The Baker & McKenzie International Arbitration Yearbook

2007

Москва
Волтерс Клувер 2008

NEW DEVELOPMENTS IN RUSSIAN ARBITRATION LAW

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A. LEGISLATION, TRENDS AND TENDENCIES

A.1 Legislation

The Russian court system consists of the Constitutional Court, the courts of general jurisdiction, and the state arbitrazh (commercial) courts. The Constitutional Court generally hears matters relating to the compliance of federal and regional laws and regulations with the Russian Constitution. Courts of general jurisdiction hear criminal cases, civil disputes between individuals, and disputes arising from administrative relationships between individuals and state agencies. Disputes regarding business activity are heard before the state arbitrazh courts.

The Russian word 'arbitrazh' is not related to arbitration but originates from an old Soviet tradition, whereby disputes between state enterprises were heard before the so-called 'State Arbitrazh.' In the USSR, it was assumed that under a planned economy no real disputes could arise between socialist enterprises (since all enterprises ultimately had the same owner), and any differences which did arise could be settled by an intermediary, the State Arbitrazh, which was a quasi-judicial governmental institution (in fact it was part of the government).

Russian Arbitrazh courts have 4 levels:

(1) Trial courts (e.g. Moscow Arbitrazh Court);

(2) Appeals courts;

(3) Cassation Appeals courts (Federal Arbitrazh courts);

(4) The Supreme Arbitrazh Court.

As an alternative to the state arbitrazh courts, Russian companies are entitled to refer a dispute to arbitration. The subject of such arbitra-

tion may cover a wide range of issues, with the exception of disputes arising from administrative relations (tax, customs, etc.), and also of disputes which fall within the exclusive jurisdiction of the Russian arbitrazh courts (bankruptcy claims, etc.).

The Law On International Commercial Arbitration, enacted on 7 July 1993, is based on (and is indeed almost identical to) the UNCITRAL Model Law (the "Model Law") provisions. Russia is also a party to the European Convention on International Commercial Arbitration of 1961 and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention"). Domestic arbitration is governed by the 2002 Law on Arbitration Courts in the Russian Federation and it is also based on the principles of the Model Law. No amendments were made to the abovementioned laws in 2007.

A.2 Trends and Tendencies

In Soviet times there was no room for private arbitration. However, after the economic reforms in the mid-nineties arbitration has become increasingly popular. On the one hand, state courts still consider arbitration (especially domestic) with some suspicion (for older judges it is psychologically very difficult to accept that an award on a par with a state court judgment can be rendered by somebody who is not a judge). On the other hand, the state courts are overloaded with cases, and so the development of arbitration and mediation would seem to be the realistic way to decrease the number of cases in the courts.

Despite the fact that arbitration is becoming an increasingly popular method of dispute resolution (Russia now has several hundred arbitration institutions), the total number of arbitration cases cannot be compared with the number of cases in the state courts. According to official statistics, the state arbitrazh courts heard 372,781 civil law cases in 2006. Although there are no statistics for cases submitted to arbitration, it is known that only 1,704 applications were submitted to the state courts to challenge arbitral awards or for enforcement of such awards.

B. CASES

Details are given below of judgments handed down by the Russian courts in cases related to arbitration involving foreign companies. There are also references to cases which do not involve foreign companies, because it is safe to assume that the Russian courts would adopt a similar approach to cases whether or not a foreign company is a party.

These decisions are mainly the judgments of the first level arbitrazh courts and the third level courts. This is because any application to set aside the arbitral award or to issue a writ of execution in respect of awards made by domestic arbitration courts, as well as applications for recognition and enforcement of foreign arbitral awards, have to be lodged to the first level court, while an appeal to the judgment of a court of first instance in such cases is to be filed directly to the third level court, i.e. with the Federal Arbitrazh Court.

B.1 The Arbitrazh Court is Entitled to Issue a Writ of Execution in Respect of a Foreign Arbitral Award in a Preliminary Hearing

Chapter 31 of the Arbitrazh Procedural Code, which governs the procedure for hearing applications for recognition and enforcement of foreign arbitral awards, in fact contains almost no rules for the hearing of such applications. Chapter 31 only contains a statement that an application is to be heard within one month, and also a reference to the fact that a judge is to hear such an application:

> "in accordance with the rules of this Code, and with those features set forth in this chapter, unless there is a contrary provision in an international treaty to which the Russian Federation is a signatory."

In practice, when judges hear such applications, they hold a preliminary and a main hearing, following general trial rules. However, in the case of *Teleplan/ProConsult GmbH ("Teleplan") v Sakhavneshstroi State Unitary Enterprise ("SSUE")*, the East Siberia Region Federal Arbitrazh Court found no serious breach in the fact that the court below had accepted an application for recognition and enforcement of a foreign arbitral award in a preliminary hearing.

The facts are as follows. Teleplan applied to the Arbitrazh court of the Sakha Republic (Yakutia) for recognition and enforcement of an award handed down by the Arbitration Institute of the Stockholm Chamber of Commerce on 10 June 2005 in case No. 38/2003. SSUE, the debtor under the arbitral award, which had been duly notified of the hearing, failed to appear twice for a preliminary hearing. In spite of the SSUE's absence from the preliminary hearing, the Sakha Republic Arbitrazh court ordered enforcement of the foreign arbitral award on 20 July 2006.

SSUE appealed this decision to the East Siberia Region Federal Arbitrazh Court, with one of its grounds of appeal being that an enforcement order in respect of a foreign arbitral award may not be made at a preliminary hearing. However, the cassation appeal court did not agree with the appellant's arguments, stating:

> "The fact that the decision to issue a writ of execution for compulsory enforcement of the award made by the Arbitration Institute of the Stockholm Chamber of Commerce on 10 June 2005 in case No. 038/2003 was made at a preliminary hearing is no reason to set it aside."[1]

B.2 An Arbitration Agreement may be Concluded by Exchange of Facsimiles

On 14 June 2006 an arbitration panel acting under the Rules of the arbitral tribunal at the Moscow Region Chamber of Commerce and Industry handed down an award in the case of Imanagement Services Ltd. against Cukurova Holding AS and Cukurova BVI Limited.

On 29 March 2007, the Moscow Arbitrazh Court set aside this award. In particular, the court stated that there had been no arbitration agreement between the parties, since no written document signed by the both parties was presented to the court. The court ruled that

[1] See the judgment of East Siberia Region Federal Arbitrazh Court issued on 22 January 2007 in case A58-1196/06-Ф02-5778/06-С2.

the facsimiles submitted by the parties were inadmissible as evidence pursuant to Articles 71 and 75[1] of the Arbitrazh Procedural Code.

The Moscow Region Federal Arbitrazh Court did not agree with the decision of the court at first instance, and stated as follows:[2]

> "Article 7.2 of the Law On International Commercial Arbitration (ICA) provides that an arbitration agreement is to be concluded in writing, and an agreement will be deemed concluded in writing where it is reached by exchange of letters, teletype, telegraph or other means of electronic communication or by exchanging a statement of claim and a defence.
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> In this case, when assessing the documents submitted as evidence of an arbitration agreement between foreign organisations, the court was guided by the requirements of Russian procedural law without taking account of the special rules in the ICA law, which define the requirements for the form of an arbitration agreement, and the international practice in these matters which is based on generally accepted legal principles."

The Moscow Region Federal Arbitrazh Court therefore held that an arbitration agreement could be concluded by an exchange of letters sent by facsimile, which is consistent with many other national laws of states which have adopted the Model Law and are signatories to the New York Convention.

B.3 The Rights under a Foreign Arbitral Award cannot be Assigned

On 31 March 2003 the International Arbitration Centre of the Austrian Federal Economic Chamber in Vienna handed down

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1 Article 75.3 of the Arbitrazh Procedural Code:
"Documents received by facsimile, electronic or other means, and also documents signed by electronic digital signature or other similar signature are allowed as written evidence in cases and under a procedure established by federal law, other regulatory act or by the relevant contract."

2 Judgment of Moscow Region Federal Arbitrazh Court issued on 29 June 2007 in case No. КГ-А40/4610-07.

an award in favour of East Petroleum Handelsges.m.b.H. ("East Petroleum"), ordering Tomskneft VNK OAO to pay the sum of RUB235,429,008 of debt principal, plus RUB109,464,814 in interest, and also €210,605.87 in arbitration costs, together with €39,905.48 interest on those costs.

East Petroleum assigned its rights under the arbitral award to Sandheights Ltd ("Sandheights"). Sandheights made application to the Tomsk Arbitrazh Court for recognition and enforcement of the arbitral award.

On 27 June 2006 the Tomsk Arbitrazh Court refused to hear the application. The Court stated that the existence of an assignment agreement did not give sufficient ground for Sandheights to make an application for recognition and enforcement of the award made in favour of East Petroleum. In accordance with Article 242(1) of the Arbitrazh Procedural Code an application for recognition and enforcement of a foreign arbitral award is to be made by the party in whose favour the arbitral award has been made. The Court further stated that Sandheights was not a party to the arbitration at the Vienna Centre, it does not follow from the said award that Sandheights is the successor-in-title of East Petroleum, and there had been no substitution of East Petroleum as an inappropriate party by any other party in the arbitration proceedings.

The Tomsk Arbitrazh Court therefore held that Sandheights had no right to lodge an application for recognition and enforcement of a foreign arbitration award pursuant to the requirements of the New York Convention, the Russian Federation Law on International Commercial Arbitration" or Chapter 31 of the Russian Arbitrazh Procedure Code. In view of this the Court dismissed the case.

In a cassation appeal Sandheights relied on the fact that the Court had breached Sandheights' right to judicial protection as set out in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Sandheights stated that the Court's conclusion that only a party to the arbitration award has the exclusive right to make application had no basis in Russian law, since the court had improperly applied the Arbitrazh Procedural Code,

and also the rules set out in the international conventions, which allow the lodging of an application for recognition and enforcement of a foreign arbitration award by a party other than the party in whose favour the award was made.

The West Siberia Region Federal Arbitrazh Court upheld the opinion of the court of first instance, and rejected Sandheights' appeal 21 June 2007.[1]

B.4 Disputes Related to Registrable Rights over Immovable Property are not Arbitrable

One of the most contentious questions in the arbitration community in the Russian Federation concerns the arbitrability of disputes concerning title to real estate in Russia. The Law on International Commercial Arbitration contains rules which allow an arbitral award to be set aside where, pursuant to Russian law the subject of the dispute cannot be submitted to arbitration (Article 34(2)(2)). A similar rules is set out in the Federal Law on Arbitration Courts in the Russian Federation (Article 42(2)), and also in the Arbitrazh Procedural Code (Article 233(3)(1)).

In most cases the question whether a dispute is subject to arbitration does not arise, since by general rule any dispute in civil law relations may be the subject to arbitration. Certain exceptions may be made to this rule, but only by a statute.

At the same time, the general trend now developing in Russian court practice with regard to what is subject to arbitration may be summarised as follows:

> "Disputes related to the registrable rights over immovable property are not arbitrable. This includes rights of ownership, to mortgages, and long-term leases."

It should be noted that Russian law not only has no express prohibition on the submission to arbitration of civil law disputes relating to

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[1] See the judgment of the West Siberia Region Federal Arbitrazh Court handed down on 21 June 2007 in case No. F04-8399/2006(29348-A67-10).

immovable property,[1] but also contains an express reference to such a possibility.[2]

Unfortunately, in the Russian Federation the possibility of registering rights to immovable property on the basis of an arbitral award has quite often been exploited by dishonest persons to misappropriate other people's property. Evidently, if each such case had not been overlooked by the law enforcement agencies, there would have been no need for the involvement of the Supreme Arbitrazh Court or the Supreme Court.

Both of these respected courts have found an effective, if legally complex, means of combating fraud in immovable property transactions using arbitral awards by excluding such disputes from arbitration.

Consequently in 2005 the Supreme Arbitrazh Court held that an arbitral tribunal is not entitled to make an award which binds a registration authority to register immovable property in the name of a party to an arbitration, since matters of a public-law nature (registration of immovable property) may not be the subject of arbitration proceedings.[3] In the same document, the Supreme Arbitrazh Court stated that an arbitral tribunal is not entitled to levy execution on pledged immovable property, since such disputes also fall under the exclusive jurisdiction of the state courts.[4]

Undoubtedly, arbitral tribunals are not entitled to make awards binding the registration authorities to do certain acts if only because the registration authorities are not a party to any arbitration agreement. A dispute between a registration authority and an applicant regard-

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1 It was properly noted by Moscow Region Federal Arbitrazh Court that disputes may only be excluded from arbitration by federal law.

2 See Article 28 of the Federal Law On State Registration of Rights to Immovable Property and Transactions Therewith, Article 25 of Federal Law N 102-ФЗ, dated 16 July 1998 On Mortgages (Pledge of Immovable Property).

3 Circular Letter No. 96 issued by the Presidium of the Supreme Arbitrazh Court, *Review of Arbitrazh Court Practice Related to Recognition and Enforcement of Judgments by Foreign Courts, Setting Aside the Arbitral Awards, and Issuing Writs of Execution for Compulsory Enforcement of Arbitral Awards* dated 22 December 2005, point 27.

4 Ibid, point 28.

ing registration of the title to property, by its very nature, is administrative, and hence it is not subject to arbitration under Russian law.

At the same time, an arbitral tribunal award, which, for example, determines ownership title to a building, does not oblige the registration authority to register the building, but it does constitute a ground for registering ownership title to that building. That is, the arbitral award issued in a civil law dispute between two private subjects about title to a building deals no more with public-law issues than an arbitral award on the ownership of a car, shares or machinery.

Cases decided in 2007 have, however, confirmed the earlier position of the arbitrazh courts.

On 26 March 2007 an arbitration panel acting under the Rules of the International Commercial Arbitration Court of the RF Chamber of Commerce and Industry ("ICAC") declared an obligation of Moskva-Krasnye Kholmy OAO ("MKK") to extend a lease agreement for office premises which had been concluded in 2001 with Hewlett-Packard ZAO ("HP") for a further period of four years. In accordance with the arbitral award, MKK was to sign an agreement with HP to make the appropriate amendments in the lease agreement with the subsequent registration of that agreement by the parties in accordance with the current law on state registration of the rights to immovable property.[1]

MKK made an application to the Moscow Arbitrazh Court to set aside the arbitral award, relying on the fact that the disputed award was given in a dispute which pursuant to statute could not be the subject of arbitration proceedings (rights to real property). The applicant submitted that the arbitral award binds the parties subsequently to register an agreement to amend a lease agreement, but such act has a public-law nature and hence is also not subject to arbitration.

The Moscow Arbitrazh Court set aside the ICAC award on 10 July 2007. The Court stated that the arbitral award binding MKK to extend its lease agreement for immovable property by four years by

[1] Quoted from judgment No. КГ-А40/8370-07 issued by Moscow Region Federal Arbitrazh Court on 3 September 2007.

signing an agreement with HP to amend the lease agreement and its subsequent state registration had a public-law nature; a dispute over the right to lease immovable property for a term of more than one year cannot be the subject of arbitration proceedings since it comes within the exclusive jurisdiction of the state courts.

Interestingly, the Russian Federation Supreme Court has not followed the approach of the Supreme Arbitrazh Court and did not agree with the idea that these kinds of dispute have a "public-law nature" and hence are not subject to arbitration. Nonetheless, it has found its own no less "elegant" basis for ruling that these disputes are not subject to arbitration, which was explained in the Review of Legislation and Court Practice for the third quarter of 2007[1] the Supreme Court noted as follows:

> "On the basis of the content of Article 8(1)(3) and Article 11(1) of the Civil Code the arbitral award is one of the grounds on which civil rights arise. Any dispute arising out of civil law relations may be submitted to arbitration by agreement of the parties unless there is a contrary provision in federal law (Article 1(2) of the Federal Law On Arbitration Courts in the Russian Federation).
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> Article 28 of the Federal Law On State Registration of Rights to Immovable Property and Transactions Therewith provides that the state registration of rights to immovable property could be made, in particular, on the basis of an arbitral award according to the general procedure.
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> Article 17(1) of this Federal Law provides that in addition to the documents listed in that Article, there are other documents on the transfer of rights to immovable property and transactions therewith to an applicant from the previous titleholder pursuant to the law applying at the location of such transfer at the date it is made (paragraph 8) which also constitute grounds for state registration of the existence, arising, termination, transfer, restriction (encumbering) of rights to

[1] Approved by the judgment of the Presidium of the RF Supreme Court on 7 November 2007.

> immovable property and transactions therewith; other documents, which pursuant to Russian Federation law confirm the existence, arising, termination, transfer, restriction (encumbering) of rights (paragraph 9).
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> On the basis of these provisions, where an arbitral award is not disputed by the parties, it may be the basis for the registration of rights to immovable property and transactions therewith...
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> Under paragraph six of Article 17(1) of the Federal Law On State Registration of Rights to Immovable Property and Transactions Therewith, in accordance with which the basis for state registration is a judicial decision which has come into effect, does not apply to arbitral awards, since they do not have that characteristic of judicial decisions handed down by the courts of general jurisdiction and do not have such characteristic of the judgments of the courts of general jurisdiction as 'a legal force of a judicial decision'."

It is hard to agree with the conclusion of the Russian Federation Supreme Court. Since Russian law does not give a definition of "legal force of a judicial decision" it makes sense to turn to doctrine:

> "The legal force of a judicial decision is its legal effect, according to which the presence or absence of rights and underlying facts confirming the rights are established finally, and that the rights established by court decision are subject to unconditional implementation at the request of the authorised persons."[1]
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> "The legal force of a judicial decision is the quality of a judicial act by virtue of which the decision becomes mandatory, irreversible, final, enforceable, and having prejudicial effect[2]

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1 Civil Procedure, university-level textbook, Second Edition, revised and expanded, edited by Doctor of Juridical Science, Professor and Honored Worker of Science of the RF, M.K. TREUSHNIKOV.

2 Prejudicial effect according to the Russian doctrine means that facts, established by the court decision are considered as already proven in any further disputes between the same parties.

> upon the expiration of the period for appellate or cassational appeal."[1]

An arbitral award is also:

a) irreversible (that is, it cannot be reviewed by any other judicial authority);

b) final (that is, a dispute already resolved by arbitral tribunal cannot be submitted again to any court or arbitral tribunal); and

c) enforceable.

For purposes of defining arbitrability, such consequence of an arbitral award as the prejudicial effect of established facts is not very interesting. Much more interesting is the mandatory nature of the court decision, by which is understood the obligation of a judicial decision not just for the parties to a dispute, but also for all state agencies, individuals and legal persons.

Most likely, the Supreme Court proceeded on the premise that an arbitral award does not have mandatory nature for all entities, including state agencies. Thus, in the Supreme Court's view, the arbitral award resolving a dispute between two entities regarding ownership rights to a building is not binding on state registration authority.

However, it is worth pointing out that the "mandatory nature" of a judicial decision should not be viewed as the "duty to commit certain actions" under it. As the literature correctly notes,

> "The mandatory nature of a judicial decision, properly understood, means the quality by virtue of which state agencies, local government agencies, companies and individuals are obliged in their activities to take into account the judicial decision and are not entitled to cancel or amend it or submit a new decision on a matter already resolved by a court. They are obliged to assist in implementing the decision as it enters into force and are not entitled in their actions to proceed from the premise that the decision entering into force is incorrect.

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[1] Civil Procedure, Fifth Edition, revised and expanded, executive editor Doctor of Juridical Science, Prof. V.V. Yarkov.

> Competent state agencies and officials are obliged to perform the actions necessary for execution and registration of rights established by the decision entered into force."[1]

That is, third parties have to "take into account" a decision that has been handed down. For example, if an arbitral tribunal has delivered a decision on the right of ownership of shares, then the independent registrar of shares to whom one of the parties may appeal is obliged to "take into account" that decision. He is not entitled to make any other conclusion about the ownership rights to the shares than the one contained in the arbitral award. Therefore the state agency that registers rights to real property likewise have to "take into account" an arbitration court decision on ownership rights to real property, inasmuch as they have neither the right nor the opportunity to deal otherwise with a resolved dispute between two private entities on rights to real property.

Thus, one can hardly agree with the opinion of the Supreme Court on the "non-mandatory nature" of arbitral awards. Furthermore, as noted above, one can argue with the legality of excluding disputes regarding registered rights to real property from arbitrational disputes, but inasmuch as two higher authorities have taken a similar position, in practice it would be much more reasonable to simply take a similar approach into consideration.

B.5 Validity of an Arbitration Agreement

On 20 October 1994 the State Tax Service concluded a contract with the limited liability partnership Mavrovo Skopje Re Sochi (the "Contractor") for construction of a dormitory with 65 beds at the Raduga sanatorium in the town of Sochi.

The contract provided that payment of 5% of its cost, being a guarantee sum, would be made on the expiry of the term of guaranteed operation and the signing of a transfer and acceptance certificate for the premises. However, payment of the guarantee sum was not made

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[1] Civil Procedure, university-level textbook, Second Edition, revised and expanded, edited by Doctor of Juridical Science, Professor and Honored Worker of Science of the RF, M.K. TREUSHNIKOV.

by the deadline. The Contractor therefore brought a claim before the ICAC in accordance with an arbitration clause set out in the contract.

On 27 March 2006, the ICAC rendered an award ordering that the Tax Service to pay to the Contractor the guarantee deposit of RUB15,143,303.52 and its costs of RUB510,409.49 incurred by way of arbitration fees.

Since the Tax Service failed voluntarily to implement the award of ICAC, the Contractor made an application to the Moscow Arbitrazh Court for issue of a writ of execution for compulsory enforcement.

The Moscow Arbitrazh Court granted the application on 17 July 2006, and by a decision dated 20 September 2006, the Moscow Region Federal Arbitrazh Court upheld the decision of the lower court.

The Tax Service appealed to the Supreme Arbitrazh court, relying on the fact that the arbitration agreement was invalid because the contract at issue was a contract for supply of goods and services for federal state needs, and the initial version of clause 18 in the contract contained provision for disputes to be heard by Moscow Municipal Arbitrazh court.[1] The Supreme Arbitrazh Court upheld the decisions of the lower courts, approving their arguments that the Tax Service had not proved the invalidity of the arbitration agreement, nor its argument that the arbitration agreement had been inserted into the contract after its execution without its consent.

In another case, the court held that a party was not a party to an arbitration agreement since the power of attorney for signing the contract did not specify the authority to submit a case for resolution by arbitration. On 18 August 2005 Zheldorfarmatsiya State Unitary Enterprise of the Ministry of Railways ("ZSUE") and Katren NPK ZAO ("Katren NPK") concluded a supply contract, under which any disputes were to be resolved by the Siberian Arbitration Court. The

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[1] See judgment No. 15767/06 issued by the Presidium of the Supreme Arbitrazh Court on 23 April 2007.

contract was signed on behalf of ZSUE by the director of one of its affiliates under a power of attorney.

On 22 August 2006 the Siberian Arbitration Court made an award ordering that Rossiiskiye Zheleznye Dorogi OAO ("RZhD") – the successor to ZSUE – pay the debt owed under the contract, and also a penalty and arbitration costs and fees. However, on 30 May 2007, the Moscow Arbitrazh Court refused to grant an application by Katren NPK for issue of a writ of execution for compulsory enforcement of the award made by the Siberian Arbitration Tribunal.

The Court held that, in spite of the fact that RZhD was the successor to ZSUE, it had not been a party to the arbitration agreement set out in the supply contract since the power of attorney to sign the contract and issued to the director of one of its affiliates did not include the authority to sign the arbitration agreement. The Moscow Region Federal Arbitrazh Court subsequently upheld the decision of the first level court.[1]

It is difficult to agree with such conclusions by the courts since the law contains no provisions to the effect that the authority to sign an arbitration agreement must be specially stipulated in a power of attorney. It could be the case that the courts were guided by Article 62(2) of the Arbitrazh Procedural Code (the "Code"), which states that the powers of a representative to submit a case to arbitration are to be expressly stated in the relevant power of attorney. However, this rule is applied only in case of the representation before state arbitrazh court, that is, when after initiating proceedings in the state arbitrazh court the parties reach agreement on transferring the case to arbitration. Where an arbitration agreement is concluded outside proceedings before the state courts, this rule of the Code may not and should not be applied. Since the rules of the Code on the powers of a court representative should not be applied in assessing the validity of an arbitration agreement, then the requirement that the power to conclude an arbitration agreement should also be specially stipulated in the relevant power of attorney likewise has no foundation in law.

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[1] Judgment No. КГ-А40/7824-07-П of Moscow Region Federal Arbitrazh Court, dated 2 November 2007.

B.6 Due Process

In accordance with Article 34(2) of the Law On International Commercial Arbitration an arbitral award may be set aside by the courts where a party which makes application to do so submits evidence that it had not been duly notified of the appointment of an arbitrator or of the hearing, or for other reasons was unable to present its case, and also where the composition of the arbitral tribunal or the arbitration procedure was not in compliance with the agreement between the parties or contrary to law. A similar rule is contained in Article 42(1) of the Law On Arbitration Courts in the Russian Federation. This reflects very similar provisions in the Model Law. In 2007 the courts have repeatedly set aside arbitral awards on these grounds, in controversial circumstances. Two examples can be given:

On 19 September 2006, the ICAC rendered an award in two claims initiated by YUKOS Capital Sarl ("YUKOS") against Yuganskneftegaz, whose overall successor in title is Rosneft NK OAO ("Rosneft"). On 18 May 2007, the Moscow Arbitrazh Court set aside both awards of ICAC. One of the grounds for setting aside was the fact that in the court's opinion the arbitration procedure did not correspond with the parties' agreement (that is, the Rules of the ICAC).

In accordance with Section 32 of the Rules of ICAC either party, prior to completion of an oral hearing may, without unjustifiable delay, amend or supplement its claim or submissions on the claim. The court at first instance considered that this rule allows amendment or supplement of the statement of claim and defence thereto, but does not allow new claims to be made.

YUKOS had originally made claims for interest on loan contracts, and also for interest for use of another's funds in consequence of failure to perform monetary obligations. Later claims were made for early termination of a loan contract and return of the loan sum, which were essentially new claims (since they had a different subject-matter and different grounds). The Moscow Region Federal Arbitrazh Court agreed with the opinion of the court of first instance.[1]

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[1] Judgment No. КГ-А40/6616-07 of Moscow Region Federal Arbitrazh Court, dated 13 August 2007.

In this case, after the claimant had made new claims Rosneft made an application to the ICAC to postpone the hearing of the case, on the grounds that the claimant's request dated 9 May 2005 for new additional claims had not been submitted to the respondent in time, the claimant's legal position was vague and imprecise, and the respondent had no real possibility of preparing its legal position prior to the hearing by ICAC (on 18 May 2006). The respondent's application was granted, and the hearing was adjourned until 20 June 2006.

During the second hearing the respondent once again made application for an adjournment because of the impossibility of submitting new evidence, but on this occasion its application was refused. The Moscow Arbitrazh Court held that refusal to grant the respondent's application to adjourn the hearing deprived it of the opportunity of adducing evidence and making submissions to the arbitral tribunal contrary to both Article 18 of the Law On International Commercial Arbitration, and also the ICAC Rules, which provide for equal treatment of the parties, each of which is to be granted every all opportunity to present their respective cases. The Moscow Region Federal Arbitrazh Court agreed with this judgment.

In the same case, the Moscow Arbitrazh Court also referred to another ground for setting aside the ICAC awards. This is perhaps the most contentious aspect of the decision and deserves to be cited in full:

> "Under Article 12(1) of the Law on International Commercial Arbitration, when a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties, unless they have already been informed of them by him.
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> As appears from the preamble of ICAC Awards Nos. 143/2005 and 145/2005, Ms. T, the managing partner of law firm N, was representing Yukos Capital S.a.r.l. Meanwhile, the law firm N, together with the Russian Chamber of Commerce

and Industry, had organised an international conference on the subject "United Nations Convention on Contracts for the International Sale of Goods: 25 Years of Enforcement", and the documents of this conference were reviewed at the ICAC hearings concerned.

The conference itself took place on 7-8 November 2005, and speakers there included, among others, the same arbitrators who would later sit on the arbitration panel in the above ICAC cases.

The same law firm, N, took part in organising a workshop in November 2004, in Vienna, Austria, "Hot issues in "East-West" Arbitration", with the list of speakers again featuring the names of the arbitrators that would later consider ICAC Cases Nos. 143/2005 and 145/2005. Thus, the arbitrators had taken part in a commercial conference and a workshop sponsored, among others, by the law firm N, whose managing partner, Ms. T, subsequently represented a party to the arbitration cases under review.

Failure to advise the respondent in those arbitration cases has accordingly deprived the latter of its procedural right under the Law on International Commercial Arbitration to challenge the arbitrator concerned.

With Ms. T being the managing partner of the law firm N, her representation of the claimant in Cases Nos. 143/2005 and 145/2005 was incompatible with the fundamental principles of Russian law, such as the equality of the parties and the adversarial nature of proceedings.

A breach of any such principle goes against the public policy of the Russian Federation."

The higher court upheld the first level court's judgment, albeit noting that the breach in question had amounted to a violation not of public policy, but of the arbitration procedure agreed upon between the parties, and thus amended the reason for the award to be set aside.

The judgment of the Moscow City Arbitrazh Court, which immediately drew much criticism from the arbitration community in Russia,

is a good illustration of two vital issues. One is the general issue of court independence, considering that the political context in the cases under review is an open secret. The other relates to the absence of any disclosure standards in Russia applicable to arbitrators.

Indeed, the Russian Law on International Commercial Arbitration, Article 12 of which is identical to Article 12 of the Model Law, does oblige an arbitrator to disclose any circumstances likely to give rise to justifiable doubts at to his/her impartiality or independence.

The key word here, regrettably overlooked by the Russian courts in this case, is "justifiable". In the case concerned, the court concluded that an arbitrator's participation in a conference sponsored by a law firm (representing one of the parties to the arbitration) could give rise to justifiable doubts as to his/her impartiality. The Court disregarded the fact, however, that the arbitrator had not been paid any fee for making presentations at the conference, as the Austrian Arbitration Association, which organised the event, only covered his travel and accommodation expenses. The Court also missed the fact that the Vienna conference in November 2004 had been sponsored by more than twenty law firms. Furthermore, it ignored the fact that only one of the three arbitrators in the case had actually taken part. The Court found that those circumstances did not detract from the justifiability of its doubts.

It should be added that the judge drawing the conclusion of the Moscow City Arbitrazh Court had no restrictions imposed on her in doing so: neither the existing legislation of the Russian Federation, its judicial practices, nor even its doctrine of jurisprudence offers any guidance as to the borderline between justifiable doubts and unjustified doubts. Unfortunately, the IBA Guidelines on Conflicts of Interest in International Arbitration are not well known in Russia, and there is no similar local document. The judge would most probably have found it much harder to conclude as to her doubts in the case in question being justifiable if there were a greater awareness of the IBA Guidelines.

In another case the Russian courts responded more liberally to the question of whether a given party was able to present its submissions. On 10 May 2006 an arbitral tribunal acting pursuant to the Rules of ICAC ordered Interland Finance Holdings Limited, registered

in the British Virgin Islands ("Interland"), to pay to Rating-Invest ZAO ("Rating-Invest") the sum of US$9,302,44 of principal debt, US$60,000 in penalties, and US$25,008 as reimbursement of arbitration fees.[1]

Interland disagreed with this arbitral award, and so it lodged an application for it to be set aside with the Moscow Arbitrazh Court. In particular, Interland submitted that it had been unable to participate in the adversarial stage of the arbitration hearing because the arbitrators had not accepted the authority of the individual put forward as the firm's duly authorised representative since the authority of the person who issued the power of attorney had not been confirmed on the date when the power of attorney was issued. Likewise the tribunal held that the firm's other representative had not been authorised to sign the counterclaim.

On 9 August 2006, the Moscow Arbitrazh Court refused the application, and on 13 October 2006 the Moscow Region Federal Arbitrazh Court approved the decision of the lower court. On 20 March 2007 the Presidium of the Supreme Arbitrazh Court agreed with the opinion of the two lower courts.

The courts stated that Interland had in fact taken part in the arbitration proceedings since it had submitted a reply to the statement of claim and had attended the hearing. Thus it was impossible to find that the company had not been duly notified of the appointment of the arbitrator or of the arbitration hearing, or that it had for any other reason been unable to present its case, or that the tribunal as constituted or the arbitration procedure was contrary either to the agreement of the parties or the law.

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[1] See Judgment No. 15421/06 issued by the Presidium of the Supreme Arbitrazh Court on 20 March 2007.