

# Kluwer Arbitration Blog

## RUSSIA: An improvement in relations between the Russian courts and international arbitration?

Francesca Albert (Herbert Smith Freehills LLP) · Monday, February 28th, 2011 · Herbert Smith Freehills

While Russia is a signatory to the New York Convention, there is a perception amongst some practitioners and arbitration users that Russia is not an arbitration friendly jurisdiction. This viewpoint is, no doubt, due to a perceived scepticism of the Russian courts and is the driving force behind many foreign investors doing business in Russia entering into contracts subject to English law with disputes to be resolved by international arbitration in a neutral venue.

However, three recent decisions suggest there has been a small, but noticeable, sea change in the approach of the Russian courts. This blog considers those decisions and suggests that Russia's perceived hostility towards international arbitration is, to a certain extent, thawing.

First is a decision from 28 December 2009 of the Federal Arbitrazh Court in *Red Burn Capital v ZAO Factoring Company Eurocommerz* (Case No. A40-59745/09-63-478). The decision is significant as the court confirmed the validity of an optional jurisdiction clause and rejected a formalistic application of the Code of Arbitrazh Procedure in favour of recognising internationally recognised principles.

Red Burn Capital filed a claim in the Russian courts seeking debt recovery from Eurocommerz under a credit agreement. The dispute resolution clause in the credit agreement required that disputes be submitted to LCIA arbitration. However, it also provided that if Red Burn objected to arbitration before the appointment of an arbitrator, it could demand that the dispute be heard by a state court, provided that such an election was validly made.

The court of first instance took the usual formalistic approach in applying the law. It terminated the court proceedings without regard to the contractual provisions of the credit agreement on the basis of Article 148 of the Code of Arbitrazh Procedure, which provides that a state Arbitrazh Court must terminate proceedings if a party challenges its jurisdiction on the grounds that the relevant contract contains an arbitration clause.

Red Burn successfully challenged the first instance judgment in the appellate courts and Eurocommerz then appealed to the Federal Arbitrazh Court. The Federal Arbitrazh Court found that the dispute resolution clause was valid and effective and that Red Burn could elect to bring its claim before the Russian courts. It noted that the credit agreement provided greater rights to the finance party (i.e. Red Burn) in respect of the choice of forum. The court also considered the

commercial positions of the parties and found it reasonable that the agreement protected the interests of the party at risk (i.e. the finance party).

It is significant that the court not only upheld an optional jurisdiction clause, but it also rejected a formalistic application of Article 148 of the Code of Arbitrazh. Indeed, the judgment is a significant step towards the adoption of international financial standards in Russia, in particular the enforcement of optional jurisdiction clauses (albeit in this case recognising that Red Burn did not wish to arbitrate).

Second is a decision of 30 August 2010 from the Federal Court of Moscow Circuit Court (Case No. A40-19/09-OT-13). The decision reaffirmed interim measures granted by the Court of Appeal in July 2009 in support of LCIA arbitration proceedings initiated by Edimax Limited (Cyprus) against Russian businessman, Shalva Chigirinsky.

Interim measures issued by foreign courts and arbitral tribunals are not enforceable in Russia because they do not meet the criteria of finality and substance as stated by clause 26 of Information Letter No 78 of the Presidium of the Supreme Arbitrazh Court, dated 7 July 2004. Therefore, the only means of securing the disputing parties' interests during an ongoing foreign arbitration is to seek interim measures from a Russian court.

While the possibility of obtaining interim relief in support of arbitration has been available since 2002 when the new Arbitrazh Procedure Code was adopted, until the Edimax decision it remained unclear whether that possibility extended to arbitration based outside Russia.

In April 2009, Edimax commenced LCIA arbitration proceedings against Mr Chigirinsky seeking payment of over US\$30 million under a guarantee (Ruling No 17095/09, dated 20 April 2010). Edimax also applied to the Russian Arbitrazh Court for a freezing injunction over Mr Chigirinsky's real estate in Moscow. This application was rejected by the Arbitrazh Court of first instance, but granted on appeal.

However, Mr Chigirinsky's ex wife successfully challenged the decision of the Court of Appeal arguing, inter alia, that the Arbitrazh Court lacked jurisdiction because the dispute involved an individual. The Court of Cassation agreed and terminated the proceedings.

Edimax then appealed the Court of Cassation's judgment to the Supreme Arbitrazh Court. That appeal was successful and the Supreme Arbitrazh Court ordered the case to be reconsidered by the Cassation Court, which then upheld the freezing injunction.

Although the main defence arguments related to lack of jurisdiction and rules of property ownership following divorce, an important conclusion was that the Supreme Arbitrazh Court confirmed it is possible to seek interim relief from Russian Arbitrazh Courts in support of foreign arbitral proceedings. The Supreme Arbitrazh Court also noted that interim measures in support of arbitration should be granted in accordance with the general rules governing interim measures.

Finally, there is a decision of 20 August 2009 from the Court of Cassation of the Moscow Federal Circuit in *Erick van Egeraat Associated Architects B.V. (Netherlands) v Capital Croup LLC* (Case No. 40-51596/09-68-437). In this case, the court held that the fact that a party nominated arbitrator had spoken at a conference organised and sponsored by the law firm of the opposite party's counsel did not, per se, affect the impartiality of the arbitrator.

Russian law provides that an arbitrator must disclose any circumstances which may give rise to justifiable doubts as to his/her impartiality or independence. Based on such disclosure, a party to the arbitration may challenge the arbitrator. The arbitrator's failure to provide such information at the time of his/her appointment may also serve as grounds for appealing an arbitral award.

Prior to the decision in *Erick van Egeraat*, there had been uncertainty in Russia as to the exact test of impartiality for arbitrators. That uncertainty resulted from the decision in *OAQ NK Rosneft v. Yukos Capital S.a.r.l* (Case No. A40-4577/07-8-46), where Rosneft applied to set aside four Awards that had been issued by the International Court of Commercial Arbitration of the Moscow Chamber of Commerce. In *Rosneft*, Yukos Capital's party nominated arbitrator had spoken at a conference organised and sponsored by the law firm representing Yukos Capital. In deciding to set aside the Awards, the Supreme Arbitrazh Court commented that arbitrators must disclose their connection to legal counsel at the time of their appointment. However, the court did not explicitly rule whether participation in conferences may affect the partiality of the arbitrators, which led to considerable concern in Russian arbitration circles regarding the Russian courts attitudes to arbitrators who appear at academic events organised and/or sponsored by instructing counsel.

In *Erick van Egeraat*, the court rejected Capital Group's claim that the arbitrator was not impartial. The court based its ruling on two specific arguments:

- (i) The law firm only acted as a so-called "information sponsor" (promoting the conference among its clients and partners). It had no influence on either the program of the conference or on the speakers' list.
- (ii) The participation of the arbitrator in the conference did not create any dependence or commercial interest with the law firm.

However, the court further stated that an arbitrator's involvement in academic events must be made known to the other party, otherwise this is a ground for setting aside awards.

The decision brings some clarity to the issue of challenging arbitrators' impartiality in the Russian courts. In particular, it illustrates that the impartiality test is based on establishing whether any interaction creates dependence or commercial interest between the law firm and the arbitrator.

Following the *Erick van Egeraat* decision, on 27 August 2010, the Russian Chamber of Commerce and Industry approved the Rules on Impartiality and Independence of Arbitrators – this is the first time that such rules have been adopted in Russia. The Rules are non-binding, but take into account the IBA Guidelines on Conflicts of Interest and the rules of various international arbitral centres. Taken together, the *Erick van Egeraat* decision and the Rules have created a sophisticated set of guidelines to govern arbitrators' impartiality in Russia – the question now is how this framework will be applied in practice.

These three decisions are all positive jurisdictional developments in support of the interests of parties arbitrating in Russia or looking to the Russian courts to assist with international arbitration. Of course, there is still a long way to go before Russia will be viewed as a pro-arbitration jurisdiction. Indeed, many parties still report difficulties enforcing arbitral awards in Russia, particularly against state entities. However, if Moscow is going to achieve its ambitious aim of becoming a major financial centre, then a sophisticated and transparent set of arbitration laws will be necessary in parallel with any wider judicial reform – these decisions might be three small steps down such a road.

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