Double Bridge Law

Arbitration and Cross-Border Litigation in Russia | Double Bridge Law Digest

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Double Bridge Law is pleased to present the first issue of the monthly digest dedicated to arbitration and cross-border litigation - related case law of the Russian courts. Most of the time the Russian courts deal with recognition and enforcement or set aside applications, but we will also highlight decisions addressing interim measures in support of arbitration, referral of parties to arbitration, service of process, as well as claims against arbitral institutions.

We will endeavor to release the digest on a monthly basis with a separate annual report released in January to highlight the previous year's trends, statistics as well as to reflect on some of the more important decisions of the past year. Each issue will cover decisions released during the relevant period, including these which may have been formally adopted slightly earlier, since the Russian courts delay release of some of the decisions with.

We hope that this digest will be helpful to both lawyers in Russia and these practicing in other countries, but with an interest in comparative issues or Russia-related arbitrations. Bearing this in mind we will include in the digest decisions of general interest as well as these addressing practical procedural issues important for these practicing before the Russian courts.

Finally, we have included in this digest some of the decisions of the first instance or appellate courts that are still subject to ordinary appeal and may be reversed. While they may not reflect the final decisions in the respective cases they illustrate some risks and trends we would like to bring to your attention as soon as possible.

We would be happy to receive any comments or suggestions or discuss further any issues the digest raises. If you would like to be included in the mailing list for the digest please send us a short email to su@doublebridgelaw.com.

Yours sincerely,

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Double Bridge Law brings together Russian attorneys focusing on international disputes. Our practice encompassed commercial and investment arbitration, cross-border litigation, human rights and public international law. To learn more about Double Bridge Law please visit our website www.doublebridgelaw.com

ARBITRATION

1. Supreme Court Takes Ambiguous Stance on Arbitrability of Disputes Concerning Publicly Funded Works

The dispute concerned validity of an arbitration clause in a contract between two private companies for the creation of a complex electric power metering system. These works were undertaken as part of a state-funded program to increase energy efficiency. The contractor argued that since these works were undertaken for a public purpose and were ultimately publicly funded, any disputes between the parties would be of public nature and therefore non-arbitrable.

The Supreme Court upheld the lower court's decision to dismiss the claim, but on a very narrow basis. Specifically, the Supreme Court pointed out that the claimant had failed to prove any injury resulting from the challenged clause. The arbitration clause had not yet been invoked and accordingly the tribunal had not yet ruled that it may exercise jurisdiction. The court added that in any event in such cases the state court retains the power to refuse recognition and enforcement on public policy grounds "to protect public interests" leaving wide room for post-award review.

The Supreme Court previously held that public procurement disputes are not arbitrable, but to reach this conclusion it relied on the complex contracting process prescribed by the law. In this case two private companies entered into the contract and the state's involvement was only indirect. The Supreme Court's refusal to expressly confirm arbitrability of such disputes may be seen as a sign of disagreement within the court itself as to the proper position. The risk nevertheless remains that in the future the Supreme Court will hold such disputes non-arbitrable.

OJSC Dagenergoremstroy v OJSC MRSK of Northern Caucasus, no. A63-1891/2013, Supreme Court, Commercial Division, 2 December 2015 (Supreme Court ref. no. 308-ЭС15-10232).

2. Decision on a Shareholder's Claim Defeats Enforcement of a USD 150 mln SCC Award

The Moscow Circuit Court confirmed the lower court's decision to refuse enforcement of the award. A previous decision rendered by the Russian court after the award had been rendered, but before it had been enforced, was a sufficient ground to refuse enforcement.

The dispute between the parties arose under a framework cooperation agreement concerning reduction of carbon gas emissions. Apparently during the time the arbitration was pending minority shareholders of the respondent company commenced proceedings in Russia to invalidate the agreement. They relied on the lack of proper approval of the agreement as a major and interested party transaction. The courts upheld their claims, but in the meantime the SCC tribunal rendered an award against the respondent company. The tribunal had considered the validity of the agreement and held it valid.

During the enforcement proceedings, the courts held that an arbitral award that contradicts a standing decision of a Russian court may not be recognized and enforced in Russia on public policy grounds. They dismissed the award creditor's argument that at the time the tribunal had rendered the award

Russian invalidation proceedings were still pending and no decision had been rendered.

Shareholder's actions to invalidate agreements in issue in arbitrations ("Russian torpedoes") are common in practice. So far Russian courts consistently held that a decision invalidating the agreement following such an action precludes subsequent enforcement of any award based on the agreement. Companies entering into agreements with Russian parties are accordingly advised to exercise significant care in ensuring the Russian counterpart has obtained the relevant corporate approvals and closely following any 'satellite' litigations once arbitration commences.

Core Carbon Group ApS v OJSC Rosgazifikatziya, no. A40-50788/2015, the Moscow Circuit Commercial Court, 11 December 2015

3. Commencement of Insolvency Proceedings Possibly Frustrates Ongoing Arbitrations Against the Company

The courts set aside an award rendered against an insolvent company on application of one of the company's creditors. At the time the tribunal rendered the award against the company it had already been put under supervision (the first stage of the Russian insolvency proceedings).

The courts reasoned that the award directly affected the right of parties that had not participated in the arbitration - the insolvent company's creditors. Since they had no opportunity to present their case, the award was contrary to the Russian public policy.

The decision is difficult to reconcile with the provisions of the Russian insolvency law and previous practice. Indeed, the law expressly permits a creditor to proceed with a pending claim against the company put under supervision. On the other hand, the courts may attempt to distinguish between claims pursued before a state court in public, where the company's creditors may observe the proceedings and claims pursued in private before an arbitral tribunal. Given widely held sentiment that some parties use arbitration in bad faith to 'create' inflated claims against an insolvent company such a distinction may appear appealing to some judges.

CJSC Euroline v. JSC Rosselkhozbank, no. A32-4007/2015, Supreme Court, Single Judge (decision not to hear cassation appeal), 2 December 2015 (Supreme Court ref. no. 308-ЭС15-150002).

4. Arbitral Tribunals Need Not Use Service of Process Treaties Procedures Applicable in Litigation

The Supreme Court quashed lower courts' decisions that had refused enforcement in Russia of an award rendered by a Ukrainian ICAC (MKAS) tribunal. The lower courts relied on the arbitral institution's failure to comply with the procedure for service of process set out in the CIS treaties governing cross-border litigation.

The Supreme Court explained that the treaties governing service of process in cross-border disputes (including the CIS treaties the lower courts had relied on) do not apply to arbitration. The court should rather apply the substantive test provided in the New York Convention and consider whether the respondent had had adequate notice of the proceedings.

LLC Novy Druk v LLC Agromax Inform, no. A08-4781/2014, Supreme Court, Commercial Division, 5 November 2015 (310-ЭС15-7374).

5. By Agreeing to the Finality of an Arbitration Award the Party May Completely Lose the Right to Apply to Set the Award Aside

The Moscow Circuit confirmed the lower court's decision terminating set aside proceedings the Government of St.Petersburg had commenced. The court ruled that since the parties have agreed to the finality of the award, they have waived the right to apply to set the award aside.

The Government of St.Petersburg applied to set aside an award rendered against it by a Moscow-seated UNCITRAL tribunal. It argued that the award was contrary to the Russian public policy and hence should be set aside.

The circuit court ruled that the finality of the award agreed to by the parties constitutes an absolute bar to set aside even on public policy grounds. It distinguished an earlier case, where such a challenge had been permitted, by pointing out that there the challenge had been brought by a non-party to the underlying arbitration.
The exact effect of the decision remains unclear. In terminating the proceedings the courts received comfort from the fact that parallel recognition and enforcement proceedings were already underway in St. Petersburg and apparently decided to avoid any inconsistent rulings.

It remains to be seen whether similar approach would be adopted in a case, where the enforcement must take place outside of Russia. Nevertheless, parties agreeing to 'finality' of the arbitration award must bear the possible consequences in mind.

Government of St. Petersburg v LLC Nevskaya Concession Company, no. A40-66296/15, the Moscow Circuit Court, 24 November 2015

6. Commercial Courts Have No Jurisdiction over Enforcement Proceedings Involving Individuals

Czech Export Bank applied to enforce in Russia an award rendered by a Czech arbitral tribunal against a corporate borrower and several individual guarantors. The cassation court terminated the enforcement proceedings ruling that the application should have been brought before a court of general jurisdiction.

Under the Russian law commercial courts have jurisdiction over recognition and enforcement of arbitral awards rendered in 'economic' disputes. Previously, this heading encompassed awards against individual guarantors in bank loans or M&A disputes. However, in this case and in several other recent cases, the courts concluded that in fact they lack jurisdiction, which may signify a change of practice

JSC Czech Export Bank v LLC Progress, A.G. Gogolev, L.G. Ivashov, S.V. Karapetyan, no. A40-5286/15, the Moscow Circuit Court, 11 November 2015

7. Unclear Arbitration Clauses Continue to Cause Troubles

In a construction contract the parties agreed that "if the parties are unable to settle a dispute amicably the dispute shall be settled by three arbitrators in Moscow. The arbitration will be held at the International

Chamber of Commerce in Paris in English". The Russian courts eventually permitted the subcontractor to sue in Russia finding the clause too ambiguous.

The subcontractor commenced proceedings against the contractor before the Moscow Commercial Court seeking payment for the works and various penalties. The respondent asked the court to refer parties to arbitration. It argued that the arbitration clause was in fact quite clear, the parties had agreed to an ICC arbitration seated in Moscow.

While the appellate court agreed with the respondent, the cassation instance court disagreed. For the circuit court it was enough that the clause contained an irreconcilable contradiction with respect to the seat of arbitration to render the arbitration clause unenforceable.

The decision stands out as extremely formalistic even for a Russian court. Indeed, the Russian courts have increasingly sought to 'cure' ambiguities in the arbitration clauses. However, it serves as a useful reminder of the need to ensure maximum clarity of the clause particularly where it has been translated to Russian (as apparently happened in this case).

LLC Construction Company Pokrov v JSC Techbau S.p.A., no. A40-53190/14, the Moscow Circuit Court, 11 November 2015

8. Arbitration Clauses bind Bank's Administrators Appointed by the Central Bank

Russian banking laws empower the Central Bank to appoint temporary administrators to manage a bank on the brink of insolvency. Such administrators have certain additional powers including the right to challenge certain suspicious and onerous transactions the bank entered into. The issue in this case was whether such a challenge should come before a state court or a forum agreed by the parties in the respective contract.

The temporary administrators of Bank Trust sought to invalidate a 2013 securities sale and purchase agreement, which contained an arbitration clause under which all disputes were to be referred to the Russian ICAC (MKAS) arbitration. They argued that the arbitration clause was inapplicable, since insolvency cases are non-arbitrable.

The appellate court dismissed the claim and referred parties to arbitration. It pointed out that Bank Trust had not been declared insolvent. Even though the provision granting the temporary administrators the power to challenge the transaction is part of the insolvency law the dispute itself was not insolvency-related. Besides, the temporary administrators act as representatives of the bank and as such are bound by the arbitration clause.

OJSC Bank Trust v Phosint Limited, no. A40-117039/15, the Ninth Appellate Commercial Court, 24 November 2015

9. Arbitrability of Concession-Related Disputes May be Limited

First instance Commercial Court refused to enforce a UNCITRAL award against the St. Petersburg Government in a dispute concerning the Orlovsky tunnel concession. The court held that the arbitration clause in the concession agreement was invalid.

The Federal Law on Concessions governed the concession agreement. The law provides that disputes relating to concessions may be

settled by courts, commercial courts or arbitral tribunals («третейские суды») of the Russian Federation. The Russian words used are usually employed to refer to a domestic arbitral tribunal.

However, in the concession agreement the parties chose to settle their disputes in UNCITRAL arbitration seated in Moscow with ICC acting as the appointing authority. Once a dispute arose the tribunal concluded that it has jurisdiction and ordered the St.Petersburg government to pay c. RUR 300 mln (c. EUR 4 mln) to the concessionaire.

The court concluded that the arbitration clause was contrary to the applicable Russian law. While the tribunal's seat had been in Russia this was not sufficient to make it an arbitral tribunal "of" the Russian Federation. In addition, the rules used should be of a Russian arbitral institution and a Russian person should administer the dispute and act as the appointing authority. Since the clause provided for the UNCITRAL Rules and ICC as the appointing authority it was invalid.

While the court's logic appears to be understandable, the end result deals a serious blow to the stability of concession agreements. Furthermore, the court failed to expressly deal with many obvious counterarguments. Firstly, the court overlooked the fact that the city government voluntarily agreed to such a clause. Secondly, the additional conditions of validity the court read into the law lack logical basis. The rules of virtually every institution are the same now and in any event nothing prevents a Russian institution from adopting the same rules a foreign institution does. When it comes to the appointing authority, the latter has to act independently. On the contrary having the seat of arbitration in Russia makes perfect sense, since it allows the Russian courts to set aside the award if one of the grounds for setting it aside exist. Ironically, in this case the Russian courts of the seat (in Moscow) refrained from exercising this power (see item 5 above).

It remains to be seen how the second instance court will this issue.

LLC Nevskaya Concession Company v the Government of St.Petersburg, no. A56-9227/2015, the St. Petersburg Commercial Court, 9 December 2015.

CROSS-BORDER LITIGATION

10. Choice of the 'Supreme Court of London' May Not be the Wisest Option

Russian courts held unenforceable the forum selection clause in favour of the 'Supreme Court of London' in a dispute concerning repayment of a c. 60 000 pounds sterling loan.

The court established that there is no 'Supreme Court of London' and went on to consider whether the parties may have referred to the Supreme Court or the High Court of England and Wales. The Russian court came to the conclusion that in either case the forum selection would be inoperative. Obviously, the Supreme Court is not a trial court. With respect to the High Court the reasoning is more obscure, since the court only refers summarily to expert evidence. The reason may have been that the High Court generally does not consider claims below 100 000 pounds sterling.

Danstunnan AB v LLC Favorit Production, no. A40-17612/15, the Ninth Appellate Court, 17 November 2015

11. Attempts to Create Nexus through 'Anchor Respondents' Lead to Non-Enforcement

The claimant commenced proceedings in Kazakhstan against a Russian respondent, the manufacturer of certain rail cars, and several Kazakh companies. It was a tort claim for the damages allegedly caused by improper condition of the cars the respondent had manufactured. The Kazakh courts eventually ruled against the Russian respondent, but dismissed the claims against the two Kazakh companies.

The Russian court acknowledged that where a claim is brought against several respondents a court of the seat of one of the respondents has jurisdiction. At the same time it pointed out that the claims against Kazakh companies were brought exclusively to obtain Kazakh courts' jurisdiction as evidenced by the ultimate dismissal of these claims. In these circumstances, the claimant's actions amounted to an abuse of process and Kazakh courts lacked jurisdiction.

JSC Kaztemirtrans v OJSC NPK Uralvagonzavod, no. A60-36482/2015, the Sverdlovsk Region Commercial Court, 7 December 2015 (subject to appeal).