on determination of baselines, bays, delimitation between states whose coasts are adjacent or face each other, innocent passage and contiguous zone. It also addressed the notion, limits and regime of the continental shelf. Amongst other things it set out the "equidistance-special circumstances" principle as the method of delimitation of boundaries between states in offshore areas. This provides that the boundary between opposite or adjacent states is to be determined along the median or equidistance line between their respective coasts, in the absence of agreement to the contrary or special circumstances justifying another boundary.

Most importantly, in the North Sea Continental Shelf case of 1969 the International Court of Justice in the Hague (ICJ), whose decisions are generally regarded as definitive in this area of public international law, declared that there was a body of customary international law on the continental shelf which is identical in content to Articles 1 and 3 of the Convention. It declined to hold that the equidistance principle contained in Article 6 also held the same status, preferring instead "equitable principles"; but in practice the effect of this approach has been to recognize equidistance as a starting point but to emphasise the importance of special circumstances rather than pure equidistance in arriving at final delimitation. Other decisions followed. Most notable was in the Anglo-French Continental Shelf Case (1997-8), which was not a decision of the ICJ but rather of an ad hoc tribunal whose award was published. The case was complicated due to the number and location of islands (especially the Channel Islands, which are close to the French coast), promontories and other irregularities. The tribunal held that "a lateral equidistance line extending...for long distances may... result in inequitable delimitation by reason of the distorting effect of individual geographical features". In the Libya/Malta Continental Shelf case of 1985, the ICJ applied an "equitable principles/special circumstances" approach which took into account the general configuration of coastlines and proportionality between length of coastline and length of continental shelf, with the result that it established delimitation 18 minutes north of the equidistance line – in effect recognizing the much greater mass of Libya in comparison with Malta.

In legal historical terms this body of law established by the Convention and ICJ decisions was a remarkable achievement in a relatively short period of time.

The Third United Nations Conference on the Law of the Sea between 1973 and 1982 resulted in an even more wide-ranging Convention on the Law of the Sea of 1982 ("UNCLOS") which had an even larger number of adherents, but some significant states – most notably the United States – did not adopt it. Nonetheless, in relation to delimitation of boundaries, UNCLOS reaffirmed the principles in the 1958 Convention and the decisions of the ICJ as reflecting customary international law.

The success of this international law regime is well exemplified by the agreement in 2010 of the Russia-Norway treaty on delimitation and cooperation in the Barents Sea and the Arctic Ocean. It was signed after many decades of negotiations going back into the Soviet period.

It remains to be seen how this will play out in the broader reaches of the Arctic Ocean, where both Russia and Canada have very long coastlines and the United States a relatively short one. In recent years, Russian has been carefully taking steps to lay its claim by asserting its position in relative to the Lomonosov and Mendeleev Ridges in its offshore continental shelf area.

Investor-State Dispute Settlement

Having successfully attracted investment, states sometimes – and from an investor's point of view, far too often - change their minds about the terms that should apply. This has been the experience of many in the petroleum industry over a long period of time. A state trying to attract investment – particularly where no oil or gas has previously been found - may offer an investor very favourable terms which the state (or some key element in it) later regrets. The reasoning before the investor comes in (particularly, but not always, where the population of the state is desperately poor) often is, in effect, that "something is better than nothing" bearing in mind that the state has neither the technical capabilities nor the capital to find petroleum in the ground (whether onshore or offshore) and therefore to do what is necessary to get the interested foreign investors in. It is rarely easy to find oil or gas where none has been found before (even in countries which subsequently prove to have vast and prolific reserves – Iran and Saudi Arabia are a very good examples) so the investor perceives that it is taking very high risks and should be rewarded accordingly. Once the reserves have been proved and developed, all this may be forgotten about, particularly by the government of the state and its population who see "our oil" or "our gas" being produced by foreigners who make a lot of money out of it. Inevitably there are suggestions (or, at least, innuendos) that the clever foreigners with the assistance of their sophisticated international lawyers pulled some sort of "fast one" on the gullible politicians of the state in persuading it to grant the initial terms.

Non-financial aspects may also come into the picture. Environment, health and safety, labour rights and human rights issues can become of great concern and, in some situations, can outweigh the financial side. The imbalance between benefits accruing to the local community and the nation as such can sometimes make the situation very complicated.

This is not only a problem in developing countries – similar situations have arisen in countries as advanced and diverse as the UK and Israel. (The United States, which has had its own powerful domestic industry since the mid-19th century, whilst not so much concerned about foreign investment in its petroleum industry, has nonetheless experienced high tensions between the interests of consumers and producers - and massive domestic anti-trust issues - which continue to this day and, in some ways, may be seen by some as analogous.)

Stabilisation

Over time, investors from the international petroleum industry have developed techniques for protecting themselves. One of the older techniques was the use of "stabilisation" provisions either in legislation or agreements with governments (or both). Stabilisation provisions can take various forms, the most common of which are clauses which attempt to "freeze" the state's legislation so that subsequent changes do not affect the investor, clauses which provide that the state will not nationalise the assets or modify the investment contract without the investor's agreement, economic equilibrium clauses - which provide that the state will maintain the economic equilibrium of the investment and compensate the investor if it is disturbed by e.g. subsequent legislation - and clauses which provide that the burden of changes resulting from subsequent legislation will be borne by the state. Economic equilibrium clauses were particularly common while stabilisation provisions were still fashionable.

The problem with legislative stabilisation is very simple – the state is sovereign, and it is often impossible (particularly in the absence of external pressure from the investor's home state, which may be reluctant to interfere in another state's affairs) to prevent the legislation from being changed subsequently. Contractual stabilisation therefore has been preferred, but the drafting of clauses that will be effective in all possible situations is fraught with difficulty, not least because it is often not possible at the outset to anticipate the circumstances that could give rise to a dispute in future. If a dispute arises over a stabilisation clause therefore, however carefully and thoughtfully the draftsman may have worked in preparing it, the claim is almost inevitably a complex, long and hard-fought one.

For this reason, stabilisation clauses have fallen from fashion as a way of providing long term security for investments in the industry.

PSAs

The industry has tended, in recent years, to focus much more on the form of the grant of rights to exploit petroleum. In Russia, during the Yeltsin years, the international industry was very reluctant to invest under the licencing regime which Russia had adopted to replace that of the Soviet system. Licensing regimes are common in western Europe, so why not in Russia?

The problem with licensing is that it falls under administrative law, under which it is usually much more difficult to bring a claim successfully than under a contract. The industry therefore prefers contractual forms, particularly where the contract provides for a governing law of a state other than the one in which the investment is made (English law being much favoured for this) and international arbitration, which is enforceable under the New York convention. The effectiveness of this was proved in the Libya cases of the 1970s after Libya nationalised the assets of various international oil companies. Although enforcement of awards in Libya itself was not possible, the companies were able to arrest cargoes of oil being exported by Libya and satisfy their claims from the proceeds.

Production sharing agreements (PSAs) in their current form were introduced in Indonesia in the 1960s as a way of giving the state more control and direct participation in petroleum production - in contrast to the more traditional concession agreements which had previously been used in much of the Middle East, Africa, Asia and Latin America. Nonetheless, although the international industry was not happy with the imposition of PSAs at the time, after reflection they took the view that the contractual nature of the relationship under a PSA (particularly if it includes the protections above-indicated) gave them much more protection than under a licence and it became a preferred form of grant of petroleum exploitation rights.

Whereas international companies were willing to live with the uncertainties of licensing in the UK which has a highly respected legal system, they were not willing to take the risk in Russia – at least not until BP struck its highly lucrative deal with TNK, which brought them extensively into the Russian licensing system. The insistence of the other international companies that they would only participate in Russia under PSAs then faded away. PSAs are, nonetheless, still popular with the international industry in other jurisdictions.

ISDS

In recent years, the industry has also focused on the protections available in Investor-State Dispute Settlement (ISDS). ISDS is another relatively newly developed field. Traditionally, if an investor had a claim against a foreign state and felt it could not obtain an adequate remedy in the state's own courts or other domestic processes, it could try to prevail upon its own state to take up the claim as between the two states – state-state-dispute-settlement. Some states would conclude Friendship, Commerce and Navigation treaties to facilitate this. However, in practice, because it was necessary to involve the investor's own state the process was often cumbersome and unsatisfactory both to the investor and the states involved – particularly if the investor's home state was reluctant to get involved in the dispute.

Since the late 1950s, many states have entered in Bilateral Investment Treaties (BITs). These often provide assurances relating to foreign direct investment such as fair and equitable treatment (which limits arbitrary and discriminatory treatment), protection from expropriation, most favoured nation treatment (nationals and companies of the investor country being treated no worse than those from any other country), national treatment (being treated at least as well as nationals of the investee country), free transfer of investment and returns. The most significant feature of BITs for investors is that they enable the investor to have recourse to international arbitration directly against the host state (without having to ask the investor's own state to get involved) through international arbitration (so that the investor does not need to go to the domestic courts of the host state).

The development of ISDS has been managed under the auspices of the Investment Center for the Settlement of Investment Disputes based in Washing-

ton, D.C. (ICSID). The first BIT was signed in November 1959 between Pakistan and the Federal Republic of Germany. There are now over 2,750 BITs.

There are also multinational treaties – such as the Energy Charter Treaty – and free trade agreements – such as the North American Free Trade Agreement (which is also multinational) and, more recently, Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA) – which include similar protections. CETA includes an unusual dispute settlement by setting up a special court to determine disputes.

An investor initiating an arbitration under a BIT or similar treaty usually has choice of doing so under UNCITRAL rules or ICSID rules.

Each BIT is different. Some states have their own standard forms but, in practice, the actual terms after negotiation may depart from the form and it is necessary to look carefully at the BIT applicable to the situation of the investor concerned. Some investors carefully structure their investments through countries with favourable BITs, but it is essential to check the effectiveness particularly if the structure is somewhat artificial.

Since the late 1990s, there has been an explosion of ISDS claims. This has arisen partly because so many treaties have been signed, partly because of the globalization of business and partly because investors see the example of other investors bringing claims.

ISDS claims are often very high profile. Although the arbitrations are subject to confidentiality, news of an important claim often leaks out or is publicised by one side (or both) and, when this happens, it may become controversial. Governments may complain that ISDS inhibits them from instituting or implementing reforms and policies relating to public health, environmental protection, labour rights and human rights. Against this, it is pointed out that investment treaties do not limit a sovereign's right to regulate in the public interest in a fair, reasonable and non-discriminatory matter.

The proliferation of cases and their political high profile has resulted in other criticisms particularly since it has become apparent that claims can be directed against developed country states – e.g. under NAFTA or the Energy Charter Treaty – and particularly have emerged in relation to the negotiations between the EU and countries like the US and Canada (hence the different approach to dispute resolution taken in CETA).

It is sometimes suggested that there is a conspiracy between the arbitrators and the law firms to promote ISDS because they earn large fees from it and therefore the arbitrators (many of whom are also practitioners in law firms) tend to favour investors so as to encourage them to being claims. This is particularly the case where arbitrators also practice as counsel. However, according to the International Bar Association (IBA), states have won a higher percentage of ISDS cases than investors and about a third of cases end in settlement. The IBA has also observed that investors, when successful, recover on average less than half of the amounts claimed and that "only 8 per cent of ISDS proceedings are commenced by very large multinational corporations." It also notes that the practice of awarding costs against the losing party also discourages claims with substance.

Another criticism concerns the transparency of the process. Because arbitrations are confidential and conducted in private, the public do not have access and the press particularly can be irked by this. In practice, however, a great deal of information about ISDS cases of public important is, in practice, made public.

Another concern often expressed is that the arbitrators are private practitioners who may or may not have judicial background and that tribunals do not take account of broader policy concerns in that way that judges would. This may be true of some but not all, and, generally, the arbitrators involved in ISDS cases tend to be highly qualified.

There is also the advantage in most ISDS arbitrations that the tribunal consists of three arbitrators, with each party appointing one and the third determined either by the parties or their appointees or, if they can't agree, by an institution agreed on by the parties. The parties therefore have greater control over the selection of arbitrators than is usual in court proceedings, although this point is often ignored in the debate over the merits of ISDS.

One approach is for the BIT or trade agreement to provide for the establishment of an "investor court" to provide greater accountability and transparency. This was the approach taken in CETA, which has recently been approved by the European Court of Justice as compliant with EU law.

VI ANNUAL ARBITRATION ASSOCIATION'S CONFERENCE

Dmitry Artyukhov
Arbitration.ru
Editor-in-chief

The sixth Annual Arbitration Association Conference was held on 25 April at the Marriott Grand Hotel in Moscow. The number of participants and speakers of the event comprised more than a hundred people.

The Conference was opened by **Vladimir Khvalei**, Chair of the Board of the Arbitration Association. Vladimir ironically mentioned the problems that have only recently existed in Russian arbitration. He paraphrased a popular comedy program on Russian television: "We live in a beautiful country. Only we can create arbitration courts for fictitious debts." He mentioned: "If a tree fades in Russia, everyone will talk about it. If a tree blooms in Russia, no one will write about it." The Arbitration Association is trying to promote Russia as a place of arbitration, and the Association has good arguments for this. The speaker referred to a study of the Arbitration Association, according to which, for example, more than 80% of foreign arbitral awards were executed in Russia from 2008 to 2017. Vladimir reminded the audience that the Prague Rules received the Global Arbitration Review Award for the Best Innovation in 2019.

Denis Novak, Deputy Minister of Justice of the Russian Federation, noted that 2018 was rich with events in arbitration. In particular, amendments to the Law on Arbitration were adopted. Denis mentioned that the legislation has increased the attractiveness of corporate disputes.

In addition, Russia has become more attractive to foreign arbitration institutions. The criteria of the international reputation of foreign arbitration institutions that want to carry out their activities in Russia have been approved. Regular meetings of the Council for the Improvement of Arbitral Procedure have been held, the subject of which was announced to a foreign PAI – the Hong Kong International Arbitration Center (HKIAC).

The powers of the Council over the improvement of arbitration legislation have been expanded – now it is also engaged in the compilation and monitoring of judicial practice in the application of the Law on Arbitration. "In general,

these changes have turned the page in the history of Russian arbitration," said Denis Novak. The speaker also noted that no repressive measures were designed against "healthy" ad hoc arbitration. Denis concluded: "The pro-arbitration turn in the judicial system is happening slowly. We are at the beginning of a long path, and members of the Council are committed to the positive development of arbitration in Russia."

Kathryn Sanger, Advisor to HKIAC, Partner of Herbert Smith Freehills in Hong Kong, talked about the reasons and procedure for submitting applications for permission to bring Russian disputes to foreign PAI. HKIAC is the first foreign institution to receive such permission, according to Sanger. This was preceded by extensive preparatory work: HKIAC representatives participated in 26 events in Moscow, St. Petersburg and Vladivostok and the Center concluded several cooperation agreements with arbitration centers in Russia. In 2017, the Center began working with the Arbitration Association. The number of Russian-speaking arbitrators has increased, now at 35. The HKIAC regulation has also been translated into Russian. HKIAC could also open a representative office in Russia.

After the introduction, **Vasily Rudomino**, co-founder and partner of ALRUD, opened the first session "Arbitration of domestic disputes with a foreign element".

Timur Aitkulov, Partner of Clifford Chance and Member of the Board of the Arbitration Association, gave a brief analysis of the changes in legislation that entered into force on 29 March 2019. The likely goal of changes, according to Timur, is to facilitate the consideration of corporate disputes in Russia (clause 7.1, Article 7 of the Law on Arbitration). He mentioned the new uncertainty that these changes have created. He focused on the still unclear and unresolved amendments. Timur noted that in relation to corporate disputes, there were three categories – disputes generally not transferable to arbitration, disputes in compliance with the four conditions of arbitrability, and disputes, the condition of the arbitrability of which is their administration by PAI. Timur also drew attention to the possibility of dual interpretation of the requirements of an arbitration agreement of participants in a legal entity. He noted that there is still no sufficient judicial practice on

these disputes, and many issues remain unresolved. The speaker paid special attention to the case of Russian-Singapore arbitration.

Professor Kaj Hober, Chair of the Board of the Arbitration Institute of the Stockholm Chamber of Commerce, addressed the issue of the possibility of dealing with internal disputes by foreign arbitrations. Kaj said that in Sweden they do not distinguish between domestic and international arbitration – there is no distinction between the two in the Swedish Arbitration Act of 1929. And such a distinction is unlikely to be made in the future. Abuse in arbitration requires a decision, not by prohibiting the functioning of arbitration courts, but by improving the practice of states which annul dubious decisions. The authorities of state and associations of lawyers should also control the activities of arbitration courts. The very possibility of companies from one country to seek disputes in foreign arbitration is based on the freedom of contract and the autonomy of the parties and is fundamental to commercial turnover, according to the speaker.

Francisco G. Prol, Partner, Prol & Asociados, spoke about Spanish arbitration law, its recent past and present. The speaker briefly focused on the peculiarities of the settlement of disputes in Spain, the procedure for appointing arbitrators and challenging arbitration decisions in state courts. Francisco noted that, due to linguistic and cultural ties, a significant number of users of Spanish arbitration are now parties from Latin American countries. The speaker emphasized the role of Madrid as a Spanish arbitration center.

Susanne Heger, lawyer and founder of Heger & Partners, emphasized that she was speaking on behalf

of the Secretary General of the Vienna International Arbitration Center (VIAC), Alice Fermut-Wolf, and said that the Austrian institution was issuing an updated version of the VIAC Regulation in Russian. Susanne then focused on the criteria for defining internal disputes and their administration in Austria.

In Austrian law, there is no distinction between domestic and national disputes, which determines the criteria – the place of arbitration. This issue is settled by paragraph 577 of the Austrian Code of Civil Procedure (ZPO). According to this code, parties can freely agree on the place of arbitration. In this country, non-arbitrable family disputes, disputes over consumer protection and other disputes may be referred to arbitration. Previously, internal disputes were within the competence of local economic chambers in the federal states of Austria. Now both domestic and international disputes are within competence of the VIAC. In 2018, internal disputes dominated the VIAC. There is no licensing of arbitration institutions in Austria, as Susanne noted.

The moderator of the second session "The Arbitrability of Russian Corporate Disputes" was Stepan Guzey, Partner at Lidings.

Anton Asoskov, Professor of the Department of Civil Law, Faculty of Law, Moscow State University, gave a review of the impact of recent legislative changes on the arbitration of corporate disputes. "Arbitrability of corporate disputes is as confusing as the history of the seven kingdoms in Game of Thrones," the speaker joked. He focused on the rules of corporate arbitration and the problems of their application. Asoskov drew attention to the restriction of arbitrability of disputes for strategic business entities listed in Federal Law No. 57. The speaker also dwelt on the fact that the amendments to Federal Law No. 531, when transferring disputes from corporate contracts to arbitration, eliminated the requirement that all participants in a legal entity agree to arbitration.

Valeria Romanova, Senior Associate at Linklaters, focused on the nature of corporate disputes. Valeria noted that the practice of determining the jurisdiction of price determination cases when buying shares and shares to state and arbitration courts has now begun to take shape. The subject and basis of the claim are more and more carefully considered in their determination. As Valeria mentioned, it would be great

if courts did not proceed from a formal approach, but carefully considered the goals and interests that the party pursues when filing a lawsuit.

Marina Akchurina, a lawyer from Cleary Gottlieb, focused on the practical aspects of applying arbitration clauses. According to Marina, share purchase agreements (SPAs) often include multi-stage arbitration clauses in which whether the arbitration institution received permission on the date of the request for arbitration is tested. Foreign investors indicate the place of arbitration outside of Russia, with the exception of arbitration in the ICAC, a center that imperatively envisages Moscow as the place of arbitration. The place of arbitration for disputes arising from shareholder agreements between Russian parties is imperatively set to Russia, regardless of the choice of the arbitration institution, as Marina explained.

Artem Doudko, Partner in Osborne Clarke, focused on the issues of pre-contractual documentation in English law (Heads of Terms, Memorandum of Understanding), as well as agreements on exclusivity. Artem focused on the role of directors of the company in English law: they all have equal obligations, including nominee directors. Minority shareholders have the right to file a lawsuit against the company when there is an unlawful infringement of their interests and rights, for example, when paying out veiled dividends or when trying to change the company's charter against the will of a minority shareholder. Artem concluded that the protection of the rights of minority shareholders in English law is gradually increasing.

Martin Burkhardt, Partner in Lenz & Staehelin, spoke about the arbitrability of corporate disputes

in Switzerland. The Swiss IPL does not impose restrictions on the transfer of disputes to arbitration, but there are pitfalls. Among them is the consent to arbitration of third parties if they declare their procedural rights to participate in the dispute. In the absence of consent, third parties may declare their right to a fair trial on the basis of paragraph 1, Article 6 ECHR. Burchard gave an example of a case reviewed by the ECHR – Arret Suda c. Republicque Tcheque 1643 (ECHR 1643/06) dated 2009.

Agis Georgiades, Partner in Christos Georgiades & Associates LLC, highlighted the nuances of resolving Russian disputes in the jurisdiction of Cyprus. If the place of arbitration is Russia and the dispute is not arbitrable in the Russian Federation, the arbitral award will be rejected. If the place of arbitration is Cyprus, but Russian law is applied, a Cyprus court will have to analyze Russian law and seek expert advice. Judicial practice on the arbitration of Russian corporate disputes in Cyprus has yet to be determined, according to Agis. The speaker elaborated on Maksimov's case in more detail, which, in the opinion of the lawyer, is likely to be a precedent for Cypriot courts in the scope of recognition of arbitral awards.

Session 3 was moderated by **Pavel Bulatov**, Advisor to White & Case. Pavel noted that public procurement is an attractive niche, given its current volume. However, in public procurement there is a public element, which complicates the possibility of consideration in an arbitration court. Pavel posed the main question: "Forbidden, but after the adoption of the law, it becomes possible [to transfer disputes over public procurement to arbitration]?" He discussed with the speakers how control over the choice of an arbitration institution should be exercised in the absence of antitrust control by the state.

Alexander Zamaziy, Managing Director and Chief of Staff of the Arbitration Center at the Russian Union of Industrialists and Entrepreneurs, said that the non-arbitrability of certain types of disputes, including those indicated in Federal Law No. 223, was given by the Supreme Court in connection with several cases where the procedure for choosing arbitration courts was not transparent.

The procedure for choosing a PAI for consideration of disputes from government contracts is established in the law, and the current law has resolved this problem since it checks the scale and nature of the arbitration center, according to Alexander said. He further iterated that it would be most reasonable to present the right to choose the arbitration institution (or refuse arbitral proceedings in favor of litigation) to the parties.

Answering the moderator's questions about the openness of disputes with a public element, the speaker noted that if the agreement of the parties or the law explicitly establishes the requirements for openness of the proceedings, the Arbitration Center of the Russian Union of Industrialists and Entrepreneurs should follow them.

Ivan Urzhumov, Adviser in Foley Hoag, spoke about disputes from administrative contracts in France. Arbitrability depends on whether the dispute is an internal or complicated foreign element. For internal disputes, persons under public law are prohibited from entering into arbitration clauses. A number of exceptions are provided for in the Public Procurement Code. It also provides for exceptions in the field of scientific and technical activities and transportation. Ivan gave examples of relevant cases. He also gave examples when government contracts provided for the transfer of disputes to arbitration, for example, in the construction of the Louvre analogue in Abu Dhabi. In France, the competence to review arbitral awards lies with the courts of law and administrative courts.

Alexander Bezborodov, Partner at BEITEN BURKHARDT, drew the audience's attention to a special code of administrative proceedings and the German Civil Procedure Code (ZPO), which reinforce the general arbitrability of public procurement

disputes. Labor, patent and employment disputes are exceptions to the general arbitration rule. Alexander gave an example of the case of Toll Collect GmbH against the German government, which became known from WikiLeaks. Consideration of the dispute by an ad hoc tribunal took 14 years. The amount of compensation and the opacity of the case sparked criticism from the country's parliament. Now in Germany, discussions are underway about the need to make disputes arising out of public contracts public.

Session 4 "Bla-bla-blyka: Short discussions from the floor" was held by **Vladimir Khvalei**. He introduced the speakers and briefly spoke about the role of working groups in the Arbitration Association, inviting participants to join the working groups.

Ilya Rachkov, Partner at Nektorov, Saveliev and Partners, held a short discussion on "The fate of investment disputes involving Russia." Ilya suggested the audience think over a case of a Russian bank, which was owned by the main beneficiary through a Swiss company, and the banking license was withdrawn by the State. Professor Kai Hober commented on the situation and turned to the concept of indirect expropriation.

Dmitry Ivanov, Partner at Morgan Lewis, highlighted the topic "Data protection in arbitration: Key issues." The speaker said that disclosure of the parties in the process may be necessary, but risky. There are currently several data protection initiatives in place: GDPR, as well as the ICCA and IBA initiatives. Penalties for breaking the GDPR amount to EUR 20 million. Dmitry also drew attention to the confidentiality limits in English law.

Sergey Usoskin, Attorney, Partner at Double Bridge Law, spoke about what actions state courts interpret as acceptance of jurisdiction by the parties in the discussion "Tendencies in the practice of Russian courts in relation to arbitration." Sergey's colleague in the Arbitration Association working group, Mikhail Kalinin, drew attention to the decision in the Tatneft case. Oleg Todua briefly outlined the role of pre-trial procedures and the observance of the complaints procedure if this issue has already been considered by the arbitrators. During the session, Anton Alifanov focused on the role of Rosfinmonitoring in the enforcement of arbitral awards: this government body can counteract enforcement alongside the opposing party and the court, when its experts indicate that the execution of the award may be contrary to public order.

Andrey Kostitsyn, AdHoc Arbitration, moderated the discussion on the fate of ad hoc arbitration and compared the number of warrants granted by Russian courts since the beginning of 2019 for ad hoc and permanent arbitrations institutions' awards: 19 warrants were issued for arbitration institutions awards, while for ad hoc awards, 55 warrants were granted. As Andrey iterated, this comparison suggests that ad hoc arbitration exists in Russia, but they are afraid to promote it. He further said that it is necessary to develop ad hoc arbitration together.

The discussion "Mediation: The patient is more alive than dead" was conducted by **Irina Suspitsyna**, foreign economic activity lawyer in Miratorg Agribusiness Holding. Maxim Zhukov, lawyer of the Belarusian law firm SBH, noted that the Ministry of Justice of the Republic of Belarus is trying to popularize mediation. According to Maxim, resorting to mediation in Belarus is possible only in the preparatory court session. Irina Butalova, a representative of the Moscow Center for Mediation and Law, gave a practical example of mediation between an oil company and contractors resolved through mediation.

The Sixth Annual Arbitration Association Conference ended with an informal discussion of participants in the lobby of the Marriott Grand Hotel. The event received very positive reviews from guests and speakers.

ОБЗОР СУДЕБНЫХ РЕШЕНИЙ РФ

Наталья Кислякова
юрист АБ «КИАП», Москва

ГОСУДАРСТВЕННЫЙ СУД УКАЗАЛ НА КОМПЕТЕНЦИЮ АРБИТРАЖА В ВОПРОСАХ ОТВОДА АРБИТРА

Номер дела в государственном суде: *А40-24550/2019.*

Стороны спора:
Magneco/Metrel UK Ltd (Великобритания) – заявитель в государственном суде;
ОАО «СВЕТ» (Россия) – заинтересованное лицо в государственном суде.

Разрешавший спор третейский суд: *МКАС при ТПП РФ.*

Представители сторон в третейском суде: *Н/д.*

Арбитр: *Д. З. Аиткулов.*

Представители сторон в государственном суде:
Magneco/Metrel UK Ltd: Д. А. Васильев, А. Ю. Литвинов, Ю. Б. Фогельсон.
ОАО «СВЕТ»: И. А. Цветкова, А. Л. Стефановский.

Судья, вынесший решение в государственном суде:
А. А. Федоточкин.

Производитель промышленных материалов из Великобритании Magneco/Metrel UK Ltd обратился в Арбитражный суд г. Москвы с заявлением о содействии в отводе третейского судьи Международного коммерческого арбитражного суда при Торгово-промышленной палате Российской Федерации Д. З. Аиткулова по делу № М-118/2018.

Суд рассмотрел заявление о содействии в отводе третейского судьи и не нашел процессуальных оснований для удовлетворения заявления об отводе. Суд посчитал, что в данном случае должна быть предпринята попытка отвода арбитра в порядке, предусмотренном Законом о МКА и Правилами МКАС при ТПП РФ. В соответствии с применимыми нормами функции по отводу должен осуществлять председатель ТПП, и только если заявление об отводе арбитра им не удовлетворено, сторона, заявляющая отвод, может в течение одного месяца со дня получения уведомления о решении об отклонении отвода подать заявление в государственный суд об удовлетворении отвода.

Суд не нашел правовых оснований для удовлетворения заявления Magneco/Metrel UK Ltd о содействии в отводе третейского судьи МКАС Д. З. Аиткулова по делу № М-118/2018 Международного коммерческого арбитражного суда при ТПП РФ (МКАС) по иску ОАО «СВЕТ» к Magneco/Metrel UK Ltd о взыскании денежных средств.

СТОРОНА В АРБИТРАЖЕ ИЗВЕЩЕНА НЕНАДЛЕЖАЩИМ ОБРАЗОМ, СУД ОТКАЗАЛСЯ ИСПОЛНИТЬ РЕШЕНИЕ

Номера дел в государственном суде:
А40-217053/2018 и А40-217058/2018.

Стороны спора:
Международная торговая компания с ограниченной ответственностью «Чжунлянь» / «Чжунлянь Чжункэ» (Китай) – заявитель в государственном суде;
ЗАО «АРМ-АВТО» (Россия)– заинтересованное лицо в государственном суде.

Разрешавший спор третейский суд:
CIETAC (China International Economic and Trade Arbitration Commission – Арбитражный суд Китайской международной экономической и торговой арбитражной комиссии).

Представители сторон в третейском суде:
Н/д.

Арбитры:
Н/д.

Представители сторон в государственном суде:
«Чжунлянь» / «Чжунлянь Чжункэ»: Д. В. Нуржинский, А. Д. Шишова.
ЗАО «АРМ-АВТО»: Д. Н. Скопкарева, В. В. Рожков.

Судья, вынесший решение в государственном суде:
С. В. Подгорная.

На рассмотрение Арбитражного суда г. Москвы были переданы два заявления: международной торговой компании с ограниченной ответственностью «Чжунлянь Чжункэ» и международной торговой компании с ограниченной ответственностью «Чжунлянь». Заявления о признании и приведении в исполнение двух решений Арбитражного суда Китайской международной экономической и торговой арбитражной комиссии (по делам № M20161453 и M20161291) рассматривались в рамках двух различных производств, но в один день, одним и тем же судьей, с участием одних и тех же представителей. Потому в рамках анализа мы объединили оба дела в один обзор. Примечательно, что в делах также принимала участие Федеральная служба по финансовому мониторингу.

Оба арбитражных решения CIETAC касались спора, возникшего из ненадлежащего исполнения заключенных договоров купли-продажи. Решения были вынесены в пользу китайской компании, при этом споры были рассмотрены в отсутствие ЗАО «АРМ-АВТО». Уведомление происходило посредством службы доставки EMS, однако, как следовало из доказательств, извещения были направлены по неверному

адресу (не тому, который был указан в преамбулах договоров и в ЕГРЮЛ), на почтовых накладных в графе «Получатель» не было подписи получателя.

Суд отказал в приведении в исполнение двух решений Арбитражного суда Китайской международной экономической и торговой арбитражной комиссии в связи с ненадлежащим извещением.

ПРИ ЗАМЕНЕ ГЕНПОДРЯДЧИКА ТРЕТЕЙСКАЯ ОГОВОРКА СОХРАНИЛА ДЕЙСТВИЕ, ТЯЖЕЛОЕ ФИНАНСОВОЕ ПОЛОЖЕНИЕ СТОРОНЫ НЕ ПРЕПЯТСТВУЕТ РАССМОТРЕНИЮ ДЕЛА В ТРЕТЕЙСКОМ СУДЕ. ЗАЯВЛЕНИЯ ПО СУЩЕСТВУ СПОРА, ВЫСКАЗАННЫЕ ДО ВОЗРАЖЕНИЙ ПО КОМПЕТЕНЦИИ, ИМЕЮТ СИЛУ, ТОЛЬКО ЕСЛИ ОНИ СДЕЛАНЫ УПОЛНОМОЧЕННЫМ ЛИЦОМ

Номер дела в государственном суде: *А82-20226/2018.*

Стороны спора:
ООО «Хэйлунцзянская Компания «Энерго Строй» (Россия) – истец, заявитель в государственном суде;
ООО «Хуадянь-Тенинская ТЭЦ» (Россия) – ответчик, заинтересованное лицо в государственном суде.

Согласованный сторонами третейский суд:
МКАС при ТПП РФ (ранее – Третейский суд для разрешения экономических споров при ТПП РФ).

Представители сторон в третейском суде: *Н/д.*

Арбитры: *Н/д.*

Представители сторон в государственном суде:
ООО «Хэйлунцзянская Компания «Энерго Строй»: н/д.
ООО «Хуадянь-Тенинская ТЭЦ»: С. И. Бабенко.

Судьи, вынесшие решение в государственном суде:
Первая инстанция: И. М. Лапочкина.
Апелляционная инстанция: С. Г. Полякова (председательствующий судья), Л. Н. Горев, Л. Г. Малых.

Общество с ограниченной ответственностью «Хэйлунцзянская Компания "Энерго Строй"» обратилось в арбитражный суд с исковым заявлением к обществу с ограниченной ответственностью «Хуадянь-Тенинская ТЭЦ». Ответчик настаивал на оставлении заявления без рассмотрения на основании ст. 148 АПК РФ ввиду наличия третейской оговорки. Истец же ссылался на то, что:

- третейская оговорка ничтожна, так как третейский суд, указанный в договоре, ликвидирован;
- третейская оговорка утратила силу в связи с заменой генподрядчика по договору;
- третейская оговорка неисполнима ввиду трудного финансового положения истца (наложение ареста на денежные средства, а также подача заявления о признании его банкротом);
- ответчик утратил право ссылаться на третейскую оговорку ввиду заявления встречного иска в государственный суд, а не в третейский суд.

Определением от 21 января 2019 года исковое заявление оставлено без рассмотрения, суд апелляционной инстанции постановлением от 19 марта 2019 года оставил данное определение в силе. Суд мотивировал это следующим:

- функции ликвидированного третейского суда перешли МКАС при ТПП РФ в порядке правопреемства;
- ООО «Хэйлунцзянская Компания «Энерго Строй» приняло на себя весь комплекс прав и обязанностей предыдущего генподрядчика по договору без исключения, в том числе и третейскую оговорку;
- наложение ареста на денежные средства истца, а также подача заявления о признании его несостоятельным (банкротом) сами по себе не свидетельствуют о неисполнимости третейского соглашения. Указанный вывод согласуется с позицией, изложенной в определениях Верховного суда Российской Федерации от 19 марта 2015 года № 302-ЭС15-1082 и от 29 сентября 2016 года № 307-ЭС16-12344. Истец не представил доказательств обращения в соответствующий третейский суд и отказа третейского суда в принятии заявления;
- встречный иск был заявлен неправомочным лицом.

На наш взгляд, здесь можно сделать ряд важных выводов.

Во-первых, судом дана широкая интерпретация процессуального правопреемства (замена генподрядчика влечет передачу прав по третейской оговорке).

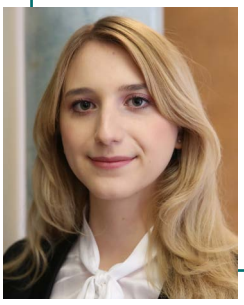
Во-вторых, суд подтвердил, что даже состояние банкротства не влияет на исполнимость оговорки (что крайне актуально для российской действительности).

В-третьих, суд заявил свою позицию относительно пределов утраты права ссылаться на третейскую оговорку ввиду заявления возражений по существу. По общему правилу, если сторона до заявления возражений о наличии третейской оговорки выскажет позицию по существу спора, она тем самым соглашается с юрисдикций государственного суда. В настоящем деле ответчиком был заявлен встречный иск, однако он был подписан неуполномоченным лицом. Таким образом, мы находим подтверждение вполне ожидаемого вывода: заявления неуполномоченных лиц по существу спора, высказанные до возражений по юрисдикции, не влияют на последствия такого оспаривания юрисдикции государственного суда.

В-четвертых, оговорки, заключенные даже задолго до условного «рубежа» третейской реформы 2016 года (а из обстоятельств дела следует, что договор между сторонами датирован 2012 годом), могут быть исполнимы. В данном случае факт того, что МКАС при ТПП РФ является правопреемником Третейского суда для разрешения экономических споров при ТПП РФ, прямо следует из Положения о МКАС при ТПП РФ.

KIAP | Korelskiy Ischuk Astafiev

СВЯЗЬ СО СТРАТЕГИЧЕСКИМ ПРЕДПРИЯТИЕМ – ИММУНИТЕТ ОТ ИСПОЛНЕНИЯ АРБИТРАЖНОГО РЕШЕНИЯ?



Анна Рязанова
стажер Baker McKenzie, Москва

Номер дела в государственном суде: *A40-117331/2018.*

Стороны спора:
Banwell International Limited – заявитель в государственном суде, истец в третейском суде;
АО «Росшельф» – заинтересованное лицо в государственном суде, ответчик в третейском суде;
ИФНС № 3 по г. Москве, Федеральная служба по финансовому мониторингу – третьи лица.

Разрешавший спор третейский суд:
Лондонский международный третейский суд (LCIA).

Представители сторон в третейском суде: *Н/д.*

Арбитры:
Дж. Берн (председательствующий арбитр), О. Баглай, К. Бланшард.

Представители сторон в государственном суде:
Banwell International Limited: М. Тугельбаев.
АО «РОСШЕЛЬФ»: н/д.

Судья, вынесший определение об отказе в признании и приведении в исполнение:
А. Г. Авагимян.

Суд кассационной инстанции:
Н. Ю. Дунаева (председательствующий судья), С. В. Нечаев, Е. А. Петрова.

Судья Верховного суда РФ:
Н. В. Павлова.

23 апреля 2019 года Верховный суд РФ отказал в передаче в Судебную коллегию по экономическим спорам кассационной жалобы компании Banwell International Limited (далее – компания Banwell)[1] по делу № А40-117331/2018[2]. Верховный суд подтвердил позицию нижестоящих судов о том, что признание и приведение в исполнение иностранного арбитражного решения, которое вынесено в отношении дочернего общества стратегического предприятия и направлено на взыскание имущества дочернего общества стратегического предприятия, противоречит публичному порядку РФ.

Данное дело касалось признания и приведения в исполнение арбитражного решения, вынесенного Лондонским международным третейским судом (LCIA) в апреле 2018 года в пользу компании Banwell по иску к АО «Росшельф»[3].

В своем решении LCIA подтвердил право компании Banwell обратить взыскание на обеспечение акциями АО «Судостроительный завод "Лотос"» по соглашению о залоге акций, а также обязал АО «Росшельф» возместить расходы на проведение арбитражного разбирательства в размере 38 339,39 фунта стерлингов.

Суд первой инстанции удовлетворил требование компании Banwell о приведении в исполнение арбитражного решения[4]. Однако ФАС МО отменил решение суда первой инстанции и отправил его на новое рассмотрение[5].

Ранее в российской судебной практике уже были случаи, когда суды объясняли отказ в признании и приведении в исполнение решения среди прочего наличием у стороны спора статуса стратегического предприятия[6]. Тем не менее впоследствии российские суды отошли от этой позиции. Так, компании MacDonald, Dettwiler and Associates удалось признать и привести в исполнение решение Международной торговой палаты по спору о взыскании задолженности с ФГУП Ордена Трудового Красного Знамени НИИ радио, которое является стратегическим[7].

Однако дело № А40-117331/2018 отличается от упомянутых, поскольку сторона спора – АО «Росшельф» – не обладает статусом стратегического предприятия, а сам спор имеет корпоративную природу.

При новом рассмотрении дела Арбитражный суд г. Москвы отказал в признании и приведении в исполнение арбитражного решения на основе п. «b» ч. 2 ст. V Нью-Йоркской конвенции 1958 года и п. 2 ч. 4 ст. 239 АПК РФ (противоречие признания и приведения в исполнение решения публичному порядку РФ).

По мнению суда, противоречие публичному порядку РФ выражается в двух обстоятельствах:

- конечным бенефициаром АО «Росшельф» является Российская Федерация. АО «Росшельф» входит в состав холдинга «Объединенная судостроительная корпорация» (АО «ОСК»). При

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[1] Компания зарегистрирована на Британских Виргинских островах. Предмет иска компании к АО «Росшельф» – обращение взыскания на заложенные акции. Требование компании было основано на соглашении о залоге акций от 2008 года.

[2] Определение Верховного суда РФ от 23 апреля 2019 года № 305-ЭС18-20885 по делу № А40-117331/18.

[3] По данным ЕГРЮЛ, 99,8% акций АО «Росшельф» владеет кипрская компания CNRG Investment Limited. АО «Росшельф» занимается консультированием по вопросам коммерческой деятельности и управления, а также строительством кораблей, судов и плавучих конструкций.

[4] Определение Арбитражного суда г. Москвы от 21 ноября 2018 года по делу № А40-117331/18.

[5] Постановление Арбитражного суда Московского округа от 4 октября 2018 года по делу № А40-117331/18.

[6] См. постановление ФАС Волго-Вятского округа от 17 февраля 2003 года по делу № А43-10716/02-27-10исп. По мнению суда, в данном деле выплата стратегическим предприятием «Красный Якорь» присужденных сумм могло привести к его банкротству, что негативно отразилось бы на социально-экономическом положении Нижнего Новгорода, Нижегородской области и Российской Федерации в целом.

[7] Определение Арбитражного суда г. Москвы от 11 сентября 2018 года по делу № А40-148306/2018. ФГУП Ордена Трудового Красного Знамени НИИ радио обжаловало данное определение, но в итоге дело завершилось заключением сторонами мирового соглашения, в котором содержалось условие о погашении задолженности. См. определение Арбитражного суда г. Москвы об утверждении мирового соглашения от 5 февраля 2019 года по делу № А40-148306/2018.

этом АО «ОСК» является стратегическим предприятием, акциями которого владеет Российская Федерация[8];

- согласно арбитражному решению предметом взыскания являются акции АО «ССЗ “Лотос”», которое также входит в АО «ОСК». Следовательно, конечным бенефициаром АО «ССЗ “Лотос”» является Российская Федерация. Суд заключил, что исполнение арбитражного решения приведет к выводу денежных средств на счета иностранных компаний, что может нанести ущерб федеральному бюджету.

Далее суд указал правовое обоснование вывода о невозможности признания и приведения в исполнение арбитражного решения по мотивам публичного порядка. Публичный порядок РФ составляют фундаментальные правовые начала (принципы), которые обладают высшей императивностью, универсальностью, особой общественной и публичной значимостью, составляют основу построения экономической, политической, правовой системы государства[9]. Далее суд констатировал, что в состав публичного порядка РФ входят положения Конституции РФ, а также основные начала гражданского законодательства.

В подтверждение своей позиции суд сослался на следующие нормы законодательства:

- основные начала гражданского законодательства, закрепленные в ст. 1 ГК РФ (равенство участников гражданских правоотношений, свободы договора и т.д.);
- запрет на совершение действий в обход закона с противоправной целью, установленный в ч. 1 ст. 10 ГК РФ (один из пределов осуществления гражданских прав);
- ч. 1 ст. 3 Налогового кодекса РФ, согласно которой каждое лицо должно уплачивать законно установленные налоги и сборы.

Однако суд не пояснил, в чем именно проявляется нарушение этих принципов при исполнении решения, вынесенного против дочернего общества стратегического предприятия. Можно лишь предположить, что в данном случае исполнение арбитражного решения приведет к нарушению налоговой обязанности в обход закона. Однако остается неясным, как обращение взыскания на акции российского общества и уплата арбитражных расходов могут привести к подобному результату. Тем не менее суд признал нарушение публичного порядка и отказал в приведении в исполнение иностранного арбитражного решения по делу № А40-117331/18.

Компания Banwell обжаловала определение арбитражного суда, ссылаясь на неправильное применение норм права и несоответствие выводов суда фактическим обстоятельствам дела. В частности, компания указывала на неверное определение судом акционеров и бенефициаров АО «Росшельф». Однако Арбитражный суд Московского округа и Верховный суд РФ посчитали, что доводы компании направлены на переоценку обстоятельств, установленных судом первой инстанции, и оставили определение в силе[10]. Таким образом, суды признали, что приведение в исполнение арбитражного решения, в рамках которого взыскание обращается на имущество дочернего общества стратегического предприятия, противоречит публичному порядку, поскольку оно осуществляется в обход закона и может нанести ущерб Российской Федерации.

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[8] Стратегическим предприятием является акционерное общество, акции которого находятся в федеральной собственности, а участие РФ в управлении этим обществом обеспечивает стратегические интересы, обороноспособность и безопасность государства, защиту нравственности, здоровья, прав и законных интересов граждан РФ. См. указ Президента РФ от 4 августа 2004 года № 1009 «Об утверждении Перечня стратегических предприятий и стратегических акционерных обществ» (в ред. от 6 мая 2019 года).

[9] В данной части Арбитражный суд г. Москвы ссылался на п. 1 Информационного письма Президиума ВАС РФ от 26 февраля 2013 года № 156.

[10] Постановление Арбитражного суда Московского округа от 16 января 2019 года по делу № А40-117331/18.

КАКИЕ СПОРЫ ИЗ РОССИЙСКИХ M&A СДЕЛОК ЯВЛЯЮТСЯ «КОРПОРАТИВНЫМИ»?

Алексей Ядыкин
советник Freshfields Bruckhaus Deringer LLP

В соответствии с новым российским законодательством об арбитраже отнесение той или иной категории споров к «корпоративным» имеет существенные последствия. Ряд корпоративных споров не подлежит передаче в арбитраж. В отношении арбитрабельных корпоративных споров установлен ряд дополнительных требований[1], включая требование об администрировании спора со стороны постоянно действующего арбитражного учреждения («ПДАУ»). С учетом этого важно понимать, какие именно споры относятся к корпоративным. Эта проблема особенно актуальна для сделок M&A. Например, если споры, вытекающие из договоров купли-продажи акций и долей в уставном капитале российских хозяйственных обществ («ДКП»), являются корпоративными, такие споры могут быть переданы либо в немногочисленные «разрешенные» российские ПДАУ, либо в Гонконгский международный арбитражный центр (HKIAC) - единственное иностранное арбитражное учреждение, признаваемое ПДАУ в соответствии с ФЗ об арбитраже[2]. Если же такие споры не являются корпоративными, они потенциально могут быть переданы в арбитраж ad hoc или в иностранное «не признанное» арбитражное учреждение.

Какие M&A споры относятся к корпоративным в соответствии с законом?

Корпоративные споры определены в АПК РФ как «споры, связанные с созданием юридического лица, управлением им или участием в юридическом лице»[3]. В рамках данного общего определения в АПК РФ приводится ряд конкретных примеров споров, признаваемых корпоративными. Для це-

*[1] Статья 225.1 АПК РФ, ч. 7 и 7.1 статьи 7, ч. 7 и 7.1 статьи 45 Федерального закона от 29.12.2015 № 382-ФЗ «Об арбитраже (третейском разбирательстве) в Российской Федерации» («**ФЗ об арбитраже**»).*

[2] С учетом выдачи HKIAC российского «разрешения» в рамках ФЗ об арбитраже 25 апреля 2019 г. Данное разрешение имеет ограничения – HKIAC не может администрировать российские «внутренние споры» (в том числе корпоративные). В то же время HKIAC может администрировать корпоративные споры международного характера.

[3] Ч. 1 статьи 225.1 АПК РФ.

лей сделок M&A важнейшими являются два прямо поименованных вида корпоративных споров:

- «споры, **связанные с принадлежностью** акций, долей в уставном (складочном) капитале хозяйственных обществ, <...> **установлением их обременений и реализацией вытекающих из них прав** (кроме споров, указанных в иных пунктах настоящей статьи), **в частности**, споры, вытекающие из договоров купли-продажи акций, долей в уставном (складочном) капитале, <...> споры, связанные с обращением взыскания на акции и доли в уставном (складочном) капитале»; и

- «...споры, вытекающие из соглашений участников юридического лица по поводу управления этим юридическим лицом, включая споры, вытекающие из корпоративных договоров»[4].

В приведенных положениях АПК РФ прямо упомянуты в качестве корпоративных споры из ДКП и из корпоративных договоров (соглашений участников / акционерных соглашений). Представляется, что к корпоративным относятся и споры, вытекающие из договоров залога акций (долей). Однако, относятся ли к корпоративным **все и любые** споры, возникающие из данных видов договоров, без каких-либо изъятий? Кроме того, возникает вопрос об отнесении к корпоративным споров, возникающих из других видов договоров, используемых в сделках M&A (в том числе соглашений о предоставлении опционов и проч.).

Позиция судебной практики

За время, прошедшее после арбитражной реформы 2015-2016 г., начала формироваться новая судебная практика по вопросу о квалификации споров в качестве корпоративных[5]. Пока еще преждевременно говорить о формировании окончательной и единообразной позиции судов, но уже можно проследить ряд тенденций. В частности, споры из ДКП, как правило, не рассматриваются судами в качестве корпоративных, если не касаются непосредственно вопроса владения акциями (долями участия)[6].

Например, в Определении Верховного Суда Российской Федерации («ВС») от 22 мая 2018 г. № 5-КГ18-94 рассматривался вопрос о квалификации спора о признании не заключенным предварительного договора купли-продажи 100% доли в уставном капитале российского общества с ограниченной ответственностью и о возврате внесенного задатка. Хотя суды нижестоящих инстанций отнесли спор к корпоративным, Судебная коллегия по гражданским делам ВС признала спор не корпоративным с учетом того, что истцом не заявлено требований о принадлежности долей, установлении их обременений или о реализации корпоративных прав. Аналогичный вывод был сделан в Определении ВС от 6 февраля 2018 г. №5-КГ17-218 в отношении иска об уменьшении покупной цены акций и взыскании денежных средств, уплаченных по ДКП[7].

Судами рассматривались и вопросы квалификации споров в отношении соглашений о предоставлении опционов. В ряде споров суды квалифицировали вытекающие из таких соглашений споры денежного характера (в том числе о взыскании неосновательного обогащения, штрафов и убытков) как не корпоративные, но имеется и противоположная практика[8].

Судами был рассмотрен и вопрос о квалификации споров, возникающих из корпоратив-

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[4] Пункты 2 и 4 ч. 1 статьи 225.1 АПК РФ.

[5] В данной статье не рассматривается «дореформенная» судебная практика по корпоративным спорам.

[6] В рассмотренных делах суды исследовали вопрос о квалификации спора в качестве корпоративного для определения подведомственности споров арбитражным судам либо судам общей юрисдикции. Вместе с тем выводы судов по этим делам могут быть применимы и для решения вопроса о возможности передачи той или иной категории споров в арбитраж.

[7] Практика о квалификации денежных споров по ДКП как не корпоративных не является полностью единообразной. Так, в Постановлении 12 ААС от 4 июля 2018 г. по делу № А57-10069/2018 суд, по-видимому, исходил из квалификации спора о взыскании задолженности по ДКП в качестве корпоративного.

[8] См. Апелляционное определение Московского городского суда от 8 ноября 2018 г. по делу № 33-45462, Апелляционное определение Московского городского суда от 12 апреля 2017 г. по делу № 33-13961.

ных договоров. В одном из дел суды рассмотрели спор о взыскании штрафа по корпоративному договору как не относящийся к корпоративным, но в другом деле исходили из безусловной квалификации споров из данного вида договоров как корпоративных[9]. По-видимому, данная трактовка более соответствует тексту АПК РФ, и можно ожидать, что в дальнейшем суды будут ее придерживаться[10].

Выводы

Вопрос о квалификации споров из ДКП, корпоративных договоров и иных видов соглашений по сделкам M&A рано считать решенным. Тем не менее, с большой долей вероятности, споры денежного характера, не затрагивающие принадлежности акций (долей) и вопросов корпоративного управления, будут рассматриваться судами как не корпоративные. В отношении споров, связанных с опционами, суды также могут решать вопрос о квалификации спора как корпоративного в зависимости от сути заявленных требований. Можно ожидать аналогичного подхода и в отношении споров из договоров залога акций (долей). Что касается споров (в том числе исключительно финансового характера) из корпоративных договоров, можно ожидать, что такие споры будут рассматриваться как корпоративные. Необходимо учитывать данные подходы судебной практики при составлении арбитражных оговорок по российским M&A сделкам.

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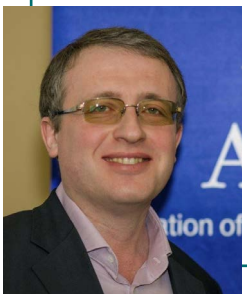
[9] Постановление 9ААС от 6 марта 2017 г. № 09АП-5191/2017-ГК. Противоположная позиция в Апелляционном определении Московского городского суда от 6 марта 2019 г. по делу № 33-4895.

[10] Трактовка споров из корпоративных договоров как корпоративных также следует из пункта 36 Постановления Пленума ВС от 23 июня 2015 г. № 25 «О применении судами некоторых положений раздела I части первой Гражданского кодекса Российской Федерации». Хотя данное Постановление было издано еще до арбитражной реформы, его выводы, по-видимому, все еще остаются актуальными.

УПРАВЛЕНИЕ КЕЙСАМИ ТРАНСГРАНИЧНОЙ НЕСОСТОЯТЕЛЬНОСТИ В США



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Общие аспекты

В условиях мирового финансового кризиса международная экономическая несостоятельность стала реальностью. Растет количество связанных с трансграничным банкротством судебных производств и третейских разбирательств. При этом правовое регулирование банкротства в разных странах существенно отличается. Эти различия могут касаться:

- критериев несостоятельности;
- круга лиц, которые могут быть признаны несостоятельными;
- процедур банкротства, применяемых к должнику;
- особенностей банкротства отдельных категорий должников;
- правил судебного разбирательства дел о банкротстве и многих других аспектов.

Всеобъемлющее определение понятия трансграничной несостоятельности отсутствует. Комиссией Организации Объединенных Наций по праву международной торговли (ЮНСИТРАЛ) под трансграничной несостоятельностью в самом широком смысле понимаются случаи, когда

несостоятельный должник имеет активы в нескольких государствах или когда в числе кредиторов должника имеются кредиторы из другого государства.

Случаев трансграничного банкротства РФ/США, когда кредиторы либо должники являются резидентами РФ и США, пока не так много. Два дела из этой категории находятся на разных этапах рассмотрения в американских судах. Однако число случаев трансграничного банкротства растет даже с учетом того, что сегодня экономики России и США едва ли можно назвать тесно связанными. Должники из РФ по тем или иным причинам все чаще оказываются за океаном ранее, чем расплатятся с кредиторами на родине.

Поиск должника и его средств в США

Рассмотрим случай, когда в России осуществляется процедура банкротства (уже на стадии конкурсного производства) в отношении должника и становится известно, что активы данного лица находятся в США. Если должник не является резидентом США в том или ином статусе (включая гражданство, брак с гражданином, наличие green card и др.), то поиск активов возможен с помощью специализирующихся на подобных мероприятиях агентств. Если должник является гражданином США, то при поиске информации существуют определенные нормативные рамки, для соответствия которым требуется подготовка правовой позиции, что в целом увеличивает затратную часть данных изысканий.

Очень важным аспектом на данном этапе является решение вопроса о том, каким образом кредиторы будут финансировать поиски активов и последующие действия правового характера за рубежом, а также насколько конкурсный управляющий подготовлен к подобным достаточно нестандартным для его основной занятости действиям. Эти аспекты очень важны и с точки зрения кейс-менеджмента должны быть урегулированы с того момента, как появится предположение о нахождении активов должника за рубежом.

Выбор стратегии

Следующим этапом является поиск юридической фирмы, которая составит план действий для двух наиболее вероятных вариантов развития событий. Учтите, что работа юристов будет достаточно длительной, поэтому рекомендуется выбрать тех подрядчиков, которые в определенной части принимают дело на условиях гонорара успеха. Также при подготовке заявления в американский суд в отношении находящегося в США должника следует максимально использовать российские ресурсы, например для перевода документов и подготовки экспертных заключений.

Для минимизации временных и финансовых затрат и повышения эффективности работы в целом следует иметь общее представление о банкротстве в США в части тех двух возможных вариантов, которые будут в той или иной степени применимы к процедурам в отношении должников с российскими кредиторами.

Вариант а: центр экономических интересов – Россия или другое государство (кроме США)

Если конкурсное производство в РФ против должника (находящегося в США и/или имеющего там активы) рассматривать в качестве основного производства (main proceeding) с учетом того, что центр экономических интересов должника находится не в США, то процедура несостоятельности будет рассматриваться в федеральном суде о банкротстве в соответствии с главой 15 раздела 11 Свода законов США[1], в основе которой лежат положения Типового закона ЮНСИТРАЛ 1997 года о трансграничной несостоятельности.

Надлежащим образом организованная подготовительная работа, включающая постоянные коммуникации привлеченных американских адвокатов с российскими кредиторами и кон-

[1] *Chapter 15 to the U. S. Bankruptcy Code (Ancillary and Other Cross-Border Insolvency); http://uscode.house.gov/view.xhtml?path=/prelim@title11/chapter15&edition=prelim.*

курсным управляющим, а также экспертом, будут в значительной мере способствовать благоприятному исходу на начальной стадии порядка признания и исполнения американским судом решения иностранного суда. У суда в США не должно возникнуть впечатление, что у основной судебной процедуры (конкурсного производства в РФ) есть политическая подоплека или имеется предвзятость судопроизводства в отношении конкретного должника.

Американский суд нужно убедить с помощью надлежащих правовых инструментов доказывания в необходимости осуществления вспомогательных процедур в США в помощь основной процедуре в РФ, чтобы, признав иностранное производство в рамках упомянутой главы 15 раздела 11 Свода законов США, установить судебные запреты в отношении должника и его имущества и получить предписание на поиск всех активов должника.

Вариант b: центр экономических интересов – США

Если окажется, что должник ведет хозяйственную деятельность в США, на момент обращения в американский суд с заявлением о признании решения российского суда центром его экономических интересов стали США, а не Россия и у него (так бывает на практике) есть еще американские кредиторы (чьи интересы американский суд будет учитывать в первую очередь), то российские кредиторы могут возбудить дело о банкротстве в США на основании главы 7 либо главы 11. Это общее направление второго варианта удовлетворения требований российских кредиторов от должника, оказавшегося в США, и выбор правовых инструментов тут имеет много нюансов и зависит от ряда факторов, в том числе от общего количества кредиторов и того, насколько они могут координировать свои заявления и действия с учетом тактического и правового аспектов.

Касаясь вопроса финансирования данной процедуры, надо отметить, что федеральное законодательство США дает достаточно правовых инструментов для удовлетворения требований кредиторов как в случае основной, так и в случае вспомогательной процедуры; вместе с тем у должника, если он действует добросовестно и имеются к этому фактические предпосылки, есть возможность просить задействования механизма финансового оздоровления.

Данная статья охватывает наиболее общие аспекты управления кейсом при трансграничной несостоятельности РФ/США, и в случае интереса со стороны читательской аудитории автор готов предоставить более развернутое изложение и анализ соответствующих правовых и управленческих инструментов, а также рассмотреть типовые ошибки кредиторов и должников в рамках подготовки к судебным и арбитражным разбирательствам, связанным с процедурой банкротства.

ЗАПРОСЫ UWO ОБ ИСТОЧНИКЕ ПРОИСХОЖДЕНИЯ КАПИТАЛА В ВЕЛИКОБРИТАНИИ

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С 31 января 2018 г. в законодательстве Великобритании действует институт судебного запроса об источнике происхождения капитала (Unexplained Wealth Orders, или UWO). На сегодняшний день известно о первых двух случаях применения запросов об источнике капитала (Запрос UWO), оба запроса были поданы в отношении граждан бывшего СССР. Есть основания полагать, что данный инструмент будет применяться правоохранительными органами Великобритании все чаще.

Что такое Запрос UWO?

Под Запросом UWO понимается официальный судебный запрос о происхождении источника капитала, выдаваемый судом по ходатайству правоохранительных органов. Запрос UWO содержит требование сообщить о правах на определенное имущество, объяснить источник его получения и представить иную относящуюся к нему информацию.

Кем может быть выдан Запрос UWO?

Закон предусматривает ограниченный перечень правоохранительных органов Великобритании, в чьей компетенции ходатайствовать в суд о выдаче Запроса UWO. К таким органам относятся Управление по налогам и таможенным сборам, Управление по финансовому регулированию и контролю, Национальное агентство по борьбе с преступностью, Бюро по борьбе с мошенничеством в особо крупных размерах и Прокуратура Великобритании.

Кто может быть адресатом Запроса UWO?

Запросы UWO могут выдаваться судом в отношении:

- лиц, подозреваемых в вовлеченности в совершение тяжких преступлений или в связи с лицами, совершившими таковые; и/или
- политических деятелей (politically exposed persons, PEPs) за пределами Европейской экономической зоны.

Для целей применения Запроса UWO не имеет значения, были ли совершены вменяемые лицу преступления на территории Великобритании или за ее пределами. Определение тяжкого преступления («serious crime») дается в Serious Crime Act 2007 и в числе прочего включает коррупционные и налоговые преступления, а также легализацию преступных доходов.

При этом Запросы UWO могут применяться не только к физическим лицам, но и к юридиче-

ским лицам и иным структурам, которые могут владеть имуществом, в том числе к трастам.

Условия выдачи Запроса UWO

- Наличие причины считать, что адресат владеет имуществом стоимостью более 50 000 фунтов стерлингов.
- Основание подозревать, что известный источник легально полученного дохода адресата недостаточен для приобретения такого имущества.
- Адресат является политическим деятелем, либо существует подозрение, что он или связанное с ним лицо совершает или совершал (совершало) / был вовлечен (было вовлечено) в совершение тяжкого преступления в Великобритании или за ее пределами.

Кто может считаться политическим деятелем?

Под «политическими деятелями» в контексте UWO могут пониматься:

- физические лица, наделенные публичными функциями международной организацией или государствами (кроме Великобритании и иных стран Европейской экономической зоны);
- члены их семей (супруги, дети и супруги детей, родители), близкие соратники (например, бизнес-партнеры) либо иным образом связанные с ними лица.

В свою очередь, определение лиц, наделенных публичными функциями, согласно Четвертой директиве ЕС по противодействию отмыванию преступных доходов[1] и Регламенту о легализации преступных доходов, финансировании терроризма и переводе средств 2017 г.[2] включает в том числе:

- глав государств или правительств, министров, заместителей министров;
- членов законодательных органов;
- членов руководящих органов политических партий;
- членов верховных и конституционных судов и иных высших судебных органов;
- членов счетных палат и центральных банков;
- послов, поверенных в делах и высший командный состав вооруженных сил;
- членов органов управления и наблюдательных советов государственных компаний (state-owned entities);
- директоров, заместителей директоров и членов советов директоров или лиц, выполняющих аналогичные функции, в международных организациях.

В отношении какого имущества может быть выдан Запрос UWO?

Сфера применения Запросов UWO чрезвычайно широка – запрос может быть выдан судом в отношении любого имущества, стоимость которого превышает 50 000 фунтов стерлингов, вне зависимости от его местонахождения.

Запрос UWO может быть выдан в том числе в отношении объектов недвижимости (включая яхты и самолеты), денежных средств, ценных бумаг, дорогостоящих объектов движимого имущества (автомобили, часы, антиквариат), прав требования и нематериальных активов.

Можно ли игнорировать Запрос UWO?

Сам по себе факт получения Запроса UWO не влечет за собой немедленных неблагоприятных последствий для адресата. Вместе с тем информация, полученная правоохранительными органами в ответ на Запрос UWO, или отсутствие удовлетворительного ответа могут послужить основанием для продолжения расследования либо начала про-

[1] *Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015.*
[2] *The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.*

цедуры наложения взыскания на имущество. При этом преднамеренное или совершенное по неосторожности представление вводящей в заблуждение или ложной по существу информации является уголовно наказуемым деянием. Максимальное наказание за такое преступление – лишение свободы сроком на два года.

Если адресат без уважительных причин не представит информацию в установленный Запросом UWO срок, то презюмируется возможность обращения взыскания на принадлежащее такому адресату имущество в порядке, предусмотренном Законом о доходах от преступной деятельности 2002 г.

Практика судебного оспаривания Запросов UWO

Первая попытка оспорить Запрос UWO была предпринята в деле Национальное Агентство по Борьбе с Преступностью против Гаджиевой (National Crime Agency v Hajiyeva).

Дело дошло до Высокого Суда Англии и решение по нему стало прецедентным для последующих случаев применения Запросов UWO.

Замира Гаджиева – супруга бывшего председателя правления азербайджанского Международного банка Джахангира Гаджиева, осужденного в Азербайджане на 15 лет лишения свободы по обвинению в мошенничестве и растрате. Основанием для выдачи Запроса UWO послужили совершенные Гаджиевой сделки по приобретению имущества в Великобритании. Использовав зарегистрированную на Британских Виргинских островах компанию, в 2009 г. Гаджиева приобрела за 11,5 млн. фунтов стерлингов недвижимость в престижном лондонском районе Найтсбридж, а также гольф-клуб. Кроме того, по информации британских правоохранительных органов, за период с 2006 по 2016 гг. Гаджиева потратила в универмаге Harrods 16,5 млн. фунтов стерлингов с использованием более чем 35 различных кредитных карт.

В деле Гаджиевой адресат Запроса UWO в своей апелляции сослался на восемь различных оснований для отмены Запроса UWO, но все они были отклонены английским судом. Ниже приведены основные выводы суда.

Основание для оспаривания Запроса UWO	*Позиция суда*
Гаджиев не является политическим деятелем, поскольку банк в форме акционерного общества по законодательству Азербайджана не может считаться государственной организацией.	Термины «политический деятель» и «государственная организация» должны определяться широко. Вопрос квалификации юридического лица в качестве государственной организации нужно решать в соответствии с законами Великобритании. В данном вопросе следует не оценивать полномочия или статус, а применять более гибкий тест на собственность и контроль. Поскольку Правительство Азербайджана было контролирующим и мажоритарным акционером банка, которым руководил Гаджиев, банк являлся государственной организацией.

Для выдачи Запроса UWO нужно было удостовериться в том, что для приобретения имущества (income requirement test) законно полученного дохода было недостаточно.	Государственные органы Великобритании обоснованно полагались на факт осуждения в Азербайджане за мошенничество и присвоение независимо от каких-либо сомнений в отношении справедливости такого судебного разбирательства. Суд установил высокий порог доказывания для возможности исключить в качестве основания для Запроса UWO вынесенный за рубежом приговор в связи с нарушениями прав человека, особенно на стадии расследования. Суд учел независимые доказательства, подкрепляющие обвинения, выдвинутые против Гаджиева властями Азербайджана (траты с использованием кредитных карт, выданных банком на имя его родственников). Аргументы о достаточности у Гаджиева (азербайджанского госслужащего с 1993 по 2015 гг.) собственных средств для приобретения недвижимости не были признаны убедительными.
Запрос UWO нарушает права человека, защищаемые ст. 1 Дополнительного протокола к Европейской конвенции о защите прав человека и основных свобод (защита права собственности).	Суд отказал в отмене Запроса UWO на этом основании. Даже если вмешательство государства в право собственности имело место, оно носило ограниченный и пропорциональный характер.
Запрос UWO противоречит праву не свидетельствовать против себя и своего супруга.	Суд счел эту гарантию неприменимой в рассматриваемой ситуации, в частности по следующим причинам: • законодательство не предусматривает ее применение в отношении возможного уголовного преследования в иностранных государствах; • раскрытие информации об имуществе не влечет за собой реального или значительного риска уголовного преследования Гаджиевых в Великобритании или за рубежом; • применение соответствующей гарантии законодательно исключено в отношении Запроса UWO.
С учетом всех обстоятельств дела суду не следовало выдавать Запрос UWO.	Суд указал на целесообразность выдачи Запроса UWO в ситуации соответствия всем установленным законодательством основаниям.

Ключевые выводы из дела Гаджиевой

- В случае Запроса UWO в отношении адресата фактически не действует презумпция невиновности, поскольку бремя доказывания легальности источника капитала и происхождения имущества возлагается на адресата Запроса UWO, а не на правоохранительные органы.
- Право не свидетельствовать против самого себя и своих близких не будет считаться достаточным основанием для отказа от исполнения требований Запроса UWO.
- К «политическим деятелям» в контексте Запросов UWO относятся не только выбираемые или назначаемые государственные чиновники, но и топ-менеджеры государственных компаний в самом широком

понимании (например, это могут быть не только госкорпорации и подконтрольные им хозяйственные общества, но и некоммерческие организации).

- Адресатом Запроса UWO могут стать родственники и бизнес-партнеры перечисленных лиц.

Дальнейшая практика применения Запросов UWO

После дела Гаджиевой стало известно о еще одном случае применения Запроса UWO, и тоже в отношении гражданина республики бывшего СССР. В феврале 2019 года лондонский суд вынес решение о конфискации средств в размере полумиллиона фунтов стерлингов на банковских счетах адресата Запроса UWO, который не смог предоставить удовлетворительную для суда информацию о происхождении капитала по такому запросу, направленному в 2018 году. Адресатом Запроса UWO, инициированного Национальным Агентством по Борьбе с Преступностью, был Влад Люка Филат, сын бывшего премьер-министра Молдовы.

Отец Влада Люки Филата, Владимир Филат, бывший премьер министр Молдовы, в настоящий момент отбывает девятилетний срок заключения по делу о коррупции, отмыванию преступных средств и присвоении более 1 миллиарда долларов США из банковской системы Молдовы.

Приехав в Лондон в 2016 году, через год после заключения своего отца, двадцатидвухлетний Влад Люка Филат совершил разовый платеж на сумму 400 000 фунтов стерлингов за аренду пентхауса в престижном районе Лондона Найтсбридже, а также приобрел автомобиль Бентли на сумму более 200 000 фунтов стерлингов. Средства поступали на счета Влада Люки Филата со счетов офшорных компаний.

В деле Филата английский суд руководствовался теми же выводами, к которым пришел Высокий Суд в прецедентном деле Гаджиевой.

Перспективы применения Запросов UWO

Немногочисленность случаев применения Запросов UWO на сегодняшний день не означает, что данный инструмент не будет использоваться правоохранительными органами Великобритании более активно в будущем.

Для этого существуют все политические и экономические предпосылки. После того, как по делу Гаджиевой было вынесено прецедентное решение Высоким Судом, появилась и юридическая определенность в практике применения Запросов UWO.

Таким образом, выбор Великобритании в качестве «безопасной гавани», способной укрыть от претензий кредиторов или уголовного преследования в России (во избежание экстрадиции и т. п.), не исключает риска получения судебного Запроса UWO, инициированного британскими правоохранительными органами.

При этом мотивом для инициативы о применении инструмента Запроса UWO британскими правоохранительными органами может быть и ходатайство российских правоохранительных органов и кредиторов.

Возможность задействования механизма Запроса UWO в Великобритании может рассматриваться в рамках мероприятий по розыску и обращению взыскания на имущество должника. С точки зрения должника, особое значение будет иметь возможность документального обоснования легальности происхождения капитала и соответствия уровня потребления и расходов уровню легальных доходов.

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АСПЕКТ WHITE-COLLAR CRIME В ДЕЛАХ ПО РОЗЫСКУ И ВОЗВРАЩЕНИЮ АКТИВОВ ИЗ-ЗА РУБЕЖА

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Тема розыска и возвращения активов из-за рубежа сегодня актуальна как никогда. По данным ЦБ РФ, просроченная задолженность по всем кредитам стабильно растет минимум на 10% ежегодно. Увеличивается и число злостных должников, которые прячут активы по всему миру. В настоящее время проектами по розыску активов недобросовестных должников занимается множество отечественных и зарубежных юридических фирм, адвокатских образований, разного рода консультантов, частных детективов и т.д. В рамках подобной деятельности возбуждаются уголовные дела на территории Российской Федерации, кредиторы обращаются в суд с исками о привлечении к ответственности собственников и руководителей компаний-должников. Инициируются процедуры личного банкротства в РФ, которое впоследствии может получить и трансграничный характер: в суды целого ряда стран подаются иски о раскрытии информации, наложении обеспечительных мер. Борьба эта идет с переменным успехом, механизмы взыскания совершенствуются, судебная практика пока только формируется. Зачастую сокрытие активов становится возможным благодаря разветвленным холдинговым структурам, доверительному управлению или путем учреждения обществ в офшорных зонах.

Кроме того, необходимо учитывать, что законодательство разных стран по мерам, направленным на поиск и взыскание активов, существенно различается. Если, например, информацию об учредителях компании в Чехии можно свободно найти в интернете, то в Швеции подобные попытки считаются нарушением законодательства и вторжением в личную сферу. А в странах Прибалтики по решению суда за телефонный долг свыше определенной суммы судебный исполнитель может снять деньги с банковского счета не только должника, но и его жены, поскольку супруги несут солидарную ответственность по долгам.

Несмотря на существующие соглашения по международному преследованию отмывания денег и инициативам, призванным сделать нормативно-правовую базу офшорных зон более прозрачной, в мире все еще достаточно мест, где процветают схемы сокрытия незаконно приобретенного имущества.

В России в недавнем прошлом и частично сегодня один из самых распространенных сценариев мошенничества – вывод кредитов, полученных в банке, через «технические» компании или строительные пирамиды в сфере

девелопмента. В результате деньги, как правило через прибалтийские банки, выводились за рубеж, а ушлый должник, не дожидаясь серьезных последствий на территории России, исчезал из поля зрения компетентных органов и кредиторов, получив иммиграционный статус в одной из более стабильных юрисдикций. В ряде случаев такой юрисдикцией становились Соединенные Штаты Америки – ввиду высокого уровня жизни, благоприятного делового климата, перспектив обучения отпрысков в престижных вузах и т.д. Денежные средства через ряд транзакций оседали на счете должника и вкладывались чаще всего в объекты американской недвижимости, милые сердцу любого российского инвестора. Грамотное оформление сделки брали на себя местные риелторы. Требования к происхождению средств на покупку несколько лет тому назад в США были не столь строгими, как сегодня, а сами покупатели из России об этом старались не распространяться. Итак, денежные средства вложены в объект недвижимости и таким образом в какой-то мере отмыты, а при последующей сделке по купле-продаже этого объекта уже есть достаточно солидное подтверждение источника определенной суммы.

Однако, несмотря на все эти действия, преступное происхождение денежных средств вследствие банковского мошенничества или хищения средств дольщиков и последующего, например, преднамеренного банкротства остается. В РФ могут возбуждаться или не возбуждаться уголовные дела, с переменным успехом идти суды и банкротства, но криминальный источник средств следует за ними в конечную юрисдикцию и, даже будучи овеществлен в объекте недвижимости, никуда не исчезает.

Необходимо отметить, что развитые правопорядки очень строго относятся к разного рода попыткам использовать их экономику и банковскую систему для легализации и/или инвестирования средств, ранее полученных злоумышленниками преступным путем в третьих странах. Уже в ходе процесса переезда в США должники из РФ неизбежно совершают большое количество промежуточных действий, которые влекут за собой определенные негативные правовые

последствия. Так, например, при заполнении иммиграционных документов им приходится скрывать определенные факты своей биографии, которые могут повлиять на принятие положительного решения иммиграционными властями США. При открытии счета в банке США и даче пояснений на предмет source of wealth им приходится рассказывать историю об успешном бизнесе в России или продаже дорогой недвижимости, доставшейся по наследству. Зачастую оставшиеся активы в России, доли в обанкротившихся компаниях, объекты недвижимости в виде зарегистрированного в Росреестре недостроя не указываются в налоговой декларации, подаваемой в американскую Internal Revenue Service, несмотря на требование указать worldwide income. На уголовно-правовые последствия таких действий очень часто не обращают внимания. Российскому клиенту кажется, что все шито-крыто: узкопрофильные налоговые консультанты и иммиграционные адвокаты могут помочь с оформлением пакета документов, составлением первоначальной налоговой декларации, подбором конкретного штата исходя из шкалы налогообложения.

В дополнение к этому усилия юристов по розыску и взысканию активов в судах России или за рубежом почти всегда лежат в гражданско-правовой плоскости. Но специалисты не учитывают тот факт, что сразу после переезда должник, возможно, уже совершил несколько серьезных федеральных преступлений на терри-

тории США, которые имеют формальный состав и не требуют особых усилий в сборе доказательственной базы и предъявления обвинения, так как везде имеются подписи правонарушителя под acknowledgement со ссылкой на соответствующую главу Свода законов США.

В частности, ст. 8 U. S. Code § 1325 – Improper entry by alien является федеральным преступлением, в п. 3 этой статьи предусмотрена ответственность за попытку въезда или получение возможности въезда на территорию США путем использования ложной информации или умышленного введения в заблуждение, а также путем умышленного сокрытия фактов, имеющих существенное значение. Правонарушители могут быть приговорены к штрафу, тюремному заключению на срок до шести месяцев и в большинстве случаев к депортации ввиду отсутствия оснований для легального пребывания на территории США. Необходимо также отметить, что срок давности по таким преступлениям отсутствует.

Если же правонарушитель «забыл» про объекты налогообложения, оставшиеся в России (даже неприбыльные), и не указал их в налоговой декларации в США, он нарушил ст. 26 U. S. Code § 7206 – Fraud and false statement, которая предусматривает ответственность за сокрытие (в нашем случае – отсутствие сведений в налоговой декларации) объектов собственности, являющихся объектами налогообложения: наказание в виде штрафа в размере до 100 тыс. долл., или тюремного заключения сроком до 3 лет, или штрафа и лишения свободы. Кроме налоговой декларации, действие статьи распространяется на любые официальные документы, подписанные в США, в которых есть предупреждение об ответственности за предоставление ложной информации. В этом случае срок привлечения к уголовной ответственности в США – не более шести лет, состав носит формальный характер и наступления каких-либо негативных последствий для того, чтобы в действиях правонарушителя был найден состав преступления, не требуется.

Ну и наконец, ст. 18 U. S. Code § 1956, 1957 – Laundering of monetary instruments содержит максимально широкое описание всех возможных действий, которые совершаются или могут совершаться правонарушителем в рамках легализации денежных средств, полученных ранее преступным путем. Состав преступления описан таким образом, что при совершении любой транзакции (в нашем примере это покупка недвижимости на деньги, похищенные у российского банка и позднее выведенные через офшоры и прибалтийские банки за рубеж) действия правонарушителя подпадают под какую-либо часть данных статей. Причем преступными считаются в том числе и действия, совершенные не на территории США, – в данном случае печально знаменитая ч. 1 ст. 159 УК РФ, мошенничество в сфере кредитования. В результате властями США к правонарушителю может быть применен штраф до 500 тыс. долл. или в двойном размере стоимости транзакции по легализации денежных средств вместе с тюремным сроком до 20 лет. К этому – и так очень широкому – составу обвинение в подавляющем большинстве случае находит дополнительные пункты, чтобы комплекс правонарушений выглядел более солидно для присяжных и жюри. Срок давности привлечения к уголовной ответственности по этой статье составляет пять лет.

Все вышесказанное – только малая часть составов преступлений, которые неизбежно совершали, совершают и будут совершать мошенники, похитившие в России деньги и перебравшиеся в США. И хотя способы легализации наверняка будут совершенствоваться и становиться более изощренными по сравнению с примитивной схемой «украл – вывел через Прибалтику – вложил в недвижимость во Флориде или Калифорнии», преступный характер денежных средств, нажитых в результате совершения противоправных действий, не исчезнет. А попытки его сокрытия через различные корпоративные структуры, номинальное владение и трасты не позволят избежать ответственности в ходе расследования и судебного разбирательства.

ЗАКАЗНЫЕ УГОЛОВНЫЕ ДЕЛА В АРБИТРАЖНОМ СПОРЕ

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Увы, сегодня государство мало способствует разрешению бизнес-конфликтов внесудебными, или альтернативными, правовыми способами. Поэтому стороны спора часто обращаются к уголовному преследованию оппонента. Ситуацию усугубляют коррупция и проблема профессионализма кадров в правоохранительных органах: правоохранители часто уклоняются от возбуждения уголовных дел в случаях, когда преступление очевидно. В других же ситуациях, когда налицо гражданско-правовой спор, внезапно одна или обе стороны становятся фигурантами уголовных дел, которые в обиходе именуются «заказными».

В этой статье мы остановимся на нескольких признаках, которые, как правило, позволяют отличить сфабрикованное уголовное дело от имеющего реальные основания.

1. Надуманность основания **для возбуждения уголовного дела.**

Основанием для законного и обоснованного уголовного преследования являются достаточные и достоверные данные, указывающие на признаки преступления. По заказным же уголовным делам чаще наблюдается прямо противоположная картина. Основанием для возбуждения уголовного дела становятся сведения, предоставленные заявителем и содержащие удобную ему характеристику возникшего спора. Бизнес-партнера с абсолютно иной (и потому нерелевантной для оппонентов) позицией, а также его доверенных лиц на стадии доследственной проверки никто не опрашивает. Картина спора на момент вынесения решения о возбуждении уголовного дела выглядит предельно односторонней.

2. Принятию решения о возбуждении заказного уголовного дела свойственна *срочность*.

Проверка сообщения об экономическом преступлении сопряжена с изучением большого количества финансовой документации и необходимостью опроса множества лиц. Правоохранительным органам для решения вопроса о возбуждении уголовного дела зачастую недостаточно не только общего (3 суток), но и максимального (30 суток) срока доследственной проверки.

Преждевременное возбуждение уголовного дела может повлечь его прекращение по реабилитирующим основаниям (например, в связи с отсутствием признаков состава преступления). А любой факт такого прекращения уголовного дела со стороны контролирующих инстанций оценивается негативно. По этой причине правоохранители на практике выносят «промежу-

точные» решения об отказе в возбуждении дела, выступающие де-факто механизмом продления сроков проверки. Несмотря на неконституционность такой практики, для должностных лиц она является типичной.

Напротив, именно быстрое возбуждение уголовного дела в короткий срок после подачи заявления, по которому проверка должным образом не проводилась, свидетельствует о заказном характере уголовного дела. Ведь весь уголовно-процессуальный инструментарий (заключение оппонента под стражу, наложение ареста на его имущество и т.д.) может быть применен лишь после возбуждения уголовного дела.

3. Заказное уголовное дело возбуждается *сразу в отношении конкретного лица*.

В обычной практике по делам о «беловоротничковых» преступлениях процесс доказывания носит сложный характер, требующий проведения большого количества следственных действий, направленных на установление всех необходимых признаков преступления, а также личности совершившего это деяние. С целью недопущения нарушений прав лица, преждевременно наделенного статусом подозреваемого (обвиняемого), распространен механизм возбуждения уголовного дела «по факту обнаружения признаков преступления».

4. Нередки случаи, когда заказное уголовное дело *возбуждено с нарушением правил подследственности*.

Территориальная подследственность по общему правилу определяется местом совершения деяния, содержащего признаки преступления. Таким местом признается место совершения деяния, содержащего признаки преступления, где оно пресечено или окончено. Тем не менее не следует забывать и о различных исключениях, влияющих на изменение подследственности уголовного дела: статус лица, в отношении которого осуществляется уголовное преследование (п. «в» ч. 2 ст. 151, ст. 447 УПК РФ); место нахождения обвиняемого или большинства свидетелей (ч. 4 ст. 152 УПК РФ); орган, выявивший преступление (ч. 5 ст. 151 УПК РФ) и др.

Если же, учитывая все нюансы правил подследственности, возникают сомнения относительно органа, инициировавшего производство по делу, то имеются основания полагать, что дело возбуждено в месте, где у заявителя имелся административный ресурс.

5. Дополнительным признаком заказного уголовного дела (в случае, когда арбитражный спор заказчиком проигран) выступает *наличие вступившего в законную силу решения суда по арбитражному спору, в котором уже дана оценка обстоятельствам возбужденного уголовного дела*.

Буквальный смысл ст. 90 УПК РФ таков: «обстоятельства, установленные вступившим в силу решением арбитражного суда, признаются следователем без дополнительной проверки». А единственным способом опровержения преюдиции признается пересмотр судебного акта по вновь открывшимся обстоятельствам. К их числу относится установление приговором суда совершенного при рассмотрении гражданского дела преступления (например, фальсификации доказательств).

На практике ситуация прямо противоположная. Нередко суды полагают, что преюдициальное значение решению арбитражного суда не придается, если:

материалы уголовного дела содержат сведения о мнимости сделок, под прикрытием которых было совершено преступление;

конкретные обстоятельства, имеющие значение для уголовного дела (например, передача имущества его владельцем), в рамках арбитражного производства не исследовались.

Для каких целей возбуждается заказное уголовное дело в арбитражном споре?

Первая и, пожалуй, наиболее желаемая цель для заказчика – *заключить оппонента под стражу*. Находясь под стражей, бизнес-партнер не только пребывает в психологически тяжелом состоянии, подвергается различным угрозам и давлению, но и существенно ограничен в доказывании своей позиции по арбитражному спору.

Во-вторых, учитывая, что в арбитражном процессе *арест на имущество* по статистике налагается лишь в трети случаев[1], оппонент пытается использовать эту меру уже с помощью контролируемого уголовного дела. Ведь в уголовном процессе статистика свидетельствует о том, что суды удовлетворяют более 80% ходатайств следствия о наложении ареста на имущество (ст. 115 УПК РФ)[2].

И наконец, не менее важной целью заказчика является *представление материалов уголовного дела в качестве доказательств по арбитражному спору*. Причем, как показывает практика, незавершенность уголовного дела не влечет недопустимости полученных в его рамках доказательств для арбитражного процесса.

Какие меры предосторожности можно предпринять?

1. Фиксируйте каждую встречу с оппонентом на диктофон.

Наличие в такой записи выверенных формулировок, подтверждающих, что спор имеет признаки исключительно гражданско-правовых отношений, а также намеков, угроз или прямых заявлений со стороны оппонента даст в дальнейшем возможность обратить такие высказывания против него.

2. Подготовьте и обезопасьте оригиналы документов, подтверждающих правомерность и добросовестность ваших действий.

Сведения, подтверждающие отсутствие намерения совершить преступление, имеют важное значение для отстаивания невиновности. При возникновении риска уголовного преследования необходимо тщательно подобрать документы и еще раз проанализировать факты, подтверждающие гражданско-правовые отношения с заказчиком.

3. Определите круг людей, которые могут выступить потенциальными свидетелями.

Расследование по «беловоротничковым» преступлениям включает огромное количество хозяйственной документации, но приоритет отдается свидетельским показаниям. В них отражаются обстоятельства того, что происходило и кто (фактически или номинально) участвовал в заключении сделки. Поэтому в процесс переговоров необходимо вовлекать лиц, которые могут подтвердить законный характер действий и отсутствие намерения совершить преступление.

4. Максимально детально продумайте и подготовьте свою правовую позицию.

В рамках доследственной проверки или расследования уголовного дела последовательно и логично из допроса в допрос излагайте свою позицию. Неменяющаяся позиция, подтвержденная иными материалами, будет свидетельствовать о добросовестном характере ваших действий. Напротив, постоянное изменение показаний может сыграть против вас даже при наличии убедительных письменных доказательств.

5. Заблаговременно сверьте свою позицию со специалистами в сфере уголовного права.

Логика, используемая правоохранительными органами при доказывании преступления, значительно отличается от общепринятой, в связи с чем юристы общего профиля могут не до конца просчитать все риски той или иной правовой позиции и стратегии защиты.

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[1] *См. статистику Судебного департамента при Верховном суде РФ, http://www.cdep.ru/index.php?id=79&item=4890.*
[2] *См. статистику Судебного департамента при Верховном суде РФ, http://www.cdep.ru/index.php?id=79.*

АКТУАЛЬНЫЕ ТРЕНДЫ СУДЕБНОГО ФИНАНСИРОВАНИЯ В РОССИИ: ВЗГЛЯД ИНВЕСТОРА

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Судебное финансирование пришло в Россию чуть более двух лет назад. С тех пор степень информированности юридического сообщества и бизнеса о нем, равно как и объем новообразованной отрасли неуклонно растут. По оценке РБК по состоянию на февраль 2019 года, общая цена профинансированных споров приближалась к 10 млрд руб. – небольшой сумме в сравнении с общим объемом судебных дел, но неплохому результату для настолько молодого и специфического института.

Подводить какие-либо итоги и делать далеко идущие выводы пока рано. Между тем уже сейчас можно выделить ряд тенденций и явлений, характеризующих российские особенности судебного финансирования. При этом, так как достоверного среза рынка и публичной информации об операционных показателях его участников пока нет, мы будем опираться на структуру обращений и опыт работы нашего фонда.

В качестве первой из вышеупомянутых тенденций хотелось бы отметить большое количество запросов на финансирование споров, не имеющих прямой денежной оценки, но обладающих определенным опосредованным финансовым эффектом (например, исков о признании права собственности на самовольную постройку, о получении недискриминационного доступа к коммуникациям, корпоративных споров, связанных с преимущественным правом и обязательным предложением, и т.д.). Так, нами был профинансирован иск девелопера к частной сетевой компании по поводу подключения к сети газораспределения нескольких застраиваемых коттеджных поселков. Результатом принятых решений стало подключение внутрипоселковой газораспределительной сети к существующему источнику газоснабжения и пуск газа потребителям. Положительный результат в суде позволил девелоперу сэкономить более 100 млн руб. на строительстве альтернативного газопровода-источника.

Вторая – рост числа обращений за комплексным решением сложной правовой ситуации. Многие клиенты ожидают от инвестора всесторонней профессиональной поддержки и осуществления стратегического управления проблемной ситуацией. Это предполагает одновременное финансирование и формирование координационного офиса, решающего всю совокупность проектных задач и увязывающего свою деятельность с представителями команды финансируемого клиента.

Ключевым объединяющим фактором для таких проектов является отсутствие у истца необходимых средств и/или опыта для сопровождения сложного судебного процесса, равно как и желание в полной мере разде-

лить с партнером, обладающим необходимой правовой экспертизой, все проектные риски. Это очень похоже на логику финансирования стартапов в венчурной индустрии, в рамках которой возник термин *smart money*, где нормой является то, что профессиональный инвестор делится с выбранным им проектом не только своими деньгами, но и своим опытом, репутацией и связями, существенно увеличивая его шансы на успех.

Примером такой ситуации служит один из недавних кейсов по финансированию и организации юридического сопровождения деятельности строительного подрядчика, находящегося в стадии наблюдения, с целью прекращения процедуры банкротства и последующее сопровождение судебного разбирательства по взысканию с заказчика около 50 млн руб. неосновательного обогащения в рамках расторгнутого, но частично исполненного договора строительного подряда.

Третий тренд выражается в запросах на совместное финансирование выкупа стрессовых активов (проблемной дебиторской задолженности, объектов недвижимости и иного имущества, обремененного юридическими рисками). Так, совсем недавно мы в очередной раз поучаствовали в софинансировании приобретения портфеля просроченной дебиторской задолженности физических лиц в размере нескольких миллиардов рублей у одного из российских банков для организации последующего взыскания, включая полное финансирование судебных расходов по предъявляемым искам.

Наконец, мы видим рост числа запросов на финансирование розыска активов состоятельных лиц, контролирующих инкорпорированные в России организации. Проекты все чаще связаны с необходимостью прокалывания корпоративной вуали, поиска и обращения взыскания на активы в России и иностранных юрисдикциях в интересах российских кредиторов.

Представляется, что эта тенденция – часть более глобального тренда, наблюдаемого в судебной практике по вопросам субсидиарной ответственности. Так, в России в 2018 году было удовлетворено 32% требований о привлечении к субсидиарной ответственности по сравнению с 22% в 2017-м и 16% в 2016-м. Количество привлеченных контролирующих лиц в нашей стране выросло с 923 человек в 2017 году до 2125 в 2018-м. Использование этого инструмента стало куда более перспективным, благодаря чему изменилось его восприятие.

Наконец, последнее – но не по значению – явление связано с введенными развитыми странами экономическими ограничениями (санкциями) в отношении лиц, прямо или косвенно связанных с РФ в ряде секторов экономики. Результатом ограничительных мер стало закрытие для зарубежных судебных инвесторов доступа к проектам, связанным тем или иным образом с вышеупомянутыми лицами. При этом иностранные юрисдикции по-прежнему используются для разрешения правовых конфликтов не только в рамках трансграничных правоотношений, но и в случаях, когда обе стороны являются российскими резидентами.

Финансировать подобные проекты на сегодняшний день могут только российские инвесторы, и зарубежные консультанты крайне заинтересованы в установлении контакта с ними. Для этих целей мы, совместно с несколькими международными командами юристов, специалистов в сфере розыска активов и сбора судебных доказательств, планируем сформировать отдельный фонд, специализирующийся на инвестициях в подобного рода кейсы.

Завершая обзор, хотелось бы отметить, что судебное финансирование во многом контрциклическая отрасль. Разумеется, нельзя говорить о полной свободе от влияния конъюнктуры, однако, несмотря на стагнацию российской экономики и по-прежнему кризисное состояние внутреннего рынка капитала, инструмент финансирования споров третьей стороной демонстрирует впечатляющие темпы роста и дает все основания для надежды на повторение его успеха в России вслед за США и Европой. Наше совместное исследование с порталом Pravo.ru подкрепляет эту надежду, показывая, что уровень информированности и понимания судебного финансирования российским профессиональным сообществом идентичен таковому в США в 2013 году.

RAA Conference
COLLECTING BAD DEBTS: THROWING GOOD MONEY AFTER BAD?

Place: Marriott Grand Hotel Moscow
Date: 6 June 2019
Time: 10.00 – 18.00

Topics to be discussed:

1: Discover the Undiscovered

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

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

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

3: Show me the Money!

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

4: Cross-border Bankruptcy involving Russian parties

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

https://arbitration.ru/en/events/conference/collecting-bad-debts-throwing-good-money-after-bad/index.php

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15 November, 2019
Hotel Baltschug Kempinski
Moscow

XIII Annual IBA Law Firm Management Conference

6 December, 2019
Marriott Hotel Novy Arbat
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For more details, please contact Alexandra Brichkovskaya at
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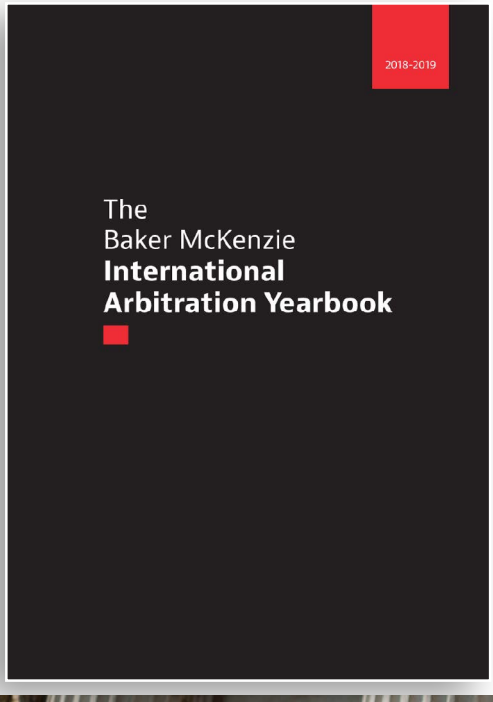

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