

Russian Interest in Asia: Dispute Resolution Beyond the Sanctions

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A View from Inside

A foreword by Victor Dumler, Dumler and Partners Law Offices, St Petersburg.

Over the last two decades, Russia-related disputes have become a considerable part of “Russia’s export” into Western Europe. Yet, after more than a year living under the sanctions regime, the situation is changing and Russian parties are increasingly looking for alternative venues for dispute resolution. Three major concerns lie behind this move. *First*, European institutions are prohibited from administering cases involving sanctioned companies and persons. Should an institution receive a permission from its national government to administer such cases, it must still also seek an approval from the Office of Foreign Assets Control, part of the U.S. Treasury Department. This also applies to arbitrators, some already having recused themselves from service on such tribunals. This uncertainty is only increased by the vague criteria determining controlled persons and entities suggested in the EU Guidelines on implementing the sanctions found in the framework of the EU Common Foreign and Security Policy of 8 December 2003 № 15579/03. *Second*, assuming the sanctions are considered as part of national law, there is the foreseeable risk of non-enforcement of a contract governed by English law, traditionally favoured by Russian parties. *Finally*, there is the detrimental effect of anti-Russia rhetoric. Deserved or not, the latest poll by the Russian Arbitration Association shows Russian parties’ are concerned with the impact the current situation may have on the outcome of arbitrations involving Russian parties.

In any event, it is all not only about money. It is also about the legal profession. Few people involved in “Russian” cases would say they are boring – quite the opposite – Russian cases regularly involve very interesting legal issues. It is an excellent development that Asia will handle its fair share of them.

The following article provides a helpful overview of the benefits of Hong Kong, in particular as a place of arbitration, for Russian parties. Indeed, in comparison not only with traditional European, but also other Asian jurisdictions, it enjoys a unique set of advantageous features going beyond its British-based common law legal system, although this is certainly one of them.

A Seismic Shift: Russia’s Economic Reorientation to the East

While the sanctions regime has undoubtedly challenged Russian parties’ traditional preference for

arbitration in Europe, the trend towards Asia reflects much more than this, and is in fact part of the overall change in Russia's commercial orientation to the East occurring in conjunction with Asia's maturing arbitral landscape.

Following Asia's leading role in the recovery from the global economic crisis, Russian commercial activity has mirrored the global rebalancing eastward, a trend only accelerated by the EU and US sanctions. Russian cross border transactions with China, a mere \$12 billion in 2003, are anticipated to reach \$200 billion by 2020. Finance and securities transactions are seeing similar growth, with Russian securities now permitted to list on the Hong Kong Stock Exchange. In contrast, Europe and the US continue to suffer from economic sluggishness and an uncertain business environment.

Hong Kong, as an independently governed region of China, has an unsurpassed reputation as the meeting place of East and West, providing a gateway to some of the globe's fastest growing economies and serving as Asia's commercial, financial and trading centre. Importantly, in the words of Justice Hamblin of the English commercial court, Hong Kong is not only "*geographically convenient*", but also "*a well-known and respected arbitration forum with a reputation for neutrality*" ([2015] EWHC 194 at 37).

With 30 years' experience managing complex international disputes, the Hong Kong International Arbitration Centre (HKIAC) is also a regional leader. As recognised by the 2014 Global Arbitration Review, Guide to Regional Arbitration, "*[r]egional arbitration pretty much began with the HKIAC*", further reminding us that "*[n]o regional institution has been running for so long ... [o]r with such success.*"

Capitalising on HKIAC's 30th anniversary, Hong Kong and HKIAC provide an excellent case study to demonstrate why Asia is fast becoming the preferred venue for Russian dispute resolution.

I. Legal Stability

Hong Kong has a reputation as a neutral seat, catering to Russian parties' preference for the British common law system. Despite its return to Chinese sovereignty in 1997, Hong Kong continues to operate a separate political system and common law legal regime under the 'One Country, Two Systems' doctrine.

Hong Kong was the first jurisdiction in Asia to base its arbitration legislation on the 2010 version of the UNCITRAL Model Law and has further strengthened its pro-arbitration credentials by explicitly providing for confidentiality of arbitral proceedings, awards and related court proceedings, as well as empowering Hong Kong seated tribunals to issue a broad range of interim relief. Further, Court oversight is provided by a fully independent, pro-enforcement judiciary, drawn from jurisdictions across the common law world; leading the World Economic Forum's "Global Competitiveness Report 2014-2015" to rank number one in Asia, and significantly above the UK, the USA and Sweden, in terms of its judicial independence.

II. Convenience

Hong Kong offers easy access to the world. 50% of the world's population lives within a five hour flight from Hong Kong. For Russians, Moscow is a 9 hour direct flight and, unlike in many other jurisdictions, including the EU, 14-day visas are available on arrival.

Hong Kong's open skies policy allows parties the flexibility to select lawyers and arbitrators from anywhere in the world, including Russia. HKIAC's appointment process reflects this, encouraging parties to appoint the arbitrator of their choice while also including a number of arbitrators capable of conducting proceedings in Russian on its Panel and List of Arbitrators. HKIAC was also the first

institution in Asia to release a Russian version of its administered arbitration rules.

III. Experience

HKIAC has significant experience managing complex international disputes. Founded in 1985, HKIAC is the oldest and most experienced international arbitration institution outside Europe and North America, managed by an international Secretariat comprised of members from the United States, the UK, India, Singapore, the Philippines, China, France and Hong Kong. HKIAC handles a high volume of new cases annually. In 2014, 472 new disputes were filed with HKIAC, 93% of the administered arbitration cases were international, parties were from 30 different jurisdictions, and the aggregate dispute value reached US\$2.4 billion.

HKIAC also has significant sector specific experience. For Russian companies concluding major energy and resources agreements it is worth noting that 1 in every 5 cases filed at HKIAC in 2014 were related to the energy, resources and environmental sectors. Similarly, as the Russian government encourages investment in ship building and progresses with plans to establish a Russian-Korean engineering centre, HKIAC's Maritime Arbitration Group provides unparalleled regional expertise and proximity.

IV. Enforcement

Through the New York Convention, Hong Kong awards are enforceable in over 150 jurisdictions and have a particularly strong record of enforcement in Mainland China, with no HKIAC award being refused enforcement there in the last 5 years.

To promote enforcement of awards in Hong Kong, the judiciary implements an indemnity cost rule. Where a party unsuccessfully challenges or resists enforcement of an award, it will generally pay costs on an indemnity basis. This provides strong incentive for parties to carefully weigh up the potential cost consequences of unfounded challenges.

Russian parties in Hong Kong can also have confidence in impartial enforcement against Chinese companies and state-owned entities. For example the Hong Kong subsidiary of a Russian company recently enforced an award against Petrochina, one of China's most powerful state-owned entities.

V. Advanced Rules

HKIAC has the most modern and comprehensive set of administered arbitration rules, which, as the following brief overview demonstrates, compare favourably with any institution in the world.

Model Clause: as well as the usual features, specific wording prompts parties to designate the governing law of the arbitration agreement. This pioneering approach is designed to avoid costly and time consuming litigation over jurisdiction and received the Global Arbitration Review's 2014 Award for Innovation. For Russian parties this prevents the unnecessary impact of inadvertently subjecting an agreement to the law of a sanctioning jurisdiction.

Provisions for Disputes Involving Multiple-Parties and/or Multiple-Contracts: To simplify and streamline the arbitration process in these circumstances, HKIAC introduced the following provisions:

- Joinder: either an existing party or a party seeking to be joined can submit a request for joinder. Applications are decided by HKIAC pre-constitution or the arbitral tribunal post-constitution. Provided the applicant is *prima facie* bound by the arbitration agreement, the written consent of all parties is not required. See: art 27.
- Consolidation: to avoid multiple proceedings and potentially contradictory awards, a party may

request consolidation of related arbitrations, either by consent or, where all claims are made under the same or compatible arbitration agreements, the same transaction, or a series of related transactions, even where the parties to each arbitration are different. See: art 28.

- Single arbitration under multiple contracts: provided certain criteria are met, a single arbitration may be commenced where claims arise out of or in relation to multiple contracts. This provides an efficient alternative to consolidation without requiring initiating individual claims. See: art 29.

Emergency Arbitrator & Expedited Procedures: Access to emergency relief is available concurrent with or following a party's filing of the notice of arbitration. Similarly, the expedited procedure offers parties the option of having their dispute fully resolved within 6 months. See: art 23.1 & sch 4.

Confidentiality: Mirroring the provisions of the Hong Kong Arbitration Ordinance, the HKIAC Rules' provisions on confidentiality are some of the most comprehensive in the world, providing significant protection for parties by default. See: art 41.

VI. Costs

Seven out of eight parties cite cost as a major concern in arbitration. Uniquely, under the HKIAC Rules, parties can pay arbitrators either as a percentage of the amount in dispute or an agreed hourly rate. To reduce the potential for runaway costs, HKIAC's administrative fees are also capped at HK\$400,000 (~US\$51,500) for amounts in dispute over HK\$400 million (~US\$51.5 million). Hourly rates are also capped at HK\$6,500 (~USD\$840) per hour. See: art 10, schs 2 and 3. HKIAC also offers transparent rates and guidelines for its Tribunal Secretary Service, avoiding the potential for disproportionately high fees as seen in the Yukos case.

Conclusion

The commercial and arbitral landscape for Russian companies has changed. As Asian economies continue to grow and institutions like HKIAC continue to innovate and update their rules to reflect modern commercial realities, there will only be greater incentive for Russian parties to locate their commercial interests and dispute resolution venues in the East. Venues like Hong Kong are now the natural forum for Russia to greet its future.