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International Dispute Resolution Involving Russian and CIS Companies

Aileen Truttmann (Schellenberg Wittmer) · Tuesday, February 28th, 2012 · Schellenberg Wittmer

Overview of the conference held on February 23 – 24 in London

A conference on international dispute resolution involving Russian and CIS (Commonwealth of Independent States; association of former Soviet Republics) companies took place in London last week. The conference was well attended, mainly by major law firms in London and Russia, by Cypriot lawyers and by experts with experience in Russia and in the CIS region. Switzerland was represented by Lalive and Schellenberg Wittmer. Simultaneous translation (English-Russian and Russian-English) was provided throughout the conference.

This post would not be the place for a full summary of the two days of speeches. Here are nevertheless a few highlights of the conference.

The first issue addressed was that of **trust** between in-house counsel of Russian companies and external counsel in Western law firms. Igor Tsibelman (legal counsel at Gazprom Neft) pointed to the fact that Russian in-house counsel are often junior and lack experience. This results in external counsel having to actually navigate the dispute themselves, which is rather unusual. The necessity to provide the in-house counsel with appropriate explanations was identified as being of utmost importance by Natalia Chumak (partner at Field Fisher Waterhouse LLP in London). It transpired that the decisive point was the understanding of the difference in cultural background. It was in addition made clear that you should not expect Russian clients to provide you with all relevant information at the initial meeting. This is, in any event, not even something you would expect from a non-Russian client. It was subsequently alluded to judges' (mainly English and US) attitude towards Russian parties and it was suggested that they might be sometimes influenced by the media.

On the issue of **interim relief**, two recent decisions of New York Courts mentioned by John Fellas (partner at Hughes Hubbard & Reed LLP in New York) attracted significant attention. In Sojitz Corp. v. Prithvi Info. Solutions Ltd., the New York Supreme Court (First Judicial Department) confirmed that attachment was permissible if the respondent's property was located in New York, even though the dispute had no connection at all to New York and even though the arbitration had not yet commenced. In Koehler v. Bank of Bermuda Ltd., the New York Court of Appeals held that it could order assets outside New York to be delivered into New York, provided New York had personal jurisdiction over the holder of the assets. In the case in question, the assets were held at a bank in Bermuda. The bank admitted New York's jurisdiction over its branch in New York. It

was submitted that the outcome of the case would most probably have been the same had the bank disputed jurisdiction.

Investment Treaty Arbitration was addressed on the second day. Noah Rubins (partner at Freshfields Bruckhaus Deringer LLP in Paris) stressed that when structuring an investment, attention should be paid to the wording of the different treaties in order to ensure appropriate coverage. Although similar, treaties are not identical. With respect to treaties concerning Russia, but not only, it was recommended to check the scope of the dispute resolution clauses to prevent undesired surprises. It was suggested that most tax-friendly countries have bad BITs, with the, until now at least, rarely known exception of the Lithuania-Russia BIT.

The decision in Tokio Tokeles v. Ukraine was also the subject of considerable attention. In that case, Ukrainian investors incorporated a company in Lithuania and then used that entity to invest in Ukraine. Although the company was 99% Ukrainian-owned, it was protected by the Lithuania-Ukraine BIT which defines nationality by reference to the place of incorporation. This decision confirms that, provided there is no wording indicating otherwise in the BIT, the origin of the capital is irrelevant.

Finally, the recent decisions of Russia's Constitutional and Supreme Arbitrazh Courts in the Maximov case, affirming the **non-arbitrability of corporate disputes**, was addressed by Timur Aitkulov (partner at Clifford Chance LLP in Moscow). Although it was indicated that Russian Courts had a rather friendly approach until recently, determining on a case-by-case basis whether the dispute presented a public element, Russian Courts seem now to have adopted a far more stringent approach. In the case in question, the business man Nikolay Maximov had obtained an award ordering the payment of amounts due to him following a share purchase transaction. It was considered that the payment issue was inseparable from the underlying issue of transfer of title to the shares, which was not arbitrable. It was submitted that there would rarely be cases where the issue of title could be totally insulated, so that there was a risk that many disputes would be seen as non-arbitrable. This decision has been heavily criticized in Russia.

Although the title of the conference appeared to indicate otherwise, the specificities of arbitrations involving Russian parties were, it seemed, not always sufficiently addressed with the result that a few topics remained very generic. That being said, this conference evidenced that arbitration involving Russian and CIS companies is a field in expansion and that it rightly deserves closer attention.

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