

# Issue Estoppel and Public Order in the Context of International Commercial Arbitration: The Russian Approach

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The Supreme Court of the Russian Federation recently ruled that initiation of a second arbitration from the same contract violates the principle of *legal certainty* which forms part of the Russian *ordre public* (Ruling of the Supreme Court of Russian Federation dated 27.09.2017 docket number N 310-3C17-5655, A54-3603/2016).

The reasoning of the decision is comparable to the principle of *issue estoppel* - one of the pillars of the English procedural law as set in *Henderson v. Henderson* (3 Hare 100, 67 ER 313):

*the parties to a lawsuit shall put forward their entire case and may not in further litigations proceed with a head of claim which could have submitted in the initial litigation.*

Given the potential impact of the Ruling to arbitrations seated abroad, it is beneficial to look at the approach of the Russian Supreme Court in light of the *principle of legal certainty*.

### **Facts of the Case**

JSC Ryazansky Plant of Ceramic Metal Instruments (Russia) and Lugana Handelsgesellschaft mbH (Germany) entered into an agreement for exclusive distribution of electronic components. The distribution agreement provided for arbitration before the German Institution of Arbitration ("Deutsche Institution für Schiedsgerichtsbarkeit e.V. - DIS").

Due to the alleged breach of the distribution agreement by the Plant, Lugana initiated arbitration proceedings accordingly. The tribunal ruled in favor of Lugana and ordered the Plant to pay the debt in arrears, interest on debt and arbitration costs ("Award DIS 1"). The Award DIS 1 was enforced in Russia.

In 2013, Lugana initiated a new arbitration before the same institution seeking legal relief regarding several heads of claims which have not been adjudicated in arbitration DIS-1 (these heads of claims are referred to as "claims 3b and 3c" in the Ruling of the Supreme Court, without any further particularities). The arbitration tribunal ruled that substantive legal effect of the Award DIS-1

(*materielle Rechtskraft*) does not preclude bringing forward these heads of claim as they have not been decided in arbitration DIS-1. Thus the tribunal entered an award in favor of Lugana (“Award DIS 2”).

Since Plant did not comply with the Award DIS-2 voluntarily, Lugana sought recognition and enforcement in Russia. The first instance court found that the award complies with Art. V of the New York Convention and, therefore, recognized and enforced it. Plant appealed such decision and the case found its way to the Russian Supreme Court.

The Supreme Court ruled that the Award DIS-1 established legal certainty between the parties in question. Although the Award DIS 2 specifically stated that claims 3b and 3c have not been raised in the proceedings DIS 1, the initiation of the proceedings arising from the same contract and pertaining to the same subject matter violates the principle established by the European Court of Human Rights in *LLC Link Oil SPb v. Russian Federation* where the court decided on the admissibility of claims (“ECHR Judgement”). Consequently, the Supreme Court ruled that Award DIS 2 violates the Russian *ordre public* and thus its recognition and enforcement should be denied.

### **Analysis of the Decision**

The Information Letter of the Supreme Arbitrazh [Commercial] court of the Russian Federation dated 26/02/2013 N 153 (“Information letter”) sets out the basic guidelines concerning the scope of *ordre public* under the Russian law. It provides that the notion *ordre public* refers to the fundamental legal grounds (principles) having superior imperative effect, universal character, specific social and public importance that form the basis of the economical political and legal state system.

One can argue that such principles include the Roman maxima *ne bis in idem* under which no person shall be penalized twice for the same breach of law (unless such application is specifically provided by the relevant law). In the arbitration context, such principle applies to the situations where an arbitration tribunal fails to discontinue proceedings if there already exists an arbitration award entered between the same parties, concerning the same factual background and with a similar legal relief sought.

The legal reliefs in the two arbitrations differ substantially, as heads of claims 3b and 3c have not been raised in the first proceedings. Thus, Award DIS-2 does not violate the Russian public order in this respect.

Another fundamental principle of Russian law is the prohibition of the *parallel existence of judicial acts with irreconcilable conclusions*. For instance, the Cassation Court of Western-Siberia in the Judgment dated 05.12.2011 N A27-781/2011 denied recognition and enforcement of an ICC award (place of arbitration – Turkey) on the grounds that the share purchase agreement, which was the subject-matter of the arbitration, had been found null and void by the Russian court under the derivative claim made by the minority shareholder of the Russian party to arbitration. As the conclusions reached in the Award DIS-1 and DIS-2 are not irreconcilable, the Award DIS-2 does not affect the Russian public order in this respect.

The Russian Supreme Court, however, should not have relied on the principle of legal certainty for two main reasons.

**First**, the Russian procedural law does not oblige the party to bring the entire case in the initial proceedings. Under Russian law, a court may terminate proceedings only if there is a previous judgment rendered between the same parties on the same cause of action and with a similar factual background (*triple identity test*). As the principle of legal certainty is not enshrined in the Russian

procedural law it may not be considered as the *fundamental legal grounds (principles) having a superior imperative effect*.

**Second**, the Supreme Court reference to the ECHR Judgment is not persuasive as the ECHR in that instance dealt with the powers of the former Russian Supreme Arbitrazh [Commercial] Court for extraordinary review (*peresmotr v poryadke nadzora*) of the judgments of the lower courts. Therefore, its application to the arbitration awards is questionable.

With that said, we believe that the *principle of legal certainty* applied in the matter N 310-ЭC17-5655, A54-3603/2016 is an entirely artificial concept. In fact, the Award DIS-2 in no way violates the genuine principle of *international ordre public* and should have been granted recognition and enforcement (as did the courts of the lower instance). The ruling of the Paris Court of Appeals in *Marriott v. JNAH*, which provides that arbitrators enjoy a wide margin of appreciation in the application of *Henderson v. Henderson* doctrine. In this respect, an exequatur of the relevant award may be denied only if it is irreconcilable with the previous judgment or arbitral award. The approach of the Paris Court of Appeals is not only consistent with the international best practice, but also with the Russian law and as such should have been applied in the matter before the Russian Supreme Court.

In any event, the approach of the Russian Supreme Court and its reliance on the principle of legal certainty raises important practical implications. The parties to arbitrations pending abroad and need to assure that they have brought their entire case before the relevant arbitration tribunal. Otherwise, the relevant award runs the risk of being not recognized and enforced in Russia.