RAA40

Russian Arbitration Association

# Newsletter

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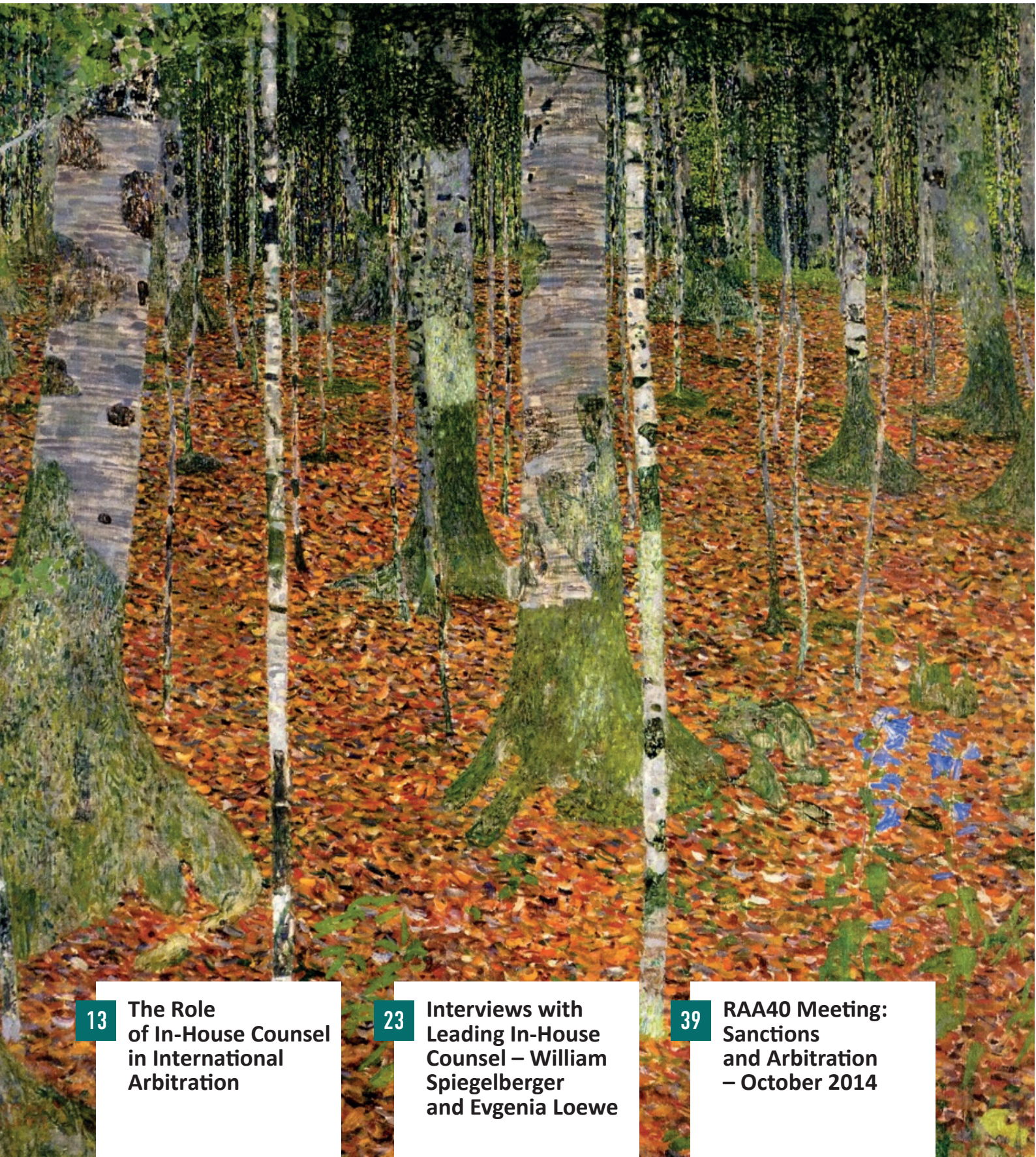

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# Welcome from Co-Chairs

Dear friends and colleagues,

We are pleased to present to you the third issue of the RAA40 Newsletter, which is a special issue devoted to the role of in-house counsel in international arbitration. The idea of this issue would not be born and realized if not the efforts and expertise of Rosneft Oil Company in-house counsel and our learned co-chair Anna Shumilova.

We believe in any discussion of the arbitration practitioners one cannot ignore or underestimate the role of in-house counsel. In most cases they are important contributors and can make a real difference to the process and, most importantly, the outcome.

The best way to understand the role of in-house counsel is to discuss it with them and other actors involved in arbitration. Two very experienced in-house counsel Evgenia Loewe of Renova Group and William Spiegelberger of UC Rusal kindly agreed to be interviewed. We have also asked to participate in the discussion the other side – external counsel and arbitrators including Alexei Dudko of Hogan Lovells, Noah Rubins of Freshfields Bruckhaus Deringer, Julia Popelysheva of Clifford Chance, Christer Söderlund of Vinge, Alexey N. Zhiltsov of the Private Law Research Center, Nick Marsh of DLA Piper and Tatiana Minaeva of Jones Day. Taking this opportunity, we would like to thank them for their time and willingness to share their insights.

We do hope that having read this issue of the Newsletter, you will learn something new about the profession and enrich your understanding of an in-house counsel's role in arbitration and how in-house counsel themselves see that role.

Finally, we would like to note that a year passed since we started as the RAA40 co-chairs. Although it took us some efforts to arrange under-forty arbitration events in Moscow on a regular basis and involve as many people therein as we could, we really enjoyed every opportunity to interact with all of you and would like to thank you for your support. We have some more ideas and will try to make this new year in office even more interesting for the Russian arbitration community!

As always, please, do not hesitate to contact us at raa40@arbitrations.ru should you have any queries about the activities of RAA40, wish to share with us your ideas or submit a contribution to the newsletter.

Yours sincerely,
RAA40 Co-Chairs


Sergey Usoskin


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# Courts and Arbitration in Russia

## Overview of Essential Cases: May–September 2014

*by Sergey Usoskin, Advocate, RAA40 Co-Chair*

### 1. Public Procurement Disputes Not Arbitrable

*State Establishment Proizvodstenno-Tekhnicheskoe Ob'edinenie Kapitalnogo Remonta i Stroitelstva … v. LLC Arbatstroy*
*(Case No. A40-148581/12, Presidium of the Supreme Commercial Court, Resolution No. 11535/13 dated 28 January 2014 (published in June 2014)*

The Presidium of the Supreme Commercial Court ruled that disputes arising from public procurement contracts are not arbitrable. On this basis it set aside an award rendered by a domestic arbitral tribunal in a dispute between a private contractor and a state establishment. The dispute concerned the failure of the private contractor to complete construction work on time.

Russian law treats most contracts for the supply of goods or services to a state authority, state enterprise or state establishment (but not a state-owned company) as public procurement contracts. Most of these contracts are awarded on the basis of public bidding.

The Supreme Commercial Court explained that only private law disputes are arbitrable under Russian law. Disputes arising from public procurement contracts are public rather than private, because such contracts are entered into to satisfy public interests rather than private ones.

The court further noted that transparency is a central principle of the Russian public procurement regime, and that submitting disputes arising from public procurement contracts to confidential arbitration is incompatible with this principle.

### 2. Arbitral Tribunal Entitled to Rely on Apparent Authority of Party's Representative

*Autorobot-Strefa Sp. z.o.o. v. LLC Sollers-Elabuga*
*(Case No. A65-30438/2012, Presidium of the Supreme Commercial Court Resolution No. 1332/14 dated 24 June 2014)*

The court permitted the enforcement of an LCIA award in favour of Autorobot. It was not open to the respondent to challenge the authority of a person that purported to act on the respondent's behalf in the arbitration, because that person's authority had been apparent from the circumstances of the case. Nor was it open to the respondent to dispute the receipt of correspondence delivered to an address that the person acting under apparent authority had earlier provided.

Autorobot commenced arbitration to recover sums due for the goods it supplied to Sollers-Elabuga. Shortly thereafter the head of legal of the respondent's parent company sent an email to the LCIA requesting all further arbitration-related correspondence to be forwarded to his address. The arbitrator sent all further correspondence to this address. Eventually, he rendered in award in favour of Autorobot.

The respondent argued that it had not authorised the person that corresponded with the LCIA to represent the respondent in the arbitration and had not issued a power of attorney to him. The Supreme Commercial Court disagreed with this argument and held that the arbitrator had been entitled to rely on a communication which made reference to the arbitration and which was sent by a senior legal officer of the respondent's parent company.

## 3. Effect of Respondent's Insolvency on Arbitration Remains Uncertain

*LLC Terminal-Vostok v. Vincia Establishment*
*(Case No. A40-166263/13, Presidium of the Supreme Commercial Court Resolution No. 5940/14 dated 15 July 2014)*

In the previous newsletter we covered a decision of the Federal Commercial Court for the Moscow Circuit in the same case. The court held that once the first stage of insolvency proceedings – supervision («наблюдение») – commences all claims against the debtor company, including those heard in an ongoing arbitration, should be referred to the court supervising the insolvency. It set aside an award rendered by an arbitral tribunal sitting under the ICAC at the Russian CCI rules, because the tribunal rendered the award after the court had put the respondent company under supervision.

The Presidium of the Supreme Commercial Court reversed this decision, but on a very narrow ground. It held that the tribunal had in fact rendered the award before the respondent was put under supervision. It was only the reasoned award that was produced after the cut-off date. However, the Presidium failed to address the more general question of insolvency's effect on arbitration.

While the Presidium's failure to tackle the issue is troubling, it should not be given too much weight. Earlier the Supreme Commercial Court held that an arbitral tribunal should terminate the proceedings once an insolvent company is put into liquidation («конкурсное производство») as from this moment disputes seize to be arbitrable. In fact, the law expressly provides that the creditors are entitled to pursue a case before state courts against a debtor put under supervision if litigation was commenced beforehand.

## 4. Respondent's Failure to Promptly Invoke the Arbitration Clause Amounts to a Waiver

*Demesne Investments Limited v. CJSC Metropolis*
*(Case No. A60-5127/2014, Commercial Court for the Ural Circuit, Resolution dated 19 August 2014)*

The court refused to refer the dispute to arbitration. It held that the respondent had abused its rights by invoking the arbitration clause only after participating in two court hearings without objection.
Demesne commenced proceedings before the Sverdlovsk Region Commercial Court seeking recovery of the monies Demesne had lent to Metropolis. Metropolis' counsel took part in two court hearings in the case without making any submissions in relation to the merits of the case. Before the third hearing Metropolis submitted an application asking the court to refer the parties to LCIA arbitration as provided for in the loan agreement.

The court rejected the application. It noted that Metropolis' counsel had reviewed the case-file which, in the court's opinion, meant that counsel had the opportunity to become aware of the arbitration clause in the loan agreement. Metropolis had then participated in a hearing without invoking the arbitration clause and only raised the issue before the next hearing. In these circumstances, the court concluded that the respondent's conduct was an abuse and therefore it was no longer an option to invoke the arbitration clause.

## 5. Arbitrability of Concession-Related Disputes Left Unresolved

*St. Petersburg Committee for the Management of City Property v LLC Nevskaya Concession Company (Case No. A56-45107/2013, Commercial Court for the North-Western Circuit, Resolution dated 14 August 2014 and Thirteenth Appellate Commercial Court Resolution dated 21 April 2014)*

The claimant commenced proceedings before the St. Petersburg Commercial Court to recover rent allegedly due under lease agreements with the respondent. The respondent invoked the arbitration clause incorporated into the lease agreements by reference to the dispute settlement clause in the concession agreement between the respondent and the city of St. Petersburg. In the concession agreement the parties agreed that any disputes between them shall be resolved by arbitration under the UNCITRAL Rules by an arbitral tribunal seated in Moscow.

The first instance appellate and cassation instance courts both held that the dispute should be referred to arbitration. However, their reasoning differs.

The claimant relied on the invalidity of the arbitration clause. It argued that under the Russian law on concession agreements any disputes under such agreements shall be submitted to either state courts or domestic arbitral tribunals ("третейские суды"). A UNCITRAL arbitral tribunal is an international arbitral tribunal and therefore it cannot resolve disputes under a concession agreement.

The appellate court tackled the arbitrability of the concession agreement-related disputes heads on. It held that the law on concession agreements permits the parties to refer disputes to arbitral tribunals ("третейские суды"). The court held that a tribunal seated in Moscow fell within this category even if the proceedings were to be governed by the UNCITRAL Rules and the arbitration in question was an international arbitration as a matter of the Russian law. The appellate court added that, in any event, the dispute between the parties concerned the lease agreement rather than the concession agreement.

The cassation instance court chose not to address the restrictions imposed by the law of concession agreements; the court limited itself to agreeing that the dispute concerned the lease agreements.

# Cases to Watch in Russia and Abroad

**Case:** LLC Omsk-Steklotara v. Sklostroj Turnov CZ s.r.o. (No. A46-12418/2013)
**Forum:** Commercial Court for the Western-Siberian Circuit (potential)

**Significance of the Case:** The case is significant in two respects. Firstly, the lower courts rejected the claimant's argument that it should be permitted to ignore the arbitration clause due to its inability to cover arbitration-related costs. Secondly, before the lower courts the respondent successfully invoked the arbitration clause clarification mechanism provided in the European Convention on International Commercial Court. In the contract the parties agreed to submit all disputes to arbitration in Vienna. The President of the Austrian Chamber of Commerce acting under the European Convention clarified that the disputes should be submitted to the Vienna International Arbitration Center.

**Case:** Serbian Privatization Agency (Agency) v. OJSC Avtodetal-Service (No. A72-15958/2013)
**Forum:** Uljanovsk Region Commercial Court

**Significance of the Case:** Agency sought enforcement of an arbitral award rendered in Serbia arising out of a privatisation agreement between the parties. The first instance court rejected the application. It noted that privatisation is a public law matter and therefore such disputes are not arbitrable. The court further stated that privatisation-related disputes are generally not arbitrable in Russia. An appeal is currently pending before the Federal Commercial Court for Povolz'e Circuit.

**Case:** Victor Melnik v Omnilightstar Limited (No. A40-135118/13)
**Forum:** Ninth Appellate Commercial Court

**Significance of the Case:** Mr Melnik sought to enforce an arbitral award rendered in a dispute arising out of a shareholders agreement between the shareholders of a Russian joint-stock company. The tribunal ordered the respondent to pay RUR 150'000'000 in compensation for breach of the agreement. The Moscow Commercial Court refused to enforce the award. It held that a dispute arising out of a shareholders agreement that governs the parties' exercise of their rights as shareholders is a "corporate dispute". The court then confirmed that "corporate disputes" are not arbitrable by virtue of Article 225.1 of the Russian Commercial ProcedureAppellate Commercial Court.

**Case:** Kyrgyzstan v. Li John Bek, Central Asian Corporation for Development Corporation (No. A40-19518/14)
**Forum:** Commercial Court for the Moscow Circuit

**Significance of the Case:** Kyrgyzstan seeks annulment of an award rendered by a tribunal sitting under the rules of the Arbitration Court at the Moscow Chamber of Commerce and Industry. The tribunal relied as the basis of its jurisdiction on Article 11 of the Convention on the Protection of Investor's Rights (the 'Convention'), which provides that investment disputes are to be resolved by national courts, Economic Court of the CIS or by international arbitration. Both the arbitral tribunal and the Moscow Commercial Court agreed that this provision contains Kyrgyzstan's consent to submit investment disputes to any international arbitration forum chosen by the claimant.

**Case:** In re Article 11 of the Convention on the Protection of Investor's Rights
**Forum:** Economic Court of the Commonwealth of Independent States

**Significance of the Case:** Kyrgyzstan requested an advisory opinion from the court on the interpretation of the above cited provision. Kyrgyzstan argues that this provision does not amount to the consent of signatories to the Convention to submit investment disputes to arbitration. A hearing is scheduled for 19 September 2014.

# Breathtaking Developments

## New LCIA Rules come into force on 1 October 2014

*by Deliya Meylanova, Eleni Polycarpou MCIArb, Withers LLP*

In July the LCIA adopted the final version of the new LCIA Rules which come into force on 1 October 2014. This is welcome modernisation of those rules which have been in place since 1998, and arriving hot on the heels of new rules having been adopted by a number of other institutions in the last 2 years, including the ICC in Paris ('ICC') and the International Centre for Dispute Resolution ('ICDR').

The wording of the rules has been thoroughly reworked, with at least cosmetic changes to most paragraphs. In general, the rules have been expanded and made more detailed. For instance, there are now clearer provisions on the permitted methods of "delivery" of documents to parties in Article 4 (the word 'service' which may cause confusion by its implied reference to Court procedures has been removed).

There are also some more substantive changes which, on the whole, make the rules more user-friendly and flexible. The aim seems to be to reduce procedural costs by removing uncertainty and to promote efficiency. The change which has been most discussed after the publication of the draft of the new rules is the addition of ethical guidelines for legal counsel. These are included in an annex to the rules and comprise what are essentially the basics of an English solicitor's or barrister's duty to the Court in litigation, that is, not to make false statements, conceal documents, knowingly prepare false evidence, or try to influence the arbitrators (on the last point see also Article 13). To English eyes these matters are standard, but, possibly in view of the fact that there are no restrictions on the rights of audience before an arbitral tribunal (ie a wide variety of lawyers may be involved), the LCIA have decided to spell these matters out. However, the draft provision which expressly permitted the LCIA to report legal advisors who infringed this code to any relevant professional body has not survived into the final version. Instead, the LCIA may issue a written reprimand, a written caution and impose "any other measure necessary to fulfil within the arbitration the general duties required of the Arbitral Tribunal" to conduct the arbitration fairly, expeditiously, impartially and efficiently.

The new rules impose slightly shorter deadlines on the parties – 28 day periods instead of 30 day periods (which on a practical level should mean that deadlines will now not fall on non-business days) and 14 days where 15 days was previously permitted (which again should have the same effect). The calculation of deadlines now expressly takes into account the difference between time zones. Various provisions deal in detail with the diligence required of arbitrators and ways of dealing with arbitrators that are not carrying out their responsibilities.

The rules now include an ability to appoint an emergency arbitrator before the tribunal is constituted (even if it is constituted in an expedited manner). This mirrors a change recently adopted in the ICC, the ICDR and the Stockholm Chamber of Commerce rules. However, given the wide use in England of interim relief from the Courts in support of impending arbitration proceedings, it remains to be seen whether parties will elect to use these provisions instead.

There are other important changes, such as the fact that late objections to jurisdiction and claims that the Tribunal has exceeded its powers are permitted if there is a good reason, and also that the choice of seat is deemed to be London in the absence of express agreement, and the ability to appoint more than 3 arbitrators. Article 16.4 expressly provides that, unless the parties provide otherwise, the law of the arbitration agreement (as well as the law of the arbitration) shall be that of the "seat" of the arbitration. These are just some of the main changes: the number of amendments means that the new rules repay careful study.

# Courts and Arbitration Abroad - England

## Diag Human SA v Czech Republic [2014] EWHC 1639 (Comm)

*by Robert Dougans, Nabeel Osman, Maria Gritsenko, Bryan Cave LLP*

Arbitral proceedings took place in the Czech Republic resulting in an award against the government of the Czech Republic in favour of Diag Human. Diag Human applied to enforce this award in the Austrian courts. The Austrian courts refused to enforce the award, holding that the award was not final and binding because an arbitral appeal process had not yet run its course. Diag Human then applied to enforce the award in England.

The Czech government argued that the award should not be enforced in England due to the doctrine of issue estoppel, which prevents the same parties litigating an issue that they have already brought before another court. Diag Human argued that issue estoppel should not prevent an arbitral award from being enforced, and that even if it did, no issue estoppel in fact existed.

Mr Justice Eder held that there was no reason why issue estoppel should not apply to the enforcement of arbitral awards under the New York Convention. He held that issue estoppel did exist on the facts, because the Austrian court's decision that the award was not final and binding was the same issue to be decided before the High Court. In particular, he dismissed the argument that the Austrian court's decision was based on the New York Convention whilst the High Court must apply section 103 of the Arbitration Act 1996 (the "Act"); he stated that this was a "distinction without a difference" given that the Act gives the relevant provision of the New York Convention legal effect in England.

This is understood to be the first case in which the English Court has refused to enforce an award on the basis of issue estoppel. It has proved controversial, with a number of commentators arguing that as the New York Convention and the Act provide for a limited number of exceptions to enforcement which do not include issue estoppel, the High Court should not have acted on that basis. Alternatively, it may be argued that issue estoppel is a matter of English public policy, and therefore a failure to apply this defence in an arbitration context would have been contrary to English public policy.

However, Diag Human did not appeal the decision, and therefore the judgment is likely to be followed by the High Court if and when it is required to consider the same question.

Therefore, the effect of this decision is that any person seeking to enforce an arbitral award should take great care when considering in which state to enforce that award. As well as considering the commercial prospects of enforcement, parties should also consider whether the law and procedure of a particular state means that there is a risk that the court will refuse to enforce the award. If so, parties should consider initially applying to enforce the award in jurisdictions which are not bound by the same legal and procedural constraints, before an attempt to enforce is made in a state where matters are less certain.

# Rochester Resources Limited, Viktor F. Vekselberg, Leonard v. Blavatnik v Leonid L. Lebedev and Coral Petroleum Limited [2014] EWHC 2926 (Comm)

*by Robert Dougans, Nabeel Osman, Maria Gritsenko, Bryan Cave LLP*

A The English High Court refuses to grant an anti-suit injunction in relation to proceedings in the New York court. In its decision rendered on 9 September 2014, Jonathan Hirst QC sitting as a Deputy Judge of the High Court found that one of the Defendants, Leonid Lebedev was not a party to the arbitration agreement contained in an acquisition agreement entered into in 2003 by Rochester Resources Limited ("Rochester") and Coral Petroleum Limited ("Coral") ("Acquisition Agreement").

The dispute arose from Leonid Lebedev's investment in Tyumen Oil Company ("TNK") prior to its joint venture with British Petroleum ("BP"). Around 1997, when the Russian Government sold an interest in TNK, Lebedev made a deal with Viktor Vekselberg and Leonard Blavatnik consisting of a transfer of his stake in TNK and payment of $25 million to entities owned and affiliated with Vekselberg and Blavatnik. When the joint venture was negotiated by Vekselberg and Blavatnik as shareholders of TNK, Lebedev agreed to surrender his right to income under the joint venture and a promissory note in the amount of $200 million for the sum of $600 million ("Promissory Note"). This arrangement was the background to the Acquisition Agreement which was entered shortly before TNK entered into its well-known joint venture with BP. The Acquisition Agreement contained an arbitration clause. The Acquisition Agreement was expressed to bind "affiliates" of the parties as well as the parties themselves.

In March 2013, Rosneft acquired TNK-BP for $55 billion. The sum of $13.8 billion is believed to have been received by Vekselberg and Blavatnik as their joint share of the purchase price.

In February 2014 Lebedev brought proceedings in New York against Vekselberg and Blavatnik on the basis that he had not received any payment for his equity stake in the BP joint venture.

On 9 May 2014, Rochester, Vekselberg and Blavatnik applied to the High Court in London for an anti-suit injunction to prevent Lebedev from proceeding with the New York proceedings. They claimed that the New York proceedings involve disputes which ought to have been resolved pursuant to the arbitration agreement in the Acquisition Agreement, by which Lebedev is bound.

The Claimants alleged that Coral was controlled by Lebedev and that it contracted throughout as the agent for Lebedev. Further, they alleged that Rochester entered into the Acquisition Agreement as agent for Vekselberg and Blavatnik who are entitled to enforce the Acquisition Agreement against Lebedev. Alternatively, the Claimants asserted that if Rochester contracted as principal and only for itself, it can enforce the Acquisition Agreement, including the arbitration clause, against Lebedev for the benefit of Vekselberg and Blavatnik. This was argued on the basis that as its ultimate beneficial owners, Vekselberg and Blavatnik are affiliates of Rochester and are entitled to enforce the rights conferred on them under section 1 of the Contracts (Rights of Third Parties) Act 1999 and to invoke the arbitration clause against Lebedev under either section 8(1) or (2) of that Act.

The Defendants' position was that Coral was independent of Lebedev and that it did not contract as agent for him; nor did Rochester contract as agent for Vekselberg and Blavatnik. They asserted that the only parties to the Acquisition Agreement were Rochester and Coral and that Rochester had no right to enforce the arbitration agreement against Lebedev on their behalf. Further, even if Vekselberg and Blavatnik were to be treated as "*affiliates*" of Rochester, they were not entitled to invoke the arbitration clause because sections 8(1) and (2) have no application and, in any event, it was not intended that the relevant clauses of the Acquisition Agreement should be enforceable by affiliates. In their argument, the Claimants were not entitled to an injunction under section 37 of the 1981 Act and Section 44 of the 1996 Act was inapplicable.

The Court first considered whether Lebedev was bound by the arbitration clause which it indicated was the critical starting issue.

In respect of the nature of Lebedev's relationship with Coral who was the signatory to the Acquisition Agreement, the Court noted that that although it would probably not make much difference, it was not clearly established that Coral is owned by Lebedev. Further, there was no evidence that Lebedev was running Coral's business.

Further, the Court indicated that Lebedev's involvement in the negotiations of the Acquisition Agreement and its rights under the Promissory Note did not make him a party to the arbitration agreement contained in the Acquisition Agreement. Under the Acquisition Agreement the Parties were defined as Coral and Rochester only. The Court therefore concluded that Coral had contracted to the Acquisition Agreement as principal and that it was more likely that Lebedev was intended to be treated as an affiliate of Coral.

Even if it could be demonstrated that Lebedev must have authorised Coral to enter into these engagements on his behalf and therefore Coral was contracting as Lebedev's agent, that would not make him a party to the arbitration agreement. The parties had made it clear that the arbitration clause covers disputes "*arising between the Parties*". The Court noted that had they not included these words, it might have been easier to conclude that the arbitration clause was intended to apply also to affiliates. Based on the terms of the arbitration agreement in relation to which the Court indicated "*there are limits as to what a Court can properly do to improve a carefully drafted and (at least in this respect) reasonably clear written agreement*". The Court concluded that Lebedev was probably not bound by the arbitration clause and that it has certainly not been established to a high degree of probability that he is bound. Accordingly, the Court found that the Claimants had failed to meet the anti-suit injunction test and its application under section 37 of the 1981 Act for an anti-suit injunction must fail. Equally, the Court found that the application under section 44 of the Arbitration Act 1996 must fail on that basis that it was also dependent upon Lebedev being party to the arbitration agreement.

This case arose out of complex issues. It does show that whilst the High Court is willing in some circumstances to make an anti-suit injunction against a person who is formally a non-party to an arbitration agreement, these will only be made if the facts justify it. Here they did not.

# IHC in Arbitration

## The role of in-house counsel in international arbitration


*by Nick Marsh, DLA Piper*
*and Tatiana Minaeva, Jones Day*

*In the fast-moving and demanding world of international arbitration, in-house counsel ("IHC") plays a pivotal role. An essential interface between external counsel and the business, an IHC helps prepare and review information, evidence and documents, as well as being responsible for formulating case strategy and managing costs. An efficient and well-organised IHC can make the difference between success and failure in a dispute.* ***Nick Marsh****, partner at DLA Piper, and* ***Tatiana Minaeva,*** *Of Counsel at Jones Day, consider the features of the role of an IHC and how, in their experience, IHCs contribution is integral to the success of an arbitration.*

An IHC's role in international arbitration differs from jurisdiction to jurisdiction. In Russia, this depends on the IHC's personal experience as well as their employer's internal policy with regards to the resolution of disputes. In certain cases, the IHC may even represent the company without the assistance of external counsel, although this is mainly the case in low value domestic arbitrations. In complex international arbitrations, the role of the IHC is central and they should be active in each stage of the process. This ensures better monitoring, fewer surprises and, most importantly, yields tailor-made solutions that can influence the arbitral process to fit the client's needs without compromising the likelihood of a successful outcome. Below we share our views on the role of the IHC in each stage of an arbitration.

### Selecting legal counsel

The IHC's role in an arbitration starts with the selection of external counsel and the negotiation of an appropriate fee structure. The choice of counsel is crucial, as in Western jurisdictions, and in particular England, the experience and talent of a party's representation in legal proceedings is vital for achieving success. This is where the IHC can add genuine value - by finding a law firm which understands the business, its strategic needs and the importance of working efficiently with the IHC, whilst appreciating the need to agree to flexible fee arrangements which are not unduly burdensome on the client's budget. It is therefore essential for IHC to know and understand the market for legal services and the fee arrangements available in the jurisdiction of interest. For this purpose, it would be advisable for IHC to regularly attend legal conferences and to keep abreast of any developments in areas of interest. Recent developments include the ICC's Guidelines on "Effec-

Recent developments include the ICC's Guidelines on "Effective Management of Arbitration – A Guide for In-House Counsel and Other Party Representatives" whose purpose is to increasethe cost and efficiency of the arbitral process

itive Management of Arbitration - A Guide for In-House Counsel and Other Party Representatives" , which were published on 5 June 2014, whose purpose is to increase the cost and efficiency of the arbitral process and which we consider further below.

## Defining strategy

After counsel is instructed, it is essential that IHC provides external counsel with relevant information and instructions from the outset of the arbitration and actively participates in discussions regarding case strategy. An IHC who understands the arbitral process (whether based on previous experience or academic studies) will be much better placed to fix case strategy and ensure that it is implemented in accordance with the client's needs. To streamline the process and ensure that a comprehensive and accurate strategy is formed, IHC should have discussed strategic goals with the business from the outset and, in turn, communicate them to external counsel. Different procedural stages in an arbitration coupled with unexpected commercial developments make up the ever-changing reality of a dispute, and strategies may need to be re-evaluated and updated throughout the course of an arbitration. Particular strategies may need to be adopted in respect of specific matters such as document production or timetabling. To ensure that both the business and external counsel are kept aware of, and are able to contribute continuously to, changes in the case strategy, it is vital for IHCs to appropriately and effectively manage their communications.

In particular, IHC will often ask external counsel to provide advice on strategy, prospects of success and risks. To ensure that this advice is provided in a timely and appropriate fashion, and that it is in a format which IHC can understand and, if required, translate or summarise it for the business, IHC will need to carefully and actively communicate specific business goals to counsel so that the advice can be tailored as a set of recommendations and appropriate action points rather than pure legal advice.

The ICC Guidelines provide a useful starting point for IHCs who may not yet be familiar with the intricacies of the arbitral process and the key steps involved. They encourage IHCs to consider case strategy at the outset, including early analysis of the prospects of success, the benefit and risks of settlement discussions and the possibility of early (and cost-effective) determination of key issues through proactive case management. The guidelines are, by their own admission, necessarily general in nature and cannot take into account the particular issues in a given dispute or comprehensively cover all appropriate strategies and considerations.

## Written submissions

The IHC will also review and comment on letters, filings or documents prepared by external counsel. The role of IHC is important at this stage, particularly in verifying the accuracy of facts. However, an experienced IHC should maintain confidence in its external counsel and give them a broad degree of discretion when making filings. An IHC which requires external counsel to let him or her approve each and every word of every filing may slow down the process unnecessarily and end up doing more harm than good.

Arbitral tribunals often fix demanding timetables which suit their own, but not necessarily the parties', diaries. An effective IHC will ensure that external counsel prepares drafts of documents in sufficient time to allow the IHC and, where necessary, the business to comment - a draft document which is only provided to the IHC for their review on the day of a deadline is probably too late! The IHC should also manage the business's expectations and ensure that key decision makers are available.

## Document production

The IHC's role is vital during the document production phase, which requires the parties to produce documents which are requested or ordered. It is therefore important that IHC understands the document production or discovery process applicable to the arbitration. IHCs are necessary to help external counsel identify

relevant holders or controllers of potentially relevant or responsive documents and to undertake appropriate internal searches and reviews of those documents. This is often a very time consuming process. Because this procedure requires the party to either submit the ordered documents, or explain why they cannot produce them, the IHC needs to carry out internal due diligence and collect responsive documents. If documents cannot be found, the IHC should explain to counsel why this is the case so that, if necessary, explanations can be provided to the other party and the tribunal.

This stage requires the IHC to know whom in the business to address about the documents in question. This is often only half the battle: persuading the business to share documents and information for strategic reasons, even if will not be shared with opponents, is an equally important part of the IHC's role. In our experience, Russian business people will often be reluctant to share information for fear it will be leaked to opponents. An IHC which has the confidence of the business will be better placed to explain the importance of this information being released and, where appropriate, disclosed to the opponent. Developing an understanding of the business and its people, and developing a relationship of trust and confidence with them, is therefore essential.

Document production can be a very costly exercise and should be carefully managed by IHC. A suitably qualified IHC can sometimes undertake an initial document production review himself to remove obviously irrelevant documents, organise potentially relevant documents and help save cost, particularly where the IHC understands the business or where documents are in Russian.

## Witnesses

In international arbitration, particularly ones based on common law systems, findings of fact can be heavily dependent on witness testimony, which is first submitted in writing and then assessed by the tribunal after cross-examination of the witness. Whilst the interviewing of witnesses and preparation of witness statements is often principally a matter for external counsel, the IHC should be closely involved in the identification of potential witnesses from the business. The IHC's attendance at witness interviews will often facilitate the sharing of information and documents between the witness and external counsel. Finally, the IHC may be required - with or without external counsel - to brief witnesses before they give live evidence to ensure they understand the process and feel at ease. In certain jurisdictions, such as USA, the witnesses can be coached by specialised trainers. In others, this is prohibited.

## Attending hearings

The ICC Guidelines encourage an IHC to consider settlement at an early stage of the proceedings

It is essential that IHC takes part in final hearings, as well as key interim hearings, as an active observer. Sometimes it is necessary to provide information quickly, so that it can be used to make or defend urgent applications. Participating in hearings also allows the IHC to get a clear first hand impression of how the case is progressing, to discuss prospects with external counsel, to update the business and, where appropriate, to initiate settlement discussions.

## Settlement

In certain cases, settlement can be the best outcome for a party. The ICC Guidelines, for example, encourage an IHC to consider settlement at an early stage of the proceedings as part of the IHC's assessment of overall case strategy and prospects. As settlement negotiations progress and a draft settlement agreement is prepared by external counsel, the IHC should ensure that the business understands the consequences of the settlement terms, including financial exposure, the prospects of any future claims and whether, for example, the business will be permitted to comment to the press.

## Managing the costs of an arbitration

Any experienced practitioner will tell you that the costs of an arbitration are difficult to predict, given that they depend to a large extent on the approach adopted by third parties. Controlling legal costs and agreeing budgets with the business and external counsel is, even with this uncertainty, an essential part of an effective IHC's role. A good IHC will carefully manage external counsel and ensure that the legal team is not too large, that it works efficiently and that it does not spend time on unnecessary tasks. Where costs are particularly sensitive, IHCs can also consider the possibility of third party funding, which is becoming more common in international arbitration.

The ICC Guidelines, for example, include a number of helpful questions, criteria and recommendations whose purpose is to help an IHC ensure that costs during the key stages of the arbitral process (such as costs of written submissions, witness statements, expert reports, final hearings and settlement discussions) are considered strategically, managed carefully and, where possible, only incurred where necessary and proportionate to the value and importance of the issues in dispute.

## Conclusion

All of the above tasks require an IHC to act as a proactive interface between the business and external counsel. An IHC who understands the arbitral process and who invests time in their relationship with the business and external counsel will be better placed to meet the many logistical and strategic challenges which both claimants and respondents inevitably face in arbitrations. Even if the IHC is not experienced, they should not be afraid to communicate with external counsel and to ask questions to ensure that they, and through them the business, have a clear understanding of the process. A good rapport between the IHC and external counsel is an essential ingredient for success.

## The authors

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