Double Bridge Law

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

Issue No. 3 (January/February 2016)

Double Bridge Law is pleased to present the third issue of the monthly digest dedicated to arbitration and cross-border litigation - related case law of the Russian courts. The digest focuses (as do the courts) on cases dealing with recognition and enforcement or set aside applications, but we 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.

This issue covers decisions released between 25 January and 29 February 2016, including these that may have been formally adopted slightly earlier, since the Russian courts delay release of some of the decisions.

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 include in the digest decisions of general interest as well as the ones addressing practical procedural issues important for lawyers 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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ARBITRATION

1. Supreme Court judges split on whether state-owned companies and establishments may submit disputes arising out of purchase of goods or services to arbitration

Under Russian law state establishments and state-owned companies must comply with certain procedures in contracting for goods, works or services (such as selecting suppliers via an open bidding process or other transparent procedures). The law does not contain any provisions limiting the freedom of the parties to the resulting contracts to agree on any forum for resolution of their disputes.

In practice the situation is more complex. Some courts have held that disputes under such contracts may not be submitted to arbitration, because they have the same nature as public procurement disputes (under contracts with state organs). With respect to the latter category of disputes the Supreme Court consistently held that they are not arbitrable, since they concern public rather than private matters. Other courts have distinguished between contracts with state organs and contracts with state-owned companies pointing out the different legal regimes applying to them and held that disputes arising out of contracts with state-owned companies are arbitrable.

A similar split appears in the recent decisions of the Supreme Court judges refusing to consider review of the lower courts' decisions. In the first case, the judge endorsed lower courts' decision to enforce an award in a dispute between a state-owned company and its contractor. She pointed out that the law on procurement by state-owned companies does not render the relevant contracts public in their nature and hence the parties may submit such disputes to arbitration. In the second case, another judge endorsed lower courts' decision refusing to enforce an award in a dispute between a state university and its supplier. She pointed out that the same law requires transparency at all stages of procurement including, in her view, the settlement of disputes. Accordingly since the arbitration was not public the arbitral procedure contravened the law.

The approach permitting state-owned companies and establishments to submit procurement disputes to arbitration appears preferable both in terms of law and policy. Indeed, there is nothing in the law that expressly prohibits submitting such disputes to arbitration. Besides the state-owned companies themselves may wish to submit such disputes to arbitration to obtain the usual benefits of arbitration (international enforceability, professional arbitrators and better opportunity to present extensive arguments). In these circumstances the state should not restrict the parties' right to choose the forum for resolution of their disputes. Even if the state decides to impose such a limitation this should be done expressly and only prospectively (i.e. with respect to future contract) to protect legitimate expectations of the parties to the existing contracts.

JSC Federal Grid Company of the Unified Electricity System v CJSC LIMB, no. A56-25135/2015, Supreme Court, Commercial Division (one judge), 4 February 2016 (Supreme Court ref. no. 307-ЭС15-16697); Kazan Federal University v LLC Fifth Element, Supreme Court, Commercial Division (one judge), 9 February 2016 (Supreme Court ref. no. 306-ЭС15-15685).

2. A Court Shall Refer Parties to Arbitration Only If the Respondent Requests Such a Referral, Not Just Mentions the Arbitration Clause in Its Pleadings

The Supreme Court held that the state courts may proceed to rule on the merits of a dispute even if the parties have agreed to arbitrate in the underlying contract if the respondent has failed to ask the court to refer parties to arbitration in its first submission on the merits. The court seized of the matter may not discontinue the case in the absence of such a request.

The dispute arose between a lessee (claimant) and a leasing company (respondent) over certain funds the claimant alleged leasing company owed him. The leasing agreement contained an arbitration clause. However, when the lessee attempted to commence arbitration he was unable to find the arbitral institution. Eventually he commenced proceedings before a commercial court arguing among other things that the arbitration clause is incapable of being performed. In its first pleading, the leasing company made submissions on the merits of the dispute, asked the court to reject the claimant's claims and also observed that the contract contains an arbitration clause.

The first instance and appellate courts issued decisions in favor of the claimant. The cassation instance court overturned earlier decisions and referred parties to arbitration. It held that since the parties had agreed to arbitration, state courts have no jurisdiction unless the respondent positively consents to it.

In overturning the cassation instance court's decision, the Supreme Court relied on two principal arguments. Firstly, a state court has jurisdiction even if the parties have agreed to arbitration. It may refer parties to arbitration only where the respondent relies on the arbitration clause in litigation. Secondly, the respondent must request such referral expressly; a mere reference to the arbitration clause in a submission would not suffice.

The decision contains a useful reminder to the state courts that they may not terminate proceedings on their own initiative if they locate an arbitration clause in the contract (something first instance courts do quite frequently). On the other hand respondents sued in Russia who wish to have the dispute resolved by arbitration must remember to make the relevant submission to the court.

A.A. Lagunov v LLC Leasing Company Razvitie, no. A57-16403/2014, Supreme Court, Commercial Division, 8 February 2016 (Supreme Court ref. no. 306-ЭС15-13927).

3. Supreme Court Suggests a Representative Is Not Authorized to Sign a Contract with an Arbitration Clause If Such a Power Is Not Expressly Included in the Power of Attorney

In an unusual twist a three-judge panel of the Supreme Court endorsed lower courts' finding that a representative of the company who has authority to sign commercial contracts on company's behalf is not authorized to agree to an arbitration clause in the contract.

The dispute concerned enforcement of a domestic award ordering the respondent to pay certain debts for the water supply and sewage services the claimant had provided. The underlying contract

contained an arbitration clause and was signed by a manager of the claimant in charge of the relevant services on the basis of a power of attorney. At the enforcement/set aside stage the respondent argued that an unauthorized representative of the claimant had signed the arbitration clause. The courts agreed with this argument and set the award aside.

The Supreme Court overturned the lower courts on a very narrow estoppel ground. It held that the respondent had waived the right to rely on alleged invalidity of the clause, because it had failed to raise the issue in arbitration.

However, the Supreme Court proceeded to endorse the lower courts' holding that an unauthorized representative had signed the arbitration clause and this would normally have been a ground to set the award aside. The court relied on two grounds. Firstly, the access to state courts is a paramount right that must be waived expressly; an arbitration clause constitutes such a waiver and therefore must be agreed to unequivocally. Secondly, under Article 62 of the Commercial Procedure Code a power of attorney to a person representing a party to litigation must expressly provide for the authority to agree to refer disputes to arbitration. In this case, the claimant's manager had had the power to sign commercial contracts, but the power of attorney had not included the power to agree to arbitration. Hence, the arbitration clause was invalid.

The Supreme Court's decision appears to be wrong for several reasons. Firstly, Article 62 of the Commercial Procedure Code applies to powers of attorney issued for the purposes of litigation. Such a power of attorney does not usually authorize a person to sign any contracts on behalf of the represented party, hence the need to separately authorize the representative to sign an arbitration agreement. Secondly, while the agreement to arbitration must indeed be express it does not follow that an agent of a party that has been authorized to agree to a commercial contract in general needs a specific power to agree to an arbitration clause. Finally, the Supreme Commercial Court repeatedly held that a person authorized to sign contracts on behalf of another person may sign a contract containing an arbitration clause and that Article 62 of the Commercial Procedure Code is inapplicable outside of litigation.

It may be hoped that the decision will have only limited effect (if any, given the arguments above). The court dealt with a power of attorney issued in August 2013, but since 30 December 2013 Article 1217.1 of the Russian Civil Code expressly provides that a power of attorney authorizing a person to sign a contract should be assumed to authorize signing of an arbitration clause, unless otherwise provided by law. However, the Supreme Court's reference to Article 62 of the Commercial Procedure Code makes reliance on Article 1217.1 less than bulletproof. In these circumstances, parties contemplating signing contracts including arbitration clauses may be well advised to insist that the power to agree to an arbitration clause be expressly included in the power of attorney.

Izhvodokanal v LLC Management Company Expert, no. A71-15240/2014, Supreme Court, Commercial Division, 29 February 2016 (Supreme Court ref. no. 309-ЭС15-12928).

4. Lessee May Ask an Arbitral Tribunal to Compel the Lessor to Register Real Estate Lease Agreement with in a State Register

Cassation instance court referred parties to arbitration overturning decisions of lower courts. An arbitral tribunal may settle a dispute over whether the lessor must register the lease agreement between the parties. The decision will not bind the state registrar nor result in the registration and therefore the subject matter of the dispute is private rather than public in nature.

The lessee commenced proceedings in the Moscow Region Commercial Court asking the court to order the lessor to register a long-term lease agreement the parties had entered into. Before the first submission on the merits the lessor invoked the arbitration clause in the contract and asked the court to refer the dispute to ICAC (MKAS) at the Russian CCI, the forum agreed in the lease agreement. However, both the first instance and the appellate court failed to consider this argument and rendered decisions on the merits of the case.

The cassation instance court overturned the decisions. In doing so it dismissed two arguments raised by the lessee. First, it held that the arbitral tribunal will not need to rule on the rights of a non-signatory of the arbitration to the arbitration clause, the state registrar. Second, the court distinguished between two disputes: one concerning the lessor's obligation to submit the agreement for registration and the other concerning the state registrar's obligation to register the agreement. The court explained that the first dispute (the one before the courts in the case) concerns party's performance of its contractual obligations and may accordingly be settled by an arbitral tribunal.

JSC Dixi-Yug v CJSC Noginsk-Vostok*, no. A41-23320/2015, the Moscow Circuit Court, 27 January 2016.*

4. Only 'Russian' Arbitral Tribunals May Resolve Concession-Related Disputes

The cassation instance court affirmed refusal to enforce an UNCITRAL award against the government of St.Petersburg in a dispute concerning termination of the concession agreement for the construction of Orlovskiy tunnel under Neva river. The court held that the tribunal had not been 'Russian' enough, since it had sat under UNCITRAL rules, ICC (Paris) administered the arbitration and served as the appointing authority.

The Russian law on concessions provides that any disputes arising out of concession agreements may be submitted to 'treteiskiye sudi' (phrase commonly used to refer to domestic arbitral tribunals) 'of the Russian Federation'. The relevant phrase is not a term of art and it has never been expressly stated what attributes an arbitral tribunal must possess to constitute an arbitral tribunal of the Russian Federation.

In the case before the court, the concession agreement provided for a tribunal under UNCITRAL Rules administered by ICC and seated in Moscow. When a dispute arose, three arbitrators were appointed (two Russian nationals and a national of Bulgaria). Eventually they rendered an award ordering the government of St.Petersburg to pay certain amounts to the concessionaire.

In refusing to enforce the award the court relied on invalidity of the arbitration clause. It explained that to constitute an arbitral tribunal of the Russian Federation the tribunal must (i) be seated in Russia; (ii) apply rules of arbitration approved by a Russian person; (iii) be administered by a Russian person. In the event, UNCITRAL arbitration administered by ICC failed to satisfy the last two conditions and hence violated the law on concessions.

LLC Nevskaya Concession Company v the Government of St.Petersburg, no. A56-9227/2015, the North-Western Circuit Court, 17 February 2016.

Decisions of the First Instance Courts

5. By Agreeing to Application of 'Russian Procedural Law' to the Arbitration the Parties Have not Agreed to the Application of the Commercial Procedure Code

The court refused to set aside an ICAC (MKAS) at the Russian CCI award finding that the tribunal had been within its rights in refusing to admit additional submissions and evidence the claimant had untimely presented.

The claimant (in both arbitration and set aside proceedings) commenced arbitration to recover payment for certain works the respondent allegedly had failed to make. Shortly before the hearing it sought to introduce additional evidence and submissions, but the tribunal refused the application. The tribunal dismissed the claimant's claims in their entirety.

In the set aside proceedings the claimant argued that the tribunal had no power to deny admission of the documents, since the parties had agreed on application of the Russian procedural law to arbitration. The court dismissed this argument for two reasons. Firstly, the parties' agreement that 'Russian substantive and procedural law' shall apply to arbitration does not render procedural rules applicable in litigation before Russian courts applicable in arbitration. Secondly, under the relevant arbitration rules the tribunal has the power to deny admission of documents or submissions filed late.

OJSC Alfa Laval Potok v LLC Verkhnehavskiy Meat Processing Plant, no. A40-219375/2015, the Moscow Commercial Court 5 February 2016

CROSS-BORDER LITIGATION

6. Russian Court Declines to Exercise Jurisdiction Over Insolvency Proceedings with Respect to a Foreign National

The Moscow Commercial Court held that it has no jurisdiction over insolvency proceedings since the debtor was a German national. The court found that the Russian law on insolvency applies only to Russian nationals.

The German national in question provided a surety to a Russian bank guaranteeing payments by a Russian company under a loan agreement. Apparently, the borrowed had defaulted and a claim was brought against the guarantor. The surety agreement referred to the guarantor as a German national. The Russian authorities later confirmed that he did not have Russian nationality at any relevant time.

The court ruled that it has no jurisdiction. Under the insolvency law Russian courts have jurisdiction over insolvency of 'citizens' ('grazhdan'). In turn, the law on citizenship defines Russian nationals as these who possess nationality of the Russian Federation. The court saw no reason to apply a different definition. On this basis it concluded that it has no jurisdiction.

In re insolvency of Arkadiy Bliskin, no. A40-186978/2016, the Moscow Commercial Court, 26 February 2016