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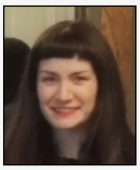
TDM Special Issue on the "*The Changing Paradigm of Dispute Resolution and Investment Protection in Post-soviet and Greater Eurasian Space*". Guest editors:



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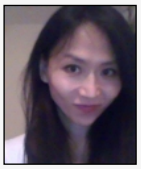

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EDITORIAL

TDM 1 (2020) - Post-soviet and Greater Eurasian Space - Introduction

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Introduction

The rules of cross-border trade and investment in Eurasian space are undergoing a significant transformation. The latter results from the shift in trade routes across post-Soviet jurisdictions, which still rely on natural resources' trade and transit. Those are so far controlled by state-owned enterprises sometimes operating in joint ventures with Western investors. This shift could already be seen in dozens of rail connections bridging East Asia with Western Europe alongside the Silk Road Economic Belt (SREB). The number of cargo trains passing through Xinjiang, Kazakhstan, Russia and Belarus increases every year and today competes with the sea trade passing through Strait of Malakka. Road transport sees similar prospects after China has joined the TIR (*Transit international routier*) Convention in May 2018. In addition to the SREB, the melting ice of Arctic opened the Northern Sea Route (NSR) to commercial shipping, raising questions of Russian maritime laws' readiness to accommodate high-volume international sea transport, as well as the sustainability thereof. With the shifting trade routes come possible conflicts over transit and other potential disputes, hence, specific questions of choice of law or alternative dispute resolution (ADR) options for the sales, transport and service contracts.

Gradual changes in global trade patterns have coincided with trade facilitation efforts of a few former Soviet republics led by Russia aiming at the economic reintegration of the region. Their objective was to remove tariff and non-tariff barriers introduced by the newly independent states since the collapse of the Soviet Union. After a number of earlier ill-fated regional economic integration endeavours, the Customs Union eventually launched in 2010 has indeed cut the rail transport time by a few days. Yet, the operation of even more ambitious Eurasian Economic Union (EAEU) underway since 2015 only further exposes the reluctance of leadership of the involved states to partially cede their sovereignty to supranational institutions. Additionally, the Eurasian project had to compete with a number of other regional trade facilitation efforts, including EU's Eastern Partnership, US-backed GUAM (Georgia, Ukraine, Azerbaijan, and Moldova), China's Southern Corridor, and various prospects for the Pan-Turkic economic space considered by Turkey.

Since the 1990s, competition between integration projects in the area went hand-in-hand with a race for hydrocarbons marketable in Western Europe, and more recently in China. The status quo in the region meant that an access to upstream sectors was usually confined to state-controlled enterprises (SCE), or, at best, joint ventures between SCEs and foreign investors. Today this balance is likely to change, as, for example Chinese SCEs diversified the mix of previously mostly Western investors in energy projects in the region whereas Russia's entry into the LNG market through the NSR along with the exploitation of shelf deposits will likely shake up pipeline natural monopolies. In terms of dispute settlement, this means that such breed of investors might seek more of autonomous ADR systems instead of relying on governments' diplomatic protection or local courts.

The themes of cross-border dispute resolution in Eurasia embrace today all three possible levels, namely, government-to-government, investor-to-government, and business-to-business levels. To wit, at the government-to-government level, the Economic Court of the CIS and the EAEU Court pragmatically balance the supranational objectives of economic integration with the intergovernmental stance of sovereign interests of their member states. The investors/business-to-government disputes in the region feature prominently in energy, extractive, and infrastructure sectors in which investors, whether domestic or foreign, and whether private or government-backed, cannot operate without exclusive rights granted by host governments. At the business-to-business level, world's major arbitration institutions, particularly the Hong Kong International Arbitration Centre (HKIAC) have expressed their interest in helping to solve SREB-related disputes, presenting themselves as impartial fora for both Chinese businesses going global and their counterparties in former Soviet republics. Meanwhile, with about 300 cases per year, the International Commercial Arbitration Court (ICAC) at the Chamber of Commerce and Industry of the Russian Federation (RFCCI) has been a rather vibrant ADR institution, even despite a parallel regional tendency to outsource ADR to the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) or to Vienna International Arbitral Centre (VIAC).

In the course of this project running throughout 2019, we have gathered contributions addressing several of the above-mentioned topics. This special issue consists of four parts as follows: *1) EAEU's legal system; 2) ADR; 3) investment protection;* and *4) development and sustainability issues.*

EAEU's legal system

In the first part covering EAEU's legal system, in the article titled '*The Court of the Eurasian Economic Union: not just for Government-to-Government Dispute Settlement*,' **Kirill Entin** and **Ekaterina Diyachenko** argue that, since its establishment in 2015 the EAEU Court has been largely seen as a mechanism for resolving disputes between governments or for interpreting the law of the EAEU in abstracto via its advisory opinions. As a result, the EAEU Court's potential has been largely underutilized by economic entities despite a liberal locus standi and the possibility to challenge the validity of both individual acts (for instance, in the field of EAEU competition law) and regulatory acts of general application adopted by the Eurasian Economic Commission (EEC), including antidumping measures or even technical regulations. The authors discuss how the EAEU Court may help private actors to protect their rights and legitimate interests under EAEU law. They examine different types of actions available to economic entities, the admissibility criteria and the consequences of the Court's judgements. As the analysis of the EAEU Court's case-law shows, the action for failure to act is of particular importance as it may be used by private entities as an indirect mechanism to enhance Member States' compliance with their obligations under EAEU law. Finally, the authors also address the issue of the sources of law that private actors could rely upon.

The second article of this part, titled '*EAEU Competition Law: What's in a Name?*', by the same authors, first overviews the provisions of the Treaty on the EAEU establishing the general principles and rules of competition. The authors further present a detailed analysis of the main features and characteristics of the EAEU competition law. Among the issues discussed in this article is the direct effect and direct applicability of the general rules of competition, the relation between EAEU and national competition law provisions as well as the division of competence between the Eurasian Economic Commission and national competition authorities. The relevant features and provisions of EAEU competition law, such as the notion of 'coordination of economic activity' are analysed through the prism of the EAEU Court's advisory opinions. The authors also use a comparative approach drawing parallels and underlining the differences with EU law and the case law of the Court of Justice of the European Union (CJEU). Finally, the authors also examine the mechanisms of judicial protection available under EAEU law to economic entities in the field of competition law.

ADR

In the second part related to ADR, in an article titled '*Current Trends in International Arbitration in Russia: Protectionism or Preventionism?*', **Rinat Gareev** argues that arbitration is now widely recognized as the most favored mechanism for resolving disputes arising out of international commercial transactions - it is usually seen as a more neutral and independent venue and is believed to mitigate parties' distrust for foreign state courts. This author examines whether states are still in a position to control arbitration, and what specific steps could be made to slow down the process of such rapid growth of the popularity and use of international arbitration by private parties. He argues that the state's legal intervention might become an obstacle to further development of international arbitration, whilst, as demonstrated, certain nations had been more successful in implementing such measures of preventive nature than others. The author chooses Russia as an example of a state having a consistently negative

reaction to arbitration, and delves into detailed reasons of such a reaction.

In the article titled '*Transnational Dispute Settlement at the International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry,*' **Dmitry Davydenko** presents the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (the 'ICAC') as a recognized arbitral Moscow-based institution with long running experience in administering transnational commercial arbitration. According to the author, disputes decided by the ICAC tribunals most frequently arise out of commercial contracts of sale of goods, services, works, and lease. The author follows the history of the ICAC, which was first established and earned international recognition in the early period of Soviet history. The author offers an overview of the most significant features of the ICAC's present status, organization and proceedings, especially in the light of the recent arbitration law reform in Russia, and presents related statistical data. The issues of applicable law and composition of the arbitral tribunals are also recognized. The author discusses why this arbitral institution deserves notable attention when choosing a dispute resolution procedure in a case involving at least one party related to Eastern Europe and CIS.

In the article titled '*Commercial Dispute Resolution in the Union State of Russia and Belarus in the Light of the Singapore Convention on Mediation: Perspective of Harmonization?*', **Natalia Gaidaenko-Schaer** presents the Union State of Russia and Belarus as a versatile interstate formation combining the features of political union and economic integration. Its activities are governed mostly by intergovernmental treaties and conventions, including multilateral agreements on legal assistance providing for the mutual recognition and enforcement of judgments issued by the national commercial courts and of arbitral awards. Thanks to the Singapore Convention on Mediation, the latter will likely become a trend for the settlement of international commercial disputes. The author analyses the possible influence of the Singapore Convention on the harmonization of the legislation of the Union State, mechanisms of enforcement of mediated settlement agreements available under the national legislations of the member states and how mediation is regulated in Russia and Belarus. Since international commercial arbitration is the most popular ADR method for settlement of international commercial disputes, an outline of the national legislation of both States on international commercial arbitration is provided. It is followed by conclusions on the sufficiency of the existing mechanisms for enforcement of mediated settlement agreements, the prospective of future harmonization of the legislation related to commercial mediation within the Union State of Russia and Belarus and within larger economic integration organizations of post-Soviet States, namely the CIS and the EAEU.

In the article titled '*Can the Astana International Financial Centre Offer a Forum for the Resolution of Transport Disputes which Arise along Belt and Road Initiative?*,' **Arailym Nurabay** examines the potential of the Astana International Financial Centre Court and of the International Arbitration Centre of the Astana International Financial Centre to resolve transport disputes which arise along Belt and Road Initiative (BRI). For that purpose, the author separately analyses the main governing documents of the Astana International Financial Centre Court and of the International Arbitration Centre of the Astana International Financial Centre. The article delves into conflicting and unclear rules, potentially problematic provisions, and omissions in the governing documents. Finally, the author presents an assessment of opportunities and limits of the Astana International Financial Centre to become an effective forum for the resolution of BRI transport disputes on the Kazakhstan's territory.

In the article titled '*An Assessment of VIAC and Energy Community as Alternative Dispute Settlement Centres in the CIS and Greater Eurasian Area: Strengths, Challenges, and Opportunities*', **Smaranda Miron** and **Stephan Karall** argue that, representing one of Europe's leading arbitral institutions, VIAC serves as a focal point for the settlement of commercial disputes in the regional and international community. With the recent changes to VIAC's Rules of Arbitration and Mediation 2018 and steadily improving transparency and cost-efficiency measures, VIAC ensures to stay on top of the cohort of leading arbitration institutions. The authors present an analysis of VIAC's role in CIS countries and the Greater Eurasian Area, along with a special focus on the newly introduced measures to improve the quality of its dispute resolution and always stay up-to-date. VIAC has recently signed a MoU with the Energy Community Secretariat's Dispute Resolution and Negotiation Centre on the collaboration in the area of dispute settlement in energy-related disputes. Hence, this paper includes an analysis of two successfully settled disputes, where the Centre administered the negotiation process. The first dispute between Gas Natural Fenosa and the Government of Moldova arose from deviations between the costs of purchasing electricity and the regulated electricity tariff. In the second case between the Energy Community Secretariat and Bosnia and Herzegovina, the state authorities committed not to use an environmental permit issued as a result of a non-compliant environmental impact assessment procedure.

In the article titled '*Recognition and Enforcement of Foreign Arbitral Awards in the Republic of Azerbaijan*,' **Azar Aliyev** and **Turkhan Ismayilzada** present an overview of the proceedings on recognition and enforcement of foreign arbitral awards in Azerbaijan. The authors start with a scrutiny of the status quo of international commercial arbitration in Azerbaijan, setting it in the context of the economic development of the country over the last 30 years. This scrutiny is a background for the following analysis of the international treaty framework, national legislation and court practice. The authors pay special attention to the elements in the national legislation that deviate from the international best practices. Another focus of the authors are structural problems of the regulation, in particular

parallel regulation proceedings on recognition and enforcement of foreign arbitral awards in the Law on International Arbitration and the Civil Procedural Code. They also analyze court practice based on thirty decisions of the Supreme Court of Azerbaijan concerning recognition and enforcement of foreign arbitral awards and court decisions, covering the period of past ten years. The main focus is made on the recent decision of the Constitutional Court of Azerbaijan declaring the decision of the Supreme Court of Azerbaijan denying the recognition and enforcement of the arbitral award rendered by the Korean Commercial Arbitration Board (KCAB) unconstitutional. The authors also attempt to determine the vector of further development in the light of ongoing reforms of economic legislation and the recent decision of the Constitutional Court.

Investment Protection

In the third part, covering investment protection, in the article titled '*Restrictions on Foreign Direct Investment (FDI) in State Controlled Entities under Russian Law*,' **Aleksandr Alekseenko** submits that one of the key priorities of the Russian Government is the attraction of FDI. As a result, according to the author, foreign investors can enjoy national treatment in Russia, provided they do not threaten state security in any way. The Russian legislation does however set some limitations on investments, in particular surrounding companies engaging in business activities of strategic importance. The main aim of these limitations is to supervise transactions of foreign investors, which can lead to their subsequent control over strategic companies. Strategic companies are very attractive to the foreign capital. The author analyses the restrictions which apply to foreign investors in Russia. He finds specific features of public supervision of FDI in strategic companies and state-owned entities and shows problems arising from the procedure of the state's preliminary approval of transactions listed in the Russian legislation. The author concludes that the Russian Government shall increase the transparency of decision making, whereby the Governmental Commission approves FDI in strategic company and establishes a clear list of transactions, regulated by the Strategic Investments Law.

In the article titled '*BIT Planning for Central Asia: The Problem of Negotiations and Definitions*,' **Aidana Aldiyarova** argues that solving the problems of negotiation and definitions of the bilateral investment treaties (BITs) of Central Asia should become a priority for policymakers of the region in the near future. According to the author, some arbitrators in cases involving Central Asian jurisdictions have identified that the applicable BITs lacked "insistency on additional requirements" in the negotiation of substantive standards. The author examines the BITs concluded by the Central Asian states and the available investor-state claims in which they participated. The principal criticism of the BITs of Central Asia is that they are based on an older way of functioning. This brings more uncertainty to investor-state dispute settlement (ISDS) practice, and they are inconsistent in their treaty language. The main argument of the author is that the BITs of Central Asia have failed to have a basic framework of negotiation as well as clear definitions of the investment standards. Thus, the main idea of the paper is to suggest planning BITs with optimal rules and definitions. As variations in interpretation of investment concepts affect the results of investment disputes, the prevention of less predictable outcomes must be reflected in the BITs. She thus submits that an innovative approach for improved substantive standards for the relevant BITs should come from the Central Asian states themselves, since they are in the best position to appreciate their situation, and it should increase the awareness of their obligations under their investment treaties.

Benjamin Terrade, in his article '*Investment Arbitration's First Bell Ring for Belarus - Belarus's Exposure to International Investment Arbitration*', posits that the year 2018 saw the first investment treaty arbitrations involving the republic of Belarus. As of now, four cases are known. In three of them the Belarusian State is respondent. Another one concerns a Belarusian investor resorting to arbitration against Cyprus, alleging a violation of the Bilateral Investment Treaty (BIT) between Belarus and Cyprus. In the three cases where Belarus is the respondent State two arbitral tribunals were constituted at the International Centre for Settlement of Investment Dispute (ICSID) and one at the Permanent Court of Arbitration (PCA). As a plaintiff in one of the abovementioned cases, a Belarusian investor has submitted the dispute for settlement to the ICSID. These first investment treaty arbitrations involving Belarus draws attention to foreign investment protection in Belarus and raises the question of the Belarusian State's take on international investment law. It also sheds a new light on previous foreign investment cases which did not lead to international arbitration. There are several factors that may explain the initiation of those disputes one of the most important being the stakeholders involved. If these first cases signal a new inclination of foreign investors towards investment arbitration, is this dispute resolution mechanism available to them and to what extent? Therefore, to assess Belarus's exposure to investment arbitration disputes, attention should be paid not only to foreign investment and foreign investors in Belarus, but also to the access of the latter to international arbitration. Looking at the level of protection granted to foreign investors and Belarus's consent to arbitration in the event of a dispute should inform us about the likelihood of new arbitration proceedings.

In the article titled '*Uzbekistan's New Bilateral Investment Treaty Standpoint: In Case of Uzbekistan-Turkey BIT (2018)*' **Farruhbek Muminov** and **Jędrzej Górski** argue that Uzbekistan is often seen as an attractive destination for FDI, largely thanks to its vast supply of natural resources. However, inward FDI in Uzbekistan remains below expectations due to the lack of transparency and stability of the domestic regulatory environment. Uzbekistan has recently undergone lengthy reforms aiming at economic liberalization. In particular, a review of investment laws suggests an improvement of the investment climate in the country. In the course of these

reforms, Uzbekistan concluded a bilateral investment treaty (BIT) with Turkey in 2018, which in essence follows the Turkish Model BIT. By revising its BITs-related policies, Uzbekistan has sent a positive message to foreign investors, suggesting a more favourable investment climate than that of the previous generation of its BITs. By adding provisions on social and environmental standards as well as public health, the new Uzbekistan-Turkey BIT also clarifies host state's regulatory powers. It is underlined that the main concern of foreign investors is a lack of transparency and predictability of the host country legislation, rather than high standards of the investors. Therefore, the authors conclude that Uzbekistan ultimately aims to create a transparent and predictable investment environment, whilst at the same time adhering to social responsibilities.

Development and Sustainability Issues

In the fourth part covering development and sustainability issues, the article titled '*Indirect Expropriation Claims in Renewable Energy Arbitrations Under the ECT*' by **Claudia Pharaon** underlines that during the past decades, the global energy scene has witnessed a considerable increase in clean energy investments, mostly driven by government-led incentive programmes. In the Eurasian region, Europe leads the international clean energy transition and Asia's renewable energy sector has been growing steadily over the last few years. Due to their large-scale and long-term character, renewable energy investments present specific risks to investors. This, combined with the actions taken in a number of states to cancel incentive measures, has resulted in an onslaught of claims involving the renewable energy sector, predominantly brought under the Energy Charter Treaty (ECT). The author examines the approaches that various tribunals adopted when ruling on indirect expropriation claims in renewable energy arbitration cases under the ECT. Based on an analysis of the tribunals' reasoning in these cases and on a comparative overview of other investment tribunals' assessments of indirect expropriation claims, the goal of this article is to elucidate the standard(s) applied to determine whether an indirect expropriation has occurred under the ECT. The article also identifies the legal and policy considerations that may drive arbitral tribunals in making their findings on indirect expropriation in renewable energy arbitrations under the ECT.

In the article titled '*Contracts Affected by Economic Sanctions: Russian and International Perspectives,*' **Andrey Kotelnikov** analyzes economic sanctions, particularly unilateral ones, as an increasingly popular instrument of foreign policy. Some states have extensive experience in adopting them and in resolving private disputes arising from such measures. For other countries, this practice is more recent and their sanction regimes are not as mature. Against the background of post-2014 sanction regimes targeting Russia and its counter-sanctions, this article considers the primary aspects of the impact sanctions have on the private contractual sphere. These include qualification of sanctions as a ground for invalidity of contracts and as impediment excusing debtors from the performance of their obligations. The author begins by analysing the theoretical framework developed in international doctrine and practice. The author highlights the differences between the application of sanctions by domestic courts and by arbitral tribunals and considers their significance. Alongside its international counterparts, the author considers Russian domestic statutory regulation, which is well-developed and similar to that in other civil-law European jurisdictions. Although it is possible to hypothesise on the possible judicial approaches, available Russian case law on this subject remains scarce and occasionally inconsistent. The avenues for further development of fundamental approaches in the practice of courts and arbitral tribunals are explored in the conclusion.

In the article titled '*Integrating in a Rough Neighbourhood? The Part of Sustainable Development in the EU Economic Integration Efforts in the post-Soviet Space: the Case of Moldova,*' **Anna Aseeva** and **Alexandra Shishkova** analyze the impact of the Deep and Comprehensive Free Trade Area (DCFTA) between the EU and Moldova on the development of the latter in a broader context of the EU's Eastern Partnership (EaP) and European Neighborhood Policy (ENP). There is a clear link between the EaP/ ENP framework, within which the policy of extending EU legislation to the post-Soviet states is actively promoted, and the Association Agreement with Moldova. The analysis of the implementation of Moldova's economic integration into the EU market highlights not only positive but also several negative trends of this process. Namely, in the shorter term, Moldova's economic, political and social benefits from the DCFTA are far from sustainable, as they are primarily associated with drastic legislative changes, as well as an increase in the export of raw materials and low-tech goods. In the long term, however, the authors argue that the DCFTA provisions bear the potential for the sustainable development of Moldova; but the effectiveness of their implementation depends primarily on solving systemic problems in the country. Against this background, the authors then offer an analysis of recent transnational disputes over one of the most crucial elements of Moldova's sustainable development-namely, electricity. In particular, the so far latest ruling in the Energoalians 20 year-long row is essential both for the resolution of future transnational energy disputes under the ECT and for a better understanding of the EU's attitude towards Moldova and its further European integration.

In the article titled '*Production Sharing Agreements in the Caucasus and Central Asia: A Contextual Study of Azerbaijan and Kazakhstan,*' **Hakan Şahin** discusses that, following the dissolution of the Soviet Union, the newly formed resource-rich countries have each striven to occupy a major position in Eurasian economy. Azerbaijan and Kazakhstan are two of the former Soviet republics that arguably have most successfully realised this goal in the petroleum sector, largely by attracting foreign investors. Their success in attracting and securing these investments has been dependent on contractual production-sharing agreements ('PSAs') as well as the implementation of a series of laws designed to protect and secure

foreign investment. Production-sharing agreements establish the legal, fiscal and commercial framework between a multinational oil company and a concerned state with respect to each other. The article focuses on the legal and taxation aspects of the PSAs initiated by Azerbaijan and Kazakhstan from a comparative perspective. The author exposes the main legal issues and explores the most controversial contractual commitments inserted into this type of agreement. The author goes on to propose practicable solutions to overcome the outlined challenges and makes concrete recommendations to the governments of these states.

In the article titled '*Maintenance of the Historic Title of Russia to the Straits of the Northern Sea Route in the Twenty-First Century,*' **Timur Abushakhmanov** argues that the Northern Sea Route (NSR) provides a faster and shorter route between Northern Europe and East Asia than the Suez Canal and Cape Routes. Its importance for international commerce is gradually growing as, due to the melting of the Arctic ice, the NSR is becoming more navigable. This development spurs more debate on the legal status of the major NSR straits. Russia claims them to be its historic internal waters where it can control navigation to the fullest possible extent, while the United States dispute this claim. The author examines the current legal status of the NSR straits and shed a critical light on the Russian characterization of the NSR straits as historic waters on the assumption that they are not used for international navigation. The author also addresses the question whether the historic title of Russia can be maintained in case the NSR straits are transformed into the straits used for international navigation between the areas of the exclusive economic zone of Russia.

Full article here

EAEU's Legal System

The Court of the Eurasian Economic Union: Not Just for Government-to-Government Dispute Settlement

Dr. Ekaterina Diyachenko
Court of the Eurasian Economic Union

Dr. Kirill Entin
Court of the Eurasian Economic Union, Higher School of Economics

Abstract

Since its establishment in 2015 the Court of the Eurasian Economic Union (the 'Court') has been largely seen as a mechanism for resolving disputes between governments or for interpreting the law of the Eurasian Economic Union (EAEU) in abstracto via its advisory opinions. As a result, its potential has been largely underutilized by economic entities despite a liberal locus standi and the possibility to challenge the validity of both individual acts (for instance, in the field of EAEU competition law) and regulatory acts of general application adopted by the Eurasian Economic Commission (EEC), including antidumping measures or even technical regulations.

This article aims to discuss how the EAEU Court may help private actors to protect their rights and legitimate interests under EAEU law. It examines the different types of actions available to economic entities, the admissibility criteria and the consequences of the Court's judgements. As the analysis of the EAEU Court's case-law shows, the action for failure to act is of particular importance as it may be used by private entities as an indirect mechanism to enhance Member States' compliance with their obligations under EAEU law. Finally, the authors also address the issue of the sources of law that private actors could rely upon.

Full article here

EAEU Competition Law: What's in a Name?

Dr. Ekaterina Diyachenko
Court of the Eurasian Economic Union

Dr. Kirill Entin
Court of the Eurasian Economic Union, Higher School of Economics

Abstract

The article opens with a brief overview of the provisions of the Treaty on the Eurasian Economic Union (EAEU) establishing the general principles and rules of competition. It further presents a detailed analysis of the main features and characteristics of the EAEU competition law. Among the issues discussed in this article is the direct effect and direct applicability of the general rules of competition, the relation between EAEU and national competition law provisions as well as the division of competence between the Eurasian Economic Commission and national competition authorities. T

he relevant features and provisions of EAEU competition law, such as the notion of 'coordination of economic activity' are analysed through the prism of the EAEU Court's advisory opinions. The authors also use a comparative approach drawing parallels and underlining the differences with EU law and the case law of the Court of Justice of the European Union (CJEU). Finally, the authors also examine the mechanisms of judicial protection available under EAEU law to economic entities in the field of competition law.

Full article here

Current Trends in International Arbitration in Russia: Protectionism or Preventionism?

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Abstract

One of the major perceived disadvantages of litigation as the potential mode of dispute resolution in international commercial transactions context is the prospect of ending up in national courts of the defendant state. There is a high risk that foreign state courts may have inherent prejudice towards alien businesses. For that reason, arbitration is now widely recognized as the most favored mechanism for resolving disputes arising out of international commercial transactions - it is usually seen as a more neutral and independent venue and is believed to mitigate parties' distrust for foreign state courts.

This article aims to examine whether states are still in a position to control arbitration, and what specific steps could be made to slow down the process of such rapid growth of the popularity and use of international arbitration by private parties. It is argued that the state's legal intervention might become an obstacle to further development of international arbitration, whilst, as demonstrated, certain nations had been more successful in implementing such measures of preventive nature than others. Russia is chosen as an example of a state having a consistently negative reaction to arbitration. This article delves into detailed reasons of such a reaction.

Full article here

Transnational Dispute Settlement at the International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry

Dr. Dmitry Davydenko
MGIMO

Abstract

The International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (the 'ICAC') is a recognized arbitral Moscow-based institution with long running experience in administering transnational commercial arbitrations. Most frequently, disputes decided by the ICAC tribunals arise out of commercial contracts of sale of goods, services, works, and lease. This paper follows the history of the ICAC, which was first established and earned international recognition in the early period of Soviet history.

The paper offers an overview of the most significant features of the ICAC's present status, organization and proceedings, especially in the light of the recent arbitration law reform in Russia, and presents related statistical data. The issues of applicable law and composition of the arbitral tribunals are also recognized. The paper discusses why this arbitral institution deserves notable attention when choosing a dispute resolution procedure in a case involving at least one party related to Eastern Europe and CIS.

Full article here

Commercial Dispute Resolution in the Union State of Russia and Belarus in the Light of the Singapore Convention on Mediation: Perspective of Harmonization?

Natalia Gaidaenko Schaer
Secretan Troyanov Schaer SA

Abstract

The Union State of Russia and Belarus is a versatile interstate formation combining the features of political union and economic integration. Its activities are governed mostly by intergovernmental treaties and conventions, including multilateral agreements on legal assistance providing for the mutual recognition and enforcement of judgments issued by the national commercial courts and of arbitral awards. Thanks to the Singapore Convention on Mediation, the latter will likely become a trend for the settlement of international commercial disputes.

The author analyses the possible influence of the Singapore Convention on the harmonization of the legislation of the Union State, mechanisms of enforcement of mediated settlement agreements available under the national legislations of the member states and how mediation is regulated in Russia and Belarus. Since international commercial arbitration is the most popular alternative dispute resolution (ADR) method for settlement of international commercial disputes, an outline of the national legislation of both States on international commercial arbitration is provided. It is followed by conclusions on the sufficiency of the existing mechanisms for enforcement of mediated settlement agreements, the prospective of future harmonization of the legislation related to commercial mediation within the Union State of Russia and Belarus and within larger economic integration organizations of post-Soviet States, namely the Commonwealth of Independent States (CIS) and the Eurasian Economic Union (EAEU).

Full article here

Can the Astana International Financial Centre Offer a Forum for the Resolution of Transport Disputes which Arise along Belt and Road Initiative?

Arailym Nurabay
JSC Consulting Group Bolashak

Introduction

[Will be added shortly] This paper examines the potential of the Astana International Financial Centre Court and of the International Arbitration Centre of the Astana International Financial Centre to resolve transport disputes which arise along Belt and Road Initiative (BRI). For that purpose, the author separately analyses the main governing documents of the Astana International Financial Centre Court and of the International Arbitration Centre of the Astana International Financial Centre. The article delves into conflicting and unclear rules, potentially problematic provisions, and omissions in the governing documents. Finally, the author presents an assessment of opportunities and limits of the Astana International Financial Centre to become an effective forum for the resolution of BRI transport disputes on the Kazakhstan's territory.

Full article here

An Assessment of VIAC and Energy Community as Alternative Dispute Settlement Centres in the CIS and Greater Eurasian Area: Strengths, Challenges, and Opportunities

Smaranda Miron
Energy Community Secretariat

Mag. Stephan Karall
Vienna International Arbitral Centre (VIAC)

Abstract

Representing one of Europe's leading arbitral institutions, the Vienna International Arbitral Centre (VIAC) serves as a focal point for the settlement of commercial disputes in the regional and international community. With the recent changes to VIAC's Rules of Arbitration and Mediation 2018 and steadily improving transparency and cost-efficiency measures, VIAC ensures to stay on top of the cohort of leading arbitration institutions. This paper presents an analysis of VIAC's role in CIS countries and the Greater Eurasian Area, along with a special focus on the newly introduced measures to improve the quality of its dispute resolution and always stay up-to-date. VIAC has recently signed a MoU with the Energy Community Secretariat's Dispute Resolution and Negotiation Centre (the 'Centre') on the collaboration in the area of dispute settlement in energy-related disputes. Hence, this paper includes an analysis of two successfully settled disputes, where the Centre administered the negotiation process.

The first dispute between Gas Natural Fenosa and the Government of Moldova arose from deviations between the costs of purchasing electricity and the regulated electricity tariff. In the second case between the Energy Community Secretariat and Bosnia and Herzegovina, the state authorities committed not to use an environmental permit issued as a result of a non-compliant environmental impact assessment procedure.

Full article here

Recognition and Enforcement of Foreign Arbitral Awards in the Republic of Azerbaijan

Dr. Azar Aliyev
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Abstract

This paper presents an overview of the proceedings on recognition and enforcement of foreign arbitral awards in Azerbaijan. It starts with a scrutiny of the status quo of international commercial arbitration in Azerbaijan, setting it in the context of the economic development of the country over the last 30 years. This scrutiny is a background for the following analysis of the international treaty framework, national legislation and court practice.

Special attention is paid to the elements in the national legislation that deviate from the international best practices. Another focus of the paper are structural problems of the regulation, in particular parallel regulation proceedings on recognition and enforcement of foreign arbitral awards in the Law on International Arbitration and the Civil Procedural Code. Authors also analyse court practice based on thirty decisions of the Supreme Court of Azerbaijan concerning recognition and enforcement of foreign arbitral awards and court decisions, covering the period of past ten years. The main focus is made on the recent decision of the Constitutional Court of Azerbaijan declaring the decision of the Supreme Court of Azerbaijan denying the recognition and enforcement of the arbitral award rendered by the Korean Commercial Arbitration Board (KCAB) unconstitutional.

The paper is also an attempt to determine the vector of further development in the light of ongoing reforms of economic legislation and the recent decision of the Constitutional Court.

Full article here

Restrictions on Foreign Direct Investment (FDI) in State Controlled Entities under Russian Law

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Abstract

One of the key priorities of the Russian Government is the attraction of Foreign Direct Investment (FDI). As a result, foreign investors can enjoy national treatment in Russia, provided they do not threaten state security in any way. The Russian legislation does however set some limitations on investments, in particular surrounding companies engaging in business activities of strategic importance. The main aim of these limitations is to supervise transactions of foreign investors, which can lead to their subsequent control over strategic companies. Strategic companies are very attractive to the foreign capital.

This paper analyses the restrictions which apply to foreign investors in Russia. It finds specific features of public supervision of FDI in strategic companies and state-owned entities and shows problems arising from the procedure of the state's preliminary approval of transactions listed in the Russian legislation. The paper concludes that the Russian Government shall increase the transparency of decision making, whereby the Governmental Commission approves FDI in strategic company and establishes a clear list of transactions, regulated by the Strategic Investments Law.

Full article here

BIT Planning for Central Asia: The Problem of Negotiations and Definitions

Aidana Aldiyarova

Abstract

Solving the problems of negotiation and definitions of the bilateral investment treaties (BITs) of Central Asia should become a priority for policymakers of the region in the near future. Some arbitrators in cases involving Central Asian jurisdictions have identified that the applicable BITs lacked "insistency on additional requirements" in the negotiation of substantive standards. This paper examines the BITs concluded by the Central Asian states and the available investor-state claims in which they participated. The principal criticism of the BITs of Central Asia is that they are based on an older way of functioning. This brings more uncertainty to investor-state dispute settlement (ISDS) practice, and they are inconsistent in their treaty language. The main argument of the paper is that the BITs of Central Asia have failed to have a basic framework of negotiation as well as clear definitions of the investment standards. Thus, the main idea of the paper is to suggest planning BITs with optimal rules and definitions. As variations in interpretation of investment concepts affect the results of investment disputes, the prevention of less predictable outcomes must be reflected in the BITs. It is argued here that an innovative approach for improved substantive standards for the relevant BITs should come from the Central Asian states themselves, since they are in the best position to appreciate their situation, and it should increase the awareness of their obligations under their investment treaties.

Full article here

Investment Arbitration's First Bell Ring for Belarus - Belarus's Exposure to International Investment Arbitration

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Abstract

The year 2018 saw the first investment treaty arbitrations involving the republic of Belarus. As of now, four cases are known. In three of them the Belarusian State is respondent. Another one concerns a Belarusian investor resorting to arbitration against Cyprus, alleging a violation of the Bilateral Investment Treaty (BIT) between Belarus and Cyprus. In the three cases where Belarus is the respondent State two arbitral tribunals were constituted at the International Centre for Settlement of Investment Dispute (ICSID) and one at the Permanent Court of Arbitration (PCA). As a plaintiff in one of the abovementioned cases, a Belarusian investor has submitted the dispute for settlement to the ICSID. These first investment treaty arbitrations involving Belarus draws attention to foreign investment protection in Belarus and raises the question of the Belarusian State's take on international investment law. It also sheds a new light on previous foreign investment cases which did not lead to international arbitration. There are several factors that may explain the initiation of those disputes one of the most important being the stakeholders involved. If these first cases signal a new inclination of foreign investors towards investment arbitration, is this dispute resolution mechanism available to them and to what extent? Therefore, to assess Belarus's exposure to investment arbitration disputes, attention should be paid not only to foreign investment and foreign investors in Belarus, but also to the access of the latter to international arbitration. Looking at the level of protection granted to foreign investors and Belarus's consent to arbitration in the event of a dispute should inform us about the likelihood of new arbitration proceedings.

Full article here

Uzbekistan's New Bilateral Investment Treaty Standpoint: In Case of Uzbekistan-Turkey BIT (2018)

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Abstract

Uzbekistan is often seen as an attractive destination for foreign direct investment (FDI), largely thanks to its vast supply of natural resources. However, inward FDI in Uzbekistan remains below expectations due to the lack of transparency and stability of the domestic regulatory environment. Uzbekistan has recently undergone lengthy reforms aiming at economic liberalization. In particular, a review of investment laws suggests an improvement of the investment climate in the country. In the course of these reforms, Uzbekistan concluded a bilateral investment treaty (BIT) with Turkey in 2018, which in essence follows the Turkish Model BIT. By revising its BITs-related policies, Uzbekistan has sent a positive message to foreign investors, suggesting a more favorable investment climate than that of the previous generation of its BITs. The new Uzbekistan-Turkey BIT also clarifies host states regulatory powers, by adding provisions on social and environmental standards as well as public health. That the main concern of foreign investors stands as the lack of transparency and predictability of the host country legislation is widely recognized, rather than high standards of the investors. Therefore, Uzbekistan ultimately aims to create a transparent and predictable investment environment, whilst the same time adhering to social responsibilities.

Full article here

Development and Sustainability Issues

Indirect Expropriation Claims in Renewable Energy Arbitrations Under the ECT

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Abstract

During the past decades, the global energy scene has witnessed a considerable increase in clean energy investments, mostly driven by government-led incentive programmes. In the Eurasian region, which is the main focus of this article, Europe leads the international clean energy transition and Asia's renewable energy sector has been growing steadily over the last few years. Due to their large-scale and long-term character, renewable energy investments present specific risks to investors. This, combined with the actions taken in a number of States to cancel incentive measures, has resulted in an onslaught of claims involving the renewable energy sector, predominantly brought under the Energy Charter Treaty (ECT). This article examines the approaches that various tribunals adopted when ruling on indirect expropriation claims in renewable energy arbitration cases under the ECT. Based on an analysis of the tribunals' reasoning in these cases and on a comparative overview of other investment tribunals' assessments of indirect expropriation claims, the goal of this article is to elucidate the standard(s) applied to determine whether an indirect expropriation has occurred under the ECT. The article also aims to identify the legal and policy considerations that may drive arbitral tribunals in making their findings on indirect expropriation in renewable energy arbitrations under the ECT.

Full article here

Contracts Affected by Economic Sanctions: Russian and International Perspectives

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Introduction

[Will be added shortly] This paper analyzes economic sanctions, particularly unilateral ones, as an increasingly popular instrument of foreign policy. Some states have extensive experience in adopting them and in resolving private disputes arising from such measures. For other countries, this practice is more recent and their sanction regimes are not as mature. Against the background of post-2014 sanction regimes targeting Russia and its counter-sanctions, this article considers the primary aspects of the impact sanctions have on the private contractual sphere. These include qualification of sanctions as a ground for invalidity of contracts and as impediment excusing debtors from the performance of their obligations. The author begins by analysing the theoretical framework developed in international doctrine and practice. The author highlights the differences between the application of sanctions by domestic courts and by arbitral tribunals and considers their significance. Alongside its international counterparts, the author considers Russian domestic statutory regulation, which is well-developed and similar to that in other civil-law European jurisdictions. Although it is possible to hypothesise on the possible judicial approaches, available Russian case law on this subject remains scarce and occasionally inconsistent. The avenues for further development of fundamental approaches in the practice of courts and arbitral tribunals are explored in the conclusion.

Full article here

Integrating in a Rough Neighbourhood? The Part of Sustainable Development in the EU Economic Integration Efforts in the post-Soviet Space: the Case of Moldova

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Abstract

Gunnar Wiegand and Evelina Schulz have labelled the European Union (EU)'s trade facilitation efforts in the post-Soviet space as an integration 'in a rough neighbourhood'. With this in consideration, this article looks at the impact of the Deep and Comprehensive Free Trade Area (DCFTA) between the EU and Moldova on the development of the latter in a broader context of the EU's Eastern Partnership (EaP) and European Neighborhood Policy (ENP). There is a clear link between the EaP/ ENP framework, within which the policy of extending EU legislation to the post-Soviet states is actively promoted, and the Association Agreement with Moldova. Our analysis of the implementation of Moldova's economic integration into the EU market highlights not only positive but also several negative trends of this process. Namely, in the shorter term, Moldova's economic, political and social benefits from the DCFTA are far from sustainable, as they are primarily associated with drastic legislative changes, as well as an increase in the export of raw materials and low-tech goods. In the long term, however, the DCFTA provisions bear the potential for the sustainable development of Moldova; but the effectiveness of their implementation depends primarily on solving systemic problems in the country. Against this background, we then offer an analysis of recent transnational disputes over one of the most crucial elements of Moldova's sustainable development-namely, electricity. In particular, the so far latest ruling in the Energoallians 20 year-long row is essential both for the resolution of future transnational energy disputes under the Energy Charter Treaty (ECT) and for a better understanding of the EU's attitude towards Moldova and its further European integration.

Full article here

Production Sharing Agreements in the Caucasus and Central Asia: A Contextual Study of Azerbaijan and Kazakhstan

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Abstract

Following the dissolution of the Soviet Union, the newly formed resource-rich countries have each striven to occupy a major position in Eurasian economy. Azerbaijan and Kazakhstan are two of the former Soviet republics that arguably have most successfully realised this goal in the petroleum sector, largely by attracting foreign investors. Their success in attracting and securing these investments has been dependent on contractual production-sharing agreements ('PSAs') as well as the implementation of a series of laws designed to protect and secure foreign investment. Production-sharing agreements establish the legal, fiscal and commercial framework between a multinational oil company and a concerned state with respect to each other. This article focuses on the legal and taxation aspects of the PSAs initiated by Azerbaijan and Kazakhstan from a comparative perspective. The article exposes the main legal issues and explores the most controversial contractual commitments inserted into this type of agreement. It goes on to propose practicable solutions to overcome the outlined challenges and makes concrete recommendations to the governments of these states.

Full article here

Maintenance of the Historic Title of Russia to the Straits of the Northern Sea Route in the Twenty-First Century

Timur Abushakhmanov
Egorov Puginsky Afanasiev and Partners

Abstract

The Northern Sea Route (NSR) provides a faster and shorter route between Northern Europe and East Asia than the Suez Canal and Cape Routes. Its importance for international commerce is gradually growing as, due to the melting of the Arctic ice, the NSR is becoming more navigable. This development spurs more debate on the legal status of the major NSR straits. Russia claims them to be its historic internal waters where it can control navigation to the fullest possible extent, while the United States disputes this claim. This paper seeks to examine the current legal status of the NSR straits and shed a critical light on the Russian characterization of the NSR straits as historic waters on the assumption that they are not used for international navigation. It also addresses the question whether the historic title of Russia can be maintained in case the NSR straits are transformed into the straits used for international navigation between the areas of the exclusive economic zone of Russia.

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