

CONFERENCES REVIEW NOTES

THE RESOLUTION OF DISPUTES AT THE LONDON COURT OF INTERNATIONAL ARBITRATION (LCIA): PRACTICAL ASPECTS (Moscow, March 21, 2014)

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This note is an overview of the seminar organized on March 21, 2014 in Moscow. During the discussion participants considered a draft of the new LCIA Rules, the practical aspects of the submission of applications and consideration of cases at the LCIA, the difficulties arising in the enforcement of the arbitration agreements and awards in the Russian Federation, as well as support, which the Russian courts are able to provide to the international arbitration. The summary of the issues discussed is below.

1. Introduction to the LCIA and the Final Draft of the LCIA's New Rules

The LCIA is well-known to Russian practitioners and does not require a special introduction, as the LCIA's internal statistics indicate that 25–30% of all our caseload involve parties based in Russia or other CIS countries. Please note that this figure includes cases involving companies incorporated in the BVI, Cyprus or other popular

off-shore jurisdictions, and it is likely that a large percentage of such companies have either Russian or CIS-based beneficial owners.

We would like to present a brief update on the LCIA's current caseload:

- the LCIA has remained busy: we have seen doubling of referrals between 1997 and 2007, steady increase in referrals from 2010 to 2012, a new all-time high in 2013; and
- the LCIA has become truly international: in 2008 we opened a centre in Dubai in cooperation with the DIFC, in 2010 – in India, in 2011 – in Mauritius, and in May 2013 – a representative office in Seoul.

The LCIA's advantages are as follows:

- reputation and efficient yet 'light touch' approach to the administration of the cases referred to the LCIA;
- cost efficiency as the LCIA's administrative charges and arbitrators' fees are *not* based on the sums in dispute, but on time spent by arbitrators and the LCIA's secretariat, which may be very attractive for the medium- and high-value disputes;
- Russian speaking staff at the LCIA's Secretariat and arbitrators, who speak fluent Russian and/or admitted to practice in Russia on the LCIA's database; and
- the LCIA is located in an arbitration-friendly jurisdiction, therefore, where the parties choose London as the seat of their arbitration, they can rely on the English Arbitration Act 1996 and the English Courts.

The discussion then moved to the recently published final draft of the LCIA's new rules. The review of the current version of the LCIA Rules started in late 2009 and shall be finished this year. The most interesting amendments involve the express provisions on consolidation of cases, appointment of an emergency arbitrator and party representatives' code of ethics. In welcome news for Russian alphabet users, the alphabetical numbering of provisions has been replaced with the numerical system.

Under the current rules, proceedings can be consolidated by parties' agreement and with a tribunal's approval. Under the proposed consolidation provisions, the LCIA Court will be able to decide on consolidation before a tribunal is constituted; alternatively, once a tribunal is in place, another case can be joined in if certain conditions are satisfied.

An emergency arbitrator procedure has been provided in some detail, however, this provision is presented in the LCIA draft in parenthesis, and is still debated by the LCIA Court. If adopted, it would, in addition to the existing provisions for the expedited formation of the tribunal in the cases of 'exceptional urgency', allow for the appointment of an emergency arbitrator within 3 days of from receipt of an application, who may make an order or render a reasoned award as soon as possible (but no later than 20 days following the appointment).

Finally, the draft of the LCIA's new rules include a remarkable innovation as they provide for a set of general ethical guidelines for parties' legal representatives in the Draft Annex. The parties will have to ensure that their legal representatives have agreed not to engage in activities intended unfairly to obstruct the arbitration or to jeopardise the finality of the award such as knowingly make any false statement to a tribunal, prepare or rely on false evidence or conceal documents or initiate an undisclosed unilateral contact with an arbitrator. The tribunal is expressly empowered to make a finding as to whether there has been any violation of the ethical guidelines, in which case the tribunal may order sanctions against that representative including written reprimands, cautions and references to the legal representatives' regulatory or professional bodies.

There is a number of other changes in the draft LCIA's new rules, which intend to refine and update the existing procedure, such as provisions taking into account changes in the use of technology for the submission of Requests for Arbitration and Responses by email, and rules on the effecting delivery by electronic means. Overall, the final draft of the LCIA's rules indicates that the LCIA envisages arbitration under its auspices as being a more structured approach and also confirms our reputation as a trailblazer with some proposed innovations.

2. Advantages and Issues of Application of the LCIA Rules and English Arbitration Law

Parties when drafting an agreement often pay little attention to the arbitration clause. Poorly drafted arbitration clauses cause difficulties at the stage of bringing the LCIA arbitration and enforcement of the arbitral award. The LCIA website provides for a standard arbitration clause and welcomes its use in contracts.¹

One of the main elements of the arbitration clause is a seat of arbitration. By choosing a seat of arbitration the parties effectively choose arbitration law that will govern arbitration procedure. Applicable arbitration law, amongst other things, will define procedural rights and limitations of the parties, the level of state court's interference into the arbitral procedure and, interim measures available to the parties in support of arbitration. In effect, by selecting the seat of arbitration parties also choose legal infrastructure that will be available to the parties throughout the arbitration proceedings.

By choosing London as a seat of arbitration one gets all of the below advantages in one shot:

- arbitration friendly jurisdiction²

¹ http://www.lcia.org//Dispute_Resolution_Services/LCIA_Recommended_Clauses.aspx

² For example, *Fiona Trust* [2007] UKHL 40.

- ability to stay legal proceedings brought in breach of the arbitration clause;³
- the Arbitration Act 1996 provides clear limits of court interference into the arbitral procedure;
- flexible arbitration law: the Arbitration Act 1996 contains mandatory and non-mandatory provisions;⁴
- availability of interim measures such as worldwide freezing injunction, disclosure and receivership orders that can be obtained at the English court in support of arbitration seated in London;⁵
- well-developed legal infrastructure: high quality lawyers and top law firms, independent well trained judiciary and arbitrators, reliable and tested arbitral and court procedures; and
- limited grounds of appeal of the arbitral award.⁶

One of the advantages of the English arbitration law is its flexibility. The Arbitration Act 1996 contains 25 mandatory provisions which parties are not allowed to change by agreement. Otherwise, parties are free to agree how their dispute should be resolved, subject only to such safeguards as are necessary in the public interest.⁷

Another main advantage of the English arbitration law is the ability of a party, in case of urgency, to apply to the court for interim measures before the arbitral tribunal is formed.⁸ Otherwise, party may only apply for such measures to the court with the permission of the tribunal or the agreement in writing of the other parties.

If the arbitration is administered under the LCIA Rules and parties failed to choose a seat, Art. 16.2 of the LCIA rules provides that in this case the seat of arbitration shall be London, unless and until the arbitral tribunal determines in view of all the circumstances, and after having given the parties a reasonable opportunity to make written comments, that another arbitral seat is more appropriate.

Another mistake common to poorly drafted contracts is confusion relating to the governing law of the contract and the law applicable to arbitration clause. For example, sometimes the contract states that the law applicable to the contract is the substantive law of England & Wales. However, in the subsequent clause the parties agree that implementation of the agreement shall be subject to the laws of the Russian Federation.

³ Section 9 of the Arbitration Act 1996.

⁴ Section 4 of the Arbitration Act 1996.

⁵ For example, *PJSC Vseukrainskyi Aktsionernyi Bank v. Maksimov* [2013] EWHC 3203 (Comm).

⁶ Sections 67–69 of the Arbitration Act 1996. Article 26.9 of the LCIA Rules opts out of sect. 69 of the Arbitration Act 1996 and provides for finality of the arbitral award on points of law.

⁷ Section 1(b) of the Arbitration Act 1996.

⁸ Section 44(4) of the Arbitration Act 1996.

Usually, when talking about ‘substantive law’ in international arbitration, we mean the law applicable to the substance of the dispute.⁹ However, the substantive law governing the contract should be distinguished from the substantive law governing the arbitration agreement.¹⁰ These laws may, depending on the circumstances, coincide or differ. Such distinction is drawn from the principle of autonomy and separability of the arbitration clause.¹¹ While some authors, noting the distinction between the two, state that the definition of the substantive law include both substantive law of the contract and substantive law of the arbitration agreement,¹² others separate these two concepts and refer to the substantive law of the contract only and the law governing the arbitration agreement.¹³ Hence, it is advisable to clearly indicate law applicable to the arbitration agreement to avoid confusion.

Other common mistakes include failure to agree about the language of arbitration or mechanism of nomination of one of the arbitrators. According to Art. 17.1 of the LCIA rules the initial language of the arbitration shall be the language of the arbitration agreement. But what if the agreement is written in more than one language and none of them prevails? What is the right language of communication between the party, the arbitral tribunal and the LCIA if one of the parties does not participate in arbitration?

Usually poorly drafted arbitration clauses cause delay and result in additional legal fees. Therefore, it is important to obtain proper legal advice and pay adequate attention to drafting arbitration clauses.

3. Practice of Russian Court’s Assistance to Foreign Arbitrations

Taking into consideration all the advantages of the LCIA rules and English Arbitration Act 1996 practitioners likely would prefer to conclude the arbitration agreement and not to deal with Russian state courts. At first site everything is simple: in case one of the parties files a claim to the court in breach of the arbitration clause the court shall operate ‘principle of non-interference’ and send the parties to arbitration. However, this not always works. For example, in the well-known case *Russian Telephone Company v. Sony Ericsson*¹⁴ the Supreme Commercial Court of the

⁹ UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006), Art. 28(1).

¹⁰ New York Convention on the Recognition and Enforcement of Arbitral Awards 1958, Art. V(1)(a).

¹¹ UNCITRAL Model Law, *supra* n. 9, at Art. 16(1).

¹² Gary B. Born, *International Commercial Arbitration* 1311 (Kluwer Law International 2009).

¹³ Nigel Blackaby & Constantine Partasides, *Redfern and Hunter on International Arbitration* 165 (Oxford University Press 2009).

¹⁴ The Resolution of Presidium of the Supreme Commercial Court of the Russian Federation dated June 19, 2012, case 1831/12.

Russian Federation found invalid the asymmetric arbitration clause which granted only to one party the right to approach a state court for resolution of a dispute.

Nonetheless, the general tendency is that Russian courts enforce arbitration agreements. Two recent cases are rather interesting thereby: the Supreme Commercial Court has consolidated the controversial court practice and found valid arbitration clauses which do not name directly the competent arbitration institution but refer to its rules (*Avtoshped case*¹⁵) and arbitration clauses with mistakes in a name of arbitration institution (*Sakhalin Energy case*¹⁶). In other words, Russian courts start to interpret arbitration agreements in accordance with the worldwide accepted principle of effective interpretation. The principle basically means that all doubts in wording of arbitration clause shall be resolved in favor of arbitration until it's clear that the parties intended to arbitrate.¹⁷ But in spite of this we would recommend practitioners doing business in Russia to be more accurate with the wording of arbitration agreements.

Although having an arbitration agreement chance to deal with state judicial system is not so high, Russian courts should not be abandoned completely. The reason is that they can grant interim measures in support of foreign arbitration, which was proven by case law.¹⁸ Certainly interim measures could be granted directly by arbitral tribunal, and we all know how difficult in fact to obtain measures from the state court. But enforceability of tribunal-ordered interim measures in Russia is a very controversial issue. Actually not only in Russia. The New York Convention 1958 on the Recognition and Enforcement of Foreign Arbitral Awards does not contain a definition of arbitral award; it only says that to be quality to an award, an arbitral decision shall be final. Conflicting case law exists on the issue whether or not interim measures decisions satisfy the requirement of finality and are covered by the Convention. According to common approach decisions on interim measures are not final and not enforceable because by themselves they do not resolve any part of the dispute and are temporary by legal nature.¹⁹ On the other hand, there

¹⁵ The Resolution of Presidium of the Supreme Commercial Court of the Russian Federation dated July 16, 2013, case 2572/13.

¹⁶ The Ruling of the Supreme Commercial Court of the Russian Federation dated May 24, 2013, case 2876/13.

¹⁷ On this principle see, for example, well-known Swiss Arbitration Award of 29 November 1996. In that case arbitration clause was as follows: 'all disputes shall be settled by the Arbitration Court at the Swiss Chamber for Foreign Trade in Geneva' (which does not exist). Nevertheless, holding of the decision was: an arbitration agreement is valid as to its substance; the incorrect designation of an arbitration institution does not affect the validity of an arbitration clause.

¹⁸ *Chigirinskiy case* (The Resolution of Presidium of the Supreme Commercial Court of the Russian Federation dated April 20, 2010, case 17095/09).

¹⁹ See, for example, *Resort Condominiums International Inc. v. Ray Bolwell and Resort Condominiums, Pty Ltd.*, Supreme Court of Queensland, 1993.

is approach offered by US courts²⁰ and started to be embraced by some civil law countries²¹ according to which decision on interim measures is final since it resolves the separate dispute between the parties about a request for interim measures. In *AB Living Design v. Sokos Hotels Saint Petersburg*²² the Supreme Commercial Court of the Russian Federation supported the first approach and held that interim arbitral awards of any kind, including awards made on provisional measures, are not subject to enforcement in Russia. So far with regard to assets in Russia it would be more effective to ask for interim measures not arbitral tribunals but Russian state courts.

It is well to bear in mind that this situation could sometimes be avoided. Not all interim decisions have to be recognized and enforced in Russia. Shining example is a series of cases *IBRC v. Quinn' family*²³ in which Mareva freezing injunctions and Norwich Pharmacal orders were recognized through personal law of the legal entity without special enforcement procedure.

Finally, let us turn to enforcement of arbitral awards. Generally according to Supreme Commercial Court's statistics there is no special problem with that in Russia, about 80% of arbitral awards are enforced successfully. However, some issues regarding public policy and arbitrability do exist. Since the Informational letter of Presidium of the Supreme Commercial Court dated February 26, 2013 No. 156 was issued, there is no doubt that public policy is an extraordinary ground for refusal in recognition and enforcement of arbitral award. But it applies in practice. In *Rosgazification case*²⁴ court refused to enforce the award 'competing' with Russian state court judgment (award was based on the agreement which was held void by the court at the suit of company's shareholders). This case is an example how corporate issues could be used to object jurisdiction of the international arbitration. With regard to arbitrability were several recent cases proved that Russian state courts are not ready yet to share with arbitration the disputes involving any public aspects, like disputes from the state contracts²⁵ or forest rent.²⁶

²⁰ See *Pacific Reinsurance v. Ohio Reinsurance*, 935 F.2d 1019, 1023 (9th Cir.1991); *Yasuda Fire & Marine Ins. Co. of Europe v. Continental Cas. Co.*, 37 F.3d 345 (7th Cir. 1994); *Arrowhead Global Solutions, Inc. v. Datopath, Inc.*, 166 Fed. Appx. 39, 41 (4th Cir. 2006), etc.

²¹ See, for example, *S.A. Otor Participations v. S.A.R.L. Carlyle (Luxembourg)*, Paris Court of Appeal (October 7, 2004).

²² The Resolution of Presidium of the Supreme Commercial Court of the Russian Federation dated October 5, 2010, case 6547/10.

²³ See, for example, The Resolution of 11th commercial court of appeal dated July 4, 2012, case A65-19446/2011.

²⁴ The Ruling of the Supreme Commercial Court of the Russian Federation dated December 9, 2013, case 14658/13.

²⁵ The Ruling of the Supreme Commercial Court of the Russian Federation dated November 29, 2013, case 11535/13.

²⁶ The Ruling of the Supreme Commercial Court of the Russian Federation dated December 9, 2013, case 11059/13.

At the moment these are one of the most problematic issues regarding arbitration in Russia. Taking into consideration the unification of the Supreme Court practitioners could expect in the future rather significant changes in court practice, including in the area of international arbitration.

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