Double Bridge Law

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

**Issue No. 4 (March 2016)**

Double Bridge Law is pleased to present the fourth 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 in March 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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*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. Lender's unilateral option to choose between arbitration and litigation renders the entire dispute settlement clause void

The cassation instance court in Moscow ruled that the Russian courts had jurisdiction to hear an over 14.5 bln rouble claim for the repayment of a loan, since the arbitration clause in the loan agreement had been void. According to the court the provisions of Russian law invalidating the clause are mandatory and override parties' choice of English law.

The dispute arose under a 2012 loan agreement governed by English law. The claimant (apparently an SPV) provided the loan, which was secured by guarantees from a number of Russian companies. Under the dispute resolution clauses the disputes were to be submitted to LCIA, but the lender had an option to submit them to a court in England, Russia or any other competent jurisdiction. In 2013 the borrower defaulted and the lender commenced proceedings to recover the loan before the Moscow Commercial Court. The respondents (borrower and guarantors) asked the court to refer parties to arbitration.

Despite the fact that the dispute settlement clause expressly permitted the lender to commence proceedings before the Moscow Commercial Court, the courts nevertheless addressed validity of the clause as a whole. They held that by giving only one of the parties the option to choose between arbitration and litigation the clause violated their procedural equality guaranteed by the Constitution and the Convention on Human Rights and Fundamental Freedoms. The courts then dismissed the respondents' argument that English law applicable to the contract and the clause permits such optionality. The courts reasoned that since the relevant practice of Russian courts rests on the provisions of international law, it overrides parties' choice of English law.

*Emerging Markets Structured Products B.V. v. LLC Zhilindustriya & ors, no. A40-125181/2013, Moscow Circuit Court, 14 March 2016.*

### 2. Tribunal's Reliance on an Argument Not Invoked by the Claimant Leads to the Refusal to Enforce the Award

The cassation instance court in Kazan confirmed lower court's decision that had refused to recognize and enforce a 372 mln rouble ICAC (MKAS) award against Severstal. It held that the tribunal had rendered the award on the basis of an argument the claimant had not pleaded.

The underlying dispute arose under a contract for the construction of plant that the general contractor had failed to complete. Nevertheless the contractor sued the client for a portion of the general contractor's fee tied to execution of the certificate of works' acceptance. Before the arbitral tribunal the contractor argued that the client had had to sign the certificate and accordingly the tribunal should order payment of the fee. The tribunal dismissed this argument, but held that the fee

was due, because the provision making payment conditional on execution of the certificate by the client was unenforceable under Russian law.

In refusing to enforce the award the courts held that it contradicts procedural public policy as the tribunal had failed to respect principles of procedural equality and adversarial nature of the proceedings. The courts stressed that the tribunal had relied on a legal ground the claimant had not advanced and in doing so it had failed to respect the respondent's right to equality of arms.

*CJSC Strabag v CJSC Severstal – Sorting Plant Balakovo, no. A57-22646/2015, Povolzhie Circuit Court, 9 March 2016.*

## Decisions of the First Instance and Appellate Courts

### 3. 'Russian Torpedo' No More? Court Holds that a Shareholder of a Company Is Bound by the Arbitration Clause in the Company's Contract the Shareholder Seeks to Invalidate

Appellate court in Moscow decided the parties should be referred to arbitration as the claimant was bound by the arbitration clause in the contract it had sought to invalidate.

The claimant asked the court to invalidate a long-term lease agreement a company (in which the claimant had an interest) had entered into. It argued that the terms and conditions of the lease were unfair and the shareholders had not properly approved the lease agreement. The respondent asked the court to refer parties to arbitration relying on the arbitration clause in the lease.

The appellate court agreed with the respondent and dismissed the claim. It relied on the recent Resolution of the Supreme Court's Presidium, where the Supreme Court had explained that shareholders of a company seeking invalidation of the transactions the company entered into act as representatives of the company, not independent parties. Hence, as the claimant was only a representative of the lessee the arbitration clause in the lease applied and the court was bound to refer parties to arbitration.

*Grasilis Holding B.V. v. CJSC Kulon-Istra and LLC Danom, no. A40-176458/2015, the Ninth Appellate Court, 18 March 2016.*

### 4. Claimant's Inability to Pay Arbitration Fees Renders the Arbitration Clause Incapable of Being Performed

Appellate court in St. Petersburg refused to refer parties to arbitration. It held that the claimant's inability to pay relevant arbitration fees excused the claimant from complying with the arbitration clause.

An insolvent company that sought to invalidate an assignment agreement with the respondent brought the case. The respondent asked the court to refer parties to arbitration based on the

arbitration clause in the assignment agreement. The claimant objected arguing that due to the lack of funds it cannot pay the fees necessary to commence arbitration.

The appellate court upheld the claimant's argument. It found that under the applicable rules the claimant had to pay both the registration fee and an advance on arbitration costs. The claimant had established that it had no funds and based on this evidence the court concluded that the arbitration clause was incapable of being performed. In reaching this decision the court dismissed the respondent's argument that the claimant had other assets it may sell to finance arbitration. For the court the only relevant issue was whether claimant had immediately available funds.

*LLC Forest v Z&J Technologies GmbH, no. A56-50929/2015, the Thirteenth Appellate Court, 10 March 2016.*

## CROSS-BORDER LITIGATION

### 5. Russian Court Affirms Exclusive Jurisdiction Over Insolvency of Russian Nationals

Appellate court confirmed lower court's decision to commence insolvency proceedings with respect to a Russian national despite the fact that a court in England had already declared him insolvent. It held that English judgment has not effect in Russia due to the exclusive jurisdiction of Russian courts in the matters of insolvency of Russian nationals.

Mr Kekhman provided a number of guarantees and sureties as security for various loans companies, in which he has an interest, received from banks. When the companies defaulted banks obtained judgments both against them and Mr Kekhman. At the time, Russian law did not provide for insolvency of individuals. Mr Kekhman flew to England and filed for insolvency there. English court accepted jurisdiction and declared Mr Kekhman insolvent. Administrators of his insolvency realized certain property located outside Russia.

When the Russian law on insolvency of individuals entered into force, one of Mr Kekhman's creditors – Sberbank – filed for his insolvency in Russia. Mr Kekhman objected arguing that the court in England had already declared him insolvent and the matter was essentially *res judicata*.

Both the first instance and appellate courts confirmed commenced of insolvency proceedings. In dealing with the decision of the English court the appellate court in Russia relied primarily on jurisdictional grounds. It held that under Russian law Russian courts have exclusive jurisdiction of insolvency of Russian nationals irrespective of where they live or are located. Accordingly, the decision of the English court can have no effect.

*In re insolvency of Vladimir Kekhman, no. A56-71738/2015, the Thirteenth Commercial Court, 28 March 2016.*