English Law Privilege

by Maria Gritsenko, Counsel, Bryan Cave

In common law jurisdictions, legal professional privilege ("privilege") entitles a client to withhold certain documents and other communications from disclosure in legal proceedings. This article provides an overview of the English law rules on privilege, which are relevant to participants in international arbitral proceedings in London as well as international litigants before the English courts.

I. LEGAL ADVICE AND LITIGATION PRIVILEGE

There are two main types of privilege under English law:

I. Legal advice privilege protects confidential communications between a lawyer and his client if such communications are for the purpose of seeking and receiving legal advice in a relevant legal context;

II. Litigation privilege protects confidential communications between a lawyer and his client and/or a third party or between a client and a third party, if such communications have been created for the dominant purpose of obtaining legal advice, evidence or information in preparation for actual litigation, or litigation that is "reasonably in prospect".

Confidential Communications

The term "communications" includes actual lawyer/client communications as well as evidence of such communications. This would encompass the majority of work undertaken by lawyers: a communication will be protected if it is "part of that necessary exchange of information of which the object is the giving of legal advice as and when appropriate" (*Balabel v Air India* [1988] Ch 317 at 330). Similarly, any notes made by the solicitor of what he learns as a result of his professional relationship with the client, will also be privileged: "…Notes or memoranda made by the solicitor are placed on the same footing as communications between the solicitor and the client." (*Ainswroth v Wilding* [1990] 2 Ch 315 at 323).

Privilege can only be claimed if the communication is confidential. What that means is that if confidentiality is lost, privilege will also likely be lost.

Between a lawyer

English law privilege applies to advice given by professional legal advisors, which include both external lawyers and in-house lawyers. Solicitors would need to hold a current practising certificate. In-house lawyers have to be qualified to practice under the Solicitors Regulatory Authority or by the Bar Standards Board and act in their capacity as a legal advisor (see Section II for a more detailed analysis of the privilege regime for in-house counsels). Privilege extends to employees such as legal executives, trainee solicitors and paralegals provided that they are properly supervised by qualified lawyers.

Privilege will also extend to the advice given by foreign lawyers based abroad provided that they are qualified to practise under their own regulatory body and to foreign lawyers based in England & Wales qualified to

practise under their own regulatory body and to foreign lawyers based in England & Wales qualified to practise under the Solicitors Regulatory Authority, irrespective of whether they are advising on foreign or English law. For example, the court in the IBM case held that:practise under the Solicitors Regulatory Authority, irrespective of whether they are advising on foreign or English law. For example, the court in the IBM case held that:

> "The fact that the advice given [by American attorneys] related predominantly to English law is irrelevant. It was advice of foreign lawyers, acting as lawyers, to be used by Phoenix to decide what strategy to adopt in carrying on business... The correct approach is to look at the substance and reality of the document, the circumstances in which it came into existence and also its purpose. It was advice given by lawyers in circumstances where litigation was contemplated to enable the recipient to decide what strategy to adopt, both from a legal and business standpoint. Such a document is privileged." (*IBM Corp v Phoenix International (Computers) Ltd* [1995] 1 All. E.R. 413 at 429.

Privilege does not, however, apply to other professionals, such as accountants, who give legal advice. This has been confirmed by the English Supreme Court in the 2013 Prudential case. The case concerned tax advice given to Prudential by its external accountants, disclosure of which had been sought by the tax authorities. The court ruled that because the advice was given by non-lawyers, Prudential was not entitled to claim privilege. This meant that all relevant communications were fully disclosable, even though the advice was indisputably legal in nature. (*R. (on the application of Prudential Plc) v Special Commissioner of Income Tax* [2013] UKSC 1.

And his client (Legal advice privilege)

"Client" does not include everyone within the company or the department seeking legal advice. In Three Rivers (No. 5) the Court of Appeal gave a restrictive definition of "client" for the purpose of legal advice privilege, including only those employees of an organisation who are responsible for obtaining or receiving legal advice. Therefore, communications between legal advisors and employees outside the client team will not generally be privileged. (*Three Rivers District Council v Bank of England (no 5)* [2003] QB 1556 at [21], 1575-76).

It is important to remember that this distinction only matters for the purposes of Legal advice privilege. Litigation privilege covers communications with third parties and therefore the concerns arising out of the definition of "client" should not arise in the litigation context.

For the purposes of providing legal advice in the relevant legal context (Legal advice privilege)

Legal advice privilege is not confined to advice on the law, but also covers "advice as to what should prudently and sensibly be done in the relevant legal context" (see Balabel at 330, endorsed by the House of Lords in *Three Rivers District Council v The Bank of England (No 6)* [2005] 1 AC 60 at 330). This will cover presentational, commercial or strategic advice provided that it relates to a client's legal rights, liabilities, obligations and remedies. It will not apply to advice of a purely strategic or commercial nature which is not provided in a "relevant legal context". As this was put by Lord Carswell,

> "all communications between a solicitor and his client relating to a transaction in which the solicitor has been instructed for the purpose of obtaining legal advice will be privileged, notwithstanding that they do not contain advice on matters of law or construction, provided that they are directly relevant to the performance by the solicitor of his professional duty as legal adviser of his client." (*Three Rivers (No. 6)* [2005] 1 A.C. 610 at 679, [111]).

Or for the dominant purpose of litigation (Litigation privilege)

"Litigation" refers to adversarial proceedings and therefore will exclude, for example, internal disciplinary proceedings and investigations.

Litigation has to be actual or "reasonably in prospect", i.e. more than a mere possibility. It is not sufficient that there is a distinct possibility that sooner or later someone might make a claim.

Finally, since the 1979 ruling in the Waugh case, the use in or in connection with litigation must be the "dominant purpose" of the communication for which the litigation privilege is claimed (even if the document may have been created for more than one purpose) (Waugh v British Railway Board [1980] AC 521). In a recent case, the Court of Appeal held that reports prepared by accountants were not protected by litigation privilege, as they seemed to have two purposes of the nature of the accounting treatment of the loan transactions and the litigation strategy, and it was not shown that the dominant purpose was for litigation (*Tchenguiz v Director of the Serious Fraud Office (Non-Party Disclosure)* [2014] EWCA Civ 136).

II. APPLICATION OF PRIVILEGE TO IN-HOUSE COUNSEL

Under English law, in-house lawyers are treated in the same way as lawyers in private practice for the purposes of legal advice privilege (*Alfred Compton Amusement Machines Ltd v Customs & Excise Commissioners (No 2)* [1972]). Lord Denning M.R. explained the position as follows:

> "I have always proceeded on the footing that communications between the legal advisers and their employer (who is their client) are the subject of legal professional privilege. I speak, of course, of their communications in the capacity of legal advisers. It does sometimes happen that such a legal adviser does work for his employer in another capacity, perhaps of an executive nature. Their communications in that capacity would not be the subject of legal professional privilege." [1972] 2 Q.B. 102 at 129.

Lord Scott in Three Rivers confirmed that the advice had to be given in a "relevant legal context" in order to attract privilege:

> "If a solicitor becomes the client's 'man of business'… responsible for advising the client on all matters of business, the advice may lack a relevant legal →

> context. There is, in my opinion, no way of avoiding difficulty in deciding in marginal cases whether the seeking of advice from or the giving of advice by lawyers does or does not take place in a relevant legal context so as to attract legal advice privilege. In cases of doubt the judge called upon to make the decision should ask whether the advice relates to the rights, liabilities, obligations or remedies of the client under either private law or under public law. If it does not, then, in my opinion, legal advice privilege would not apply." [2004] UKHL 48, [2005] 1 A.C. 610 at 651, at [38].

It should be noted that in-house counsel is treated differently in common law and civil law jurisdictions. In many European countries (including France and Switzerland) in-house counsel is considered as a company's employee who would lack sufficient independence for his communications to benefit from privilege.

Similarly, EU legal privilege (relevant for the specific context of the EU competition investigations) applies only to correspondence with an independent lawyer not bound to a client by a relationship of employment. This was recently confirmed by the Court of Justice in *Akzo Nobel v European Commission* (C-550/07). Communications with in-house counsel are not protected by legal privilege irrespective of in-house counsel's status under national law. The Court of Justice held that an in-house counsel's relationship as an employee of the company by its very nature does not allow him to ignore the commercial strategies pursued by his employer.

By reference to the English law position, an in-house lawyer must take care to ensure that he distinguishes clearly between advice which is legal and that which is commercial in nature. His advice will only be privileged to the extent that it is legal advice; where he is providing business advice or advice relating to administration or management affairs, it will not be possible to claim privilege.

If an in-house counsel has to disclose his or external lawyers' legal advice to the company's board, this will not result in a loss of privilege. Board minutes solely summarising or attaching a copy of legal advice will be privileged; however a discussion of the commercial issues arising from the legal advice received will not be privileged.

III. LOSS OF PRIVILEGE

Privilege will be lost if a document is circulated widely or is made publicly available. If a privileged communication is disclosed to a third party for a limited purpose and on strict terms as to confidentiality, it may be possible to maintain a claim to privilege in that document as against the rest of the world. (*B v Auckland District Law Society* [2003] UKPC 38)

Where privilege is waived in respect of one document in a sequence of documents (or one part of a document), then the class of documents (or rest of the document) will have to be disclosed unless the document (or part of the document) disclosed deals with an entirely different issue or subject matter. This is to prevent parties from "cherry picking" among the privileged material. (*Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529; *Dunlop Slazenger International Ltd v Joe Bloggs Sports Limited* [2003] All ER (D) 137.)

Common interest privilege may be construed as a defence to claims that privilege is lost/waived by circulating a document. When the disclosing party and the receiving party both share a common interest in the subject matter of the privileged document or in litigation in connection with which the document was created, the document will remain privileged. The common interest must exist at the time of disclosure to the receiving party.

When a party mistakenly allows a privileged document to be inspected, the court will examine whether it was obvious that the disclosure was mistaken in deciding whether to allow the recipient to use the document. If it was either obvious to the recipient, or alternatively would have been obvious to a reasonable solicitor in the same circumstances, the court will prevent use of the document. (*ISTIL Group Inc v Zahoor* [2003] EWHC 165 Ch).

The privilege will also be lost if the client is engaged in a "strategy of concealment and deceit", as this was held over a month ago by the Commercial Court in a case involving Mr Mukhtar Ablyazov's interests. In that matter, BTA Bank sought disclosure of certain documents which would normally attract privilege and which were held by solicitors or former solicitors of Messrs Ablyazov and Shalabayev. BTA Bank had brought a number of actions against Mr Ablyazov alleging a multi-billion pound fraud, and sought disclosure of documents for the purposes of enforcing judgments. BTA Bank argued that Messrs Ablyazov and Shalabayev lied and deliberately misled the court about the extent and nature of the assets of which Mr Ablyazov was the ultimate beneficial owner and sought to put those assets outside of BTA Bank's reach.

The Commercial Court granted disclosure, on the basis that privilege would protect communications made for the purposes of legal advice or litigation, in which the solicitor was acting in the ordinary course of the professional engagement of a solicitor. Where solicitors are deceived and used as an instrument to perpetrate a substantial fraud on the other party and the court, the normal client/ lawyer relationships would be abused and privilege would be negated. (*JSC BTA Bank v Ablyazov* [2014] EWHC 2788 (Comm) at 93).

The Ablyazov decision is one of a number of recent decisions where the English court has ordered the disclosure of privileged information. It appears that such orders, although still unusual, are being granted more readily.

IV. PRIVILEGE AND ARBITRATION

The confidential nature of communications between a client and his is universally recognized; however the scope and regimes of the privilege rules vary from one jurisdiction to another, especially when we compare common law and civil law jurisdictions. For these reasons, application of privilege presents particular challenges in the context of international arbitration.

Party autonomy and discretion of the tribunal remain the main principles. Most arbitral rules would contain a wording to the effect that the arbitrators shall determine the admissibility, relevance, materiality and weight of the evidence offered by the parties (see UNCITRAL Rules Article 27(4), LCIA Rules Article 22.1(vi), AAA Rules Article 20(6)).

More specifically on the issue of privilege, Article 9(2)(b) of the 2010 IBA Rules on Taking of Evidence in International Arbitration provides that:

> "The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons: (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable…"

Article 9(3) also contains a "checklist" of issues which a tribunal "may take into account" when assessing whether a document is privileged:

> "In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account: (a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice; (b) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations; (c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen; (d) any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and (e) the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules."

The IBA Rules still fail to provide any specific guidance as to what privilege regime should apply – the one of the law of the contract, or of the place of the arbitration, or of the jurisdictions to which the parties' counsel belong or where the document was created? Most often the counsel in arbitration proceedings will proceed according to the rules of the jurisdiction in which they are trained. If an issue arises – for example, when a party requests disclosure of a document which the other side sees as privileged – the tribunal will have to resolve in a way that ensures that each party has a reasonable opportunity to present its case.

In doing so, and as reflected in Article 9(3) quoted above, the tribunal will take care to ensure the fairness and equality between the parties, while having regard to any mandatory ethical rules the respective counsel may be subject to. The tribunal may also choose to apply a combination of the privilege regimes of the parties' lawyers- either applying the most extensive or the least extensive privilege rules. The tribunal will also often be guided by the *lex fori* – for example, by the generally applicable principles of English law, if the arbitration is seated in London.

Most importantly, the concept of "fairness" would imply considering the parties' expectations when they were requesting and receiving legal advice and/or preparing for the arbitration proceedings. It is therefore essential for the parties to adopt, from the outset, an approach consistent with the rules applicable in the jurisdictions of their legal advisors. A prudent in-house counsel would also consider the dispute resolution clauses typically used by his company (including the governing law and forum) and keep in mind the privilege regime which may eventually become relevant to the dispute.

William Spiegelberger

RUSAL

Position: Director of International Practice Department of Legal Directorate

Industry / Company: the world's largest producer of aluminium

Number of employees: about 75,000

External law firms: mainly Ashurst, Sidley Austin, Egorov Puginsky Afanasiev and Partners

Brief CV: William R. Spiegelberger is Director of the International Practice Department at Rusal Global Management B.V. in Moscow (since 2007), where he manages, among other things, the corporate group's major litigations and arbitrations outside the CIS states. He was formerly Co-Head of the Disputes Group at White & Case LLC in Moscow (2003-7), associate in the litigation department of Milbank, Tweed, Hadley & McCloy LLP in New York (1998-2003), and associate in the arbitration and litigation group of White & Case LLP in New York and Paris (1994-1997). The author of The Enforcement of Foreign Arbitral Awards in Russia (Juris, 2014), and several articles on arbitration and international legal practice, he holds a J.D. degree from Columbia Law School and is a member of the National Advisory Council of the Harriman Institute at Columbia University in New York.

Willem Vis Experience **1st Moot (1994), Columbia University**

VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT · WILLEM C. · MCMXCIII · VIENNA

2 **Second best oralist prize** (Martin Domke Award)

1 **First team prize** (Frédéric Eisemann Award)

3 **Third team prize for a brief**

Why did you choose to concentrate mostly on dispute resolution? Has your specialization changed over time? Did participation in Willem C.Vis moot influence your choice of practice?

I found dispute resolution most interesting, the least monotonous, as each dispute is different, whereas one loan agreement is much like another. I also enjoyed oral argument, moot court, etc. I was particularly inspired by my mentor at Columbia law School, the late Hans Smit. The Vis Moot confirmed my career choice of arbitration: the competition was an excellent experience, intellectually very satisfying, and a lot of fun.

Could you please tell us how your in-house career started and has developed over the years? Why have you decided to move from one of the top international law firms to the in-house department? Was the decision difficult one?

In a word: I changed jobs and went in-house for the adventure

I was hired by a friend who had started at Rusal a few months earlier as general counsel. I decided to move in-house because the position appeared to present a lot of interesting problems, with a steady stream of high-profile and big-money disputes. It was not a difficult decision, as I was then ready for a change, and quite interested in learning how a large Russian corporation operated. In a word: I changed jobs and went in-house for the adventure.

What are your main responsibilities? Do you see yourself to be more a manager or a legal advisor?

I oversee the company's major litigations and arbitrations outside the CIS, and deal with other legal risks outside of the CIS. I see myself performing a hybrid role, part business manager, part legal advisor. Much depends on the nature of the case vis-à-vis my personal abilities. Some cases I only manage; with others, I will draft the submissions myself. In both cases I act as intermediary between management, which has certain policies and goals, and the outside counsel who will help us implement those policies and achieve those goals.

Law firms are like an extension of the university. One can almost always go from a law firm to an in-house position, but the reverse is more difficult

Are there people that are more suited for a position in-house as opposed to private practice and vice versa? What qualities a disputes lawyer needs to have to succeed as an in-house counsel?

Private practice lawyers must first and foremost be able to find new clients and generate fees; they make money from the clients. In-house counsel, in contrast, must first and foremost solve problems, formulate policy, help achieve the company's goals, coordinate the work of counsel in various jurisdictions when a given case is being fought in more than one jurisdiction. In-house counsel try to keep costs (legal fees) as low as possible.

In the US in most cases lawyers move to in-house positions after spending some time in private practice, while in Russia many graduates join in-house departments immediately. Which pathway is better in your view?

I think it best to spend a few years at a law firm, as an apprentice so to speak, where one can expect to work very long, very hard hours, on a range of cases, plead before judges, etc. Law firms in this sense are like an extension of the university. Also, one can almost always go from a law firm to an in-house position, but the reverse is more difficult.

Is international arbitration the preferred choice for you company?

Not necessarily. Arbitration is preferable when (1) there is no neutral or fair court, (2) it is unclear whether a court judgment would be enforceable, and (3) some particular expertise is desirable in the arbitrators. Judicial proceedings are generally preferable if (1) one has a very strong case, (2) the court is acceptable, and (3) one can expect the judgment to be enforceable. In general, however, arbitration is chosen merely because the parties cannot agree on any other forum.

What factors influence the decision to initiate arbitration proceedings? Who makes the ultimate decision?

Management decides whether to commence arbitration upon the advice of in-house counsel, which necessarily includes an estimate of the chances of success, of the costs, and of the expected duration of the proceedings. In short: an informed cost-benefit analysis is necessary, which is the joint responsibility of management and counsel.

Peter Rees QC, ex-Shell legal director, said in his interview: "If you look at most corporations these days, litigation and compliance is the biggest risk. No corporation will go down because of a failed M&A deal." Do you agree with this statement?

In countries with a strong/honest legal culture, yes. In countries with a weak/corrupt legal system, no. In the latter countries, the greatest risk is political: outright expropriation, creeping expropriation, bribes and illegal payments, undue pressure, bureaucracy, unrest and revolution.

How do you see the role of in-house counsel in international arbitration? Does it have any specific features in Russia and CIS countries?

I personally do not deal with CIS/Russia matters directly, as there is a separate department for those cases. My role is to manage non-CIS matters. With regard to those matters, I see my main tasks as 1) forming company policy with regard to the dispute, that is: helping management to decide whether to commence as case or how best to defend one or settle, 2) coordinating work among the various outside counsel in different jurisdictions when a dispute spills into more than one forum; 3) controlling costs and fostering efficiency, and (4) ensuring outside counsel and the company collaborate effectively, as in the case of choosing witnesses, preparing witness statements, and collecting documents.

Outside counsel focus narrowly on the particular dispute; in-house counsel focuses broadly on policy and strategy

Having practiced both in the US and Russia do you think Russian/CIS companies are different from US (or European) companies when it comes to their approaches to arbitration? Does it have any effect on the role of an in-house counsel?

I have not noticed any big difference.

How would you recommend to split the tasks up between in-house and outside counsel?

Outside counsel are expert in the particular field of law and have the personnel resources to accomplish large tasks. In-house counsel act as liaison between management and outside counsel, help formulate company policy, manage expectations, control costs, and review submissions for conformity with company policy and goals. In short; outside counsel focus narrowly on the particular dispute; in-house counsel focuses broadly on policy and strategy.

Do you believe that in-house counsel can represent the company in arbitration proceedings? Does it work in case of small-scale disputes?

Yes and yes. We have the capability of representing the company ourselves in suitable disputes. The limiting factor is how much time we can afford to spend on any given dispute. As a rule, therefore, we can represent the company ourselves only in relatively small, conventional disputes, and disputes within our competence.

Some say that an in-house career creates fewer opportunities for further professional/career development in comparison with the one in private practice. Do you agree with that? Would you ever consider moving to private practice?

An in-house career has its own possibilities that differ from those available in private practice. As an in-house lawyer one can, for example, rise to the top of the legal department or take on more business responsibilities and perhaps transfer to the finance or capital markets department. There is no such option at a law firm. At a law firm, the general model is “up or out,” that is: one rises through the ranks of associates in the hope of becoming partner. If one does not become partner, one is typically asked to leave the firm. There are, it seems to me, fewer options at a law firm, where the career path is narrower.

It happens that external counsels underestimate level of IHCs’ experience telling them things they already know and offering them services they do not need. Have you ever faced this?

Sometimes. External counsel can be condescending toward in-house lawyers and view them as lawyers who failed to succeed at law firms. In my experience, I have not perceived a marked difference in ability between in-house lawyers and law firm lawyers in terms of their expertise and professionalism. In fact, I pity many law firm lawyers, as many of them do not seem to enjoy their work or their life, such as it is.

What are the most influential factors for you in selecting outside counsel? Do you find rankings of law firms in directories a good source of information?

First, trustworthiness in the sense that they will not betray our confidence and will treat the company's interests as a priority. Second, basic competence and responsiveness. Third, familiarity with the general subject-matter of the dispute, the facts and background, as this saves a lot of time and money that would otherwise be spent bringing them up to speed.

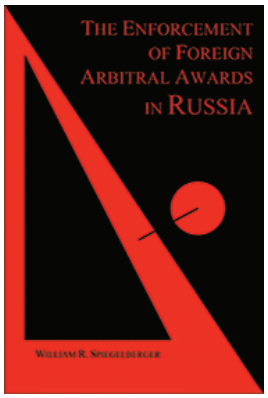
Which one of the following factors is more important in choosing an outside counsel: the understanding of each particular client's business or general procedural skills and proficiency?

I think they are equally important.

Who is ultimately responsible for the outcome of arbitration proceedings?

I am not sure what this question means. If it means "whose task is it to ensure a certain outcome," then the answer is: it is in-house counsel's task. If an in-house counsel lawyer loses too many cases, he or she will get fired, as he or she works for the company, whose own money is at stake. If outside counsel loses too many cases, he or she will not generally get fired, because outside counsel gets paid, as a rule, whether he or she wins or loses. In short: in-house counsel works for the company and answers to the company; outside counsel works for a law firm and answers to the law firm. As the company's money is at stake in a dispute, it is the in-house lawyers who stand to reap the gain from winning (getting a bonus), or endure the pain or losing (getting fired).

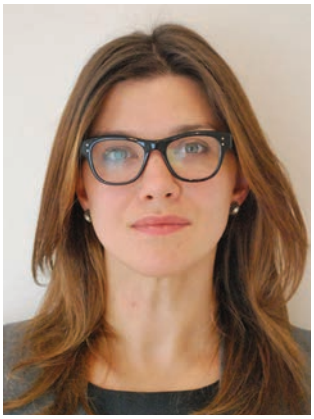
You are the author of The Enforcement of Foreign Arbitral Awards in Russia (2014), what's your opinion on Russian courts' approach to arbitration? Are there ways Russia can become more attractive as a seat of arbitration?



The conclusion reached in my book is that the Russian courts appear to be enforcing foreign arbitral awards at an acceptable rate, one probably comparable to the rate found in other developed counties. There are, however, certain inconsistencies in the court judgments, which makes predicting the outcome of a given award enforcement proceeding more difficult in Russia than in some other jurisdictions. Russian judgments also tend to be quite succinct – at least by the standards of common law courts – and do not always set out all the facts necessary to render the judge's reasoning fully comprehensible to an outsider. No doubt this is owing to the fact that Russian judgments have no precedential effect, thus they need not serve as an "instruction," for want of a better word, to non-parties to the case. Rather, they generally contain only enough information to inform the parties to the case, who do know all the relevant facts, why the judge ruled as he or she did. The above points render Russia somewhat less desirable as a place for arbitration because non-Russian parties will find it difficult to understand precisely how the Russian courts will address this or that arbitration-related issue. It is precisely this "fear of the unknown" that I tried to dispel in my book.

Interview with Evgenia Loewe – Renova Group

Evgenia Loewe



Position: Head of International Litigation

Reporting to: Chief Legal Officer

Industry / Company: Leading Russian investment group with diversified interests in natural resources, energy, telecoms, nanotechnology, and other sectors across the globe

Brief CV: Evgenia Loewe graduated from International University in Moscow in 2002 with a bachelor's degree in Civil Law. Received LLM in American Law from Boston University School of Law in 2002. Admitted to NY State Bar. For the past 11 years have been with the legal department of the Renova Group.

RENOVA GROUP

Could you please tell us how your in-house career started and has developed over the years?

My career with Renova started in 2003 when I joined the legal department of the Renova Group's management company, which had then just been established. I joined as a generalist and, since at the time, our team was comprised of only three lawyers, we were responsible for all legal matters that the group faced across the spectrum of its varied business interests. This meant that we dealt with a very diverse pool of issues that, for the most part, had an important foreign or international law aspect. My worked included anything from corporate governance and compliance to providing legal support in handling the M&A activity of the group. Given the small size of the team initially and the group's very active investment strategy, our work was structured on a project basis with each lawyer responsible for providing full legal support in relation to a number of investments allocated to him/her. This structure has worked well over the years, even as our department grew, since there has traditionally been very little movement in our team and most of our lawyers, including myself, keep their 'legacy' projects, which they tend to know in-depth. This is also why, despite taking on the foreign litigation function in 2007, I have remained responsible for the legal oversight on the legacy investments that I have managed on the M&A side beforehand.

As the needs of the Group grew so did our department, and at various times I have headed corporate and M&A sub-departments within the larger legal team of the Renova Group run by our Chief Legal Officer. I have held my current position since 2007 when it was recognised that the growing foreign litigation activity of the group required a dedicated team. The position as head of foreign litigation allowed me a great degree of anatomy and flexibility and I have since then worked in Switzerland, New York and now London, handling Renova and other engagements. This has worked well with the geography of the cases, whose venues are usually common law jurisdictions but also including litigation and arbitration proceedings in the EU. I have been fortunate to work on diverse matters spanning from complex multi-jurisdictional disputes (some of the more prominent and reported ones are VSMPO-AVISMA, TNK-BP and RUSAL shareholder disputes) to such fascinating cases as London High Court litigation against Christie's in relation to authenticity of a Russian painting.

Why did you choose to concentrate mostly on dispute resolution? Has your specialization changed over time?

I have been interested in international arbitration since my year in Boston University Law school where I was

fortunate enough to study it under the accomplished Professor William Park. At the time many of us signed up for a course vaguely titled "International Business Transactions" not expecting to receive an exciting semester-long discourse in international arbitration, the New York Convention and enforcement of foreign judgements. Later, in my earlier years at Renova, I was in charge of a project that became litigious as Renova sought to exit the particular investment. I enjoyed the fast pace and the strategic work involved in managing a large shareholder dispute, as well as the adversarial nature of the process and the dynamics this imposes. The challenge, however, was combining this time consuming work - one cannot litigate "in spare time" - with my primary M&A function, so when in 2007 the group recognised the need for a dedicated foreign litigation function I was excited to have the opportunity to head it. While my specialization has not changed since then, the nature of the job and the diversity of the cases we have handled since then has certainly allowed me a lot of room for professional growth. That said, my prior transactional experience has been very helpful when it comes to grasping commercial rationale behind the deals that often eventually culminate in a dispute, or interpreting the intent behind commercial contracts at the time of drafting. In these situations, it is extremely helpful to be intimately familiar with the drafting and negotiation process of deal-making when you need to interpret this documentation in the framework of a dispute. Conversely, I have found that my litigation experience has affected my own transaction drafting as it has made me more conscious and meticulous in the choice of words in drafting and I often find myself reviewing every sentence using a "what if this goes wrong" test.

In order to be successful as a disputes lawyer you need a healthy dose of patience, a high stress tolerance, and the ability to maintain long-term perspec-

Are there people that are more suited for a position in-house as opposed to private practice and vice versa? What qualities a disputes lawyer needs to have to succeed as an in-house counsel?

I believe that in order to be successful as a disputes lawyer you need a healthy dose of patience, a high stress tolerance, and the ability to maintain long-term perspective and focus. Unlike transactional work, disputes are marathons stretching several years. At the same time, you must have the ability to distract from pure academics and keep a focus on the long-term commercial and strategic goals behind any dispute and adapt to the needs and expectations of your company and management. I believe it all boils down to these personal qualities and skills, and both in-house and private practice practitioners can be successful at the job.

In the US in most cases lawyers move to in-house positions after spending some time in private practice, while in Russia many graduates join in-house departments immediately. Which pathway is better in your view?

Both approaches have their pros and cons. The former will probably suit a wider pool of graduates as it provides an opportunity for structured and supervised growth. In a way, it is a less risky approach to career development. Starting off in-house may be a slower track with a narrow industry specialization. On the other hand, the right in-house position in a dynamic company often allows for fast professional growth - in a small legal department, such as was the case when I joined Renova, there is necessarily a lot of learning on the job and such positions may be best for those who to do not shy away from taking independent decisions and taking responsibility. I would recommend anyone considering a career in-house to do as much due diligence as possible on the composition and dynamics of the legal department: what is the level of responsibility assigned to more junior staff, how does it interact with other departments within the company and with outside counsel, what are the growth and promotion opportunities, what are the personalities that you will be working closely with, etc.

Is international arbitration the preferred choice for you company?

Yes, in most cases, we prefer to deal with disputes through arbitration to take advantage of confidentiality and flexibility, as well as enforcement mechanisms that it allows for. We provide for this through an arbitra-

ation clause, which we insist on including in all our transactional documentation. Historically, we tend to have more arbitrations under the Rules of the LCIA with a seat in London than that of any other institution. The LCIA arbitration clause was initially one we inherited in some of the earlier shareholder agreements, and experience showed that LCIA is reliable institution with a good pool of experienced arbitrators providing efficient support of the process along the way. Being able to rely on the London courts for interim measures is another attractive feature.

What factors influence the decision to initiate arbitration proceedings? Who makes the ultimate decision?

The ultimate decision rests with the management and shareholders, who make them on the basis of recommendations we put forward, considering (as you would expect) the prospects, the anticipated length and cost of the proceedings and recovery/enforcement challenges.

Peter Rees QC, ex-Shell legal director, said in his interview: "If you look at most corporations these days, litigation and compliance is the biggest risk. No corporation will go down because of a failed M&A deal." Do you agree with this statement?

I would agree, although this does not take the responsibility off the transactional teams: many disputes start with poor drafting or failure by counsel to communicate to their clients all the intricacies of the rights and obligations they are signing up to. However, these are far more manageable challenges than litigation risk. It is not only that an unfavourable award is the final point in many disputes, but along with legal costs it can be catastrophic for the company. Moreover, litigation, being an organic process itself, opens the company to disclosure of sensitive information, regulatory investigations, and other factors that may adversely affect its value even before the final judgement/award is rendered.

Does your company have a dedicated in-house disputes team? Do you find it feasible to have someone within legal department dealing solely with international dispute resolution? How often are outside counsel retained?

The role of in-house counsel in international arbitration is to formulate a legal strategy that will enable the company to meet its the commercial goals, and to then oversee its implementation

Renova has a dedicated disputes team covering both Russian court proceedings and those in foreign jurisdictions. Since in foreign tribunals alone we have four to six ongoing proceedings at any given moment, we also rely heavily on outside counsel for all our foreign law disputes. While having a dedicated in-house international dispute specialist is certainly feasible, it is only warranted if the company has the sufficient litigation/arbitration workload. I think this should be the primary consideration and, if a company only deals with international disputes occasionally, it may be better served by pairing up its legal deal team with outside litigation counsel to handle a given dispute. While this will lead to a higher cost for a specific case, as the outside team will have to take on a lot of managerial responsibilities, it will make more economic sense in the long run.

We engage outside counsel for every foreign law dispute and tend to do so from the outset so as to have a realistic assessment of the prospects and can tailor the overall strategy and steps to be taken from the early stage.

How do you see the role of in-house counsel in international arbitration? Does it have any specific features in Russia and CIS countries? How would you recommend to split the tasks up between in-house and outside counsel?

As a principal matter, the role of in-house counsel in international arbitration is to formulate a legal strategy that will enable the company to meet its the commercial goals, and to then oversee its implementation, amending it as needed as the case develops and ensure the company's resources are not wasted on unviable

routes and its actions do no bring on unjustified risk. A secondary role for the in-house counsel is more practical and that is to act as the primary liaison for the outside legal team to both coordinate the pre-litigation and litigation stages and be the gateway to the company's management. Specifically, the in-house counsel is there to ensure our outside counsel team has access to all the information they need (and this includes documents, witness etc.) and has a thorough understanding of the factual background and the internal functioning of your company, to deliver the best result. Such individual as in-house counsel has to be a manager, liaison and interpreter. The latter is a particularly prominent role when it comes to so-called Russia/CIS disputes, where a lot of effort often goes into, on one hand, marrying the commercial perspective and expectations with the legal realities of foreign jurisdictions, and on the other hand, explaining the workings of Russian businesses to foreign counsel. Finally, a particularly challenging responsibility for the in-house counsel is to manage costs. The difficulty is that one must budget for both the foreseeable and the unpredictable costs involved in a highly dynamic and evolving process, which can include a complex disclosure process, initiation of new parallel proceedings, injunctive relief etc. Other challenges include managing disclosure process, which often time involves foreign IT specialists, with all the confidentiality and security concerns it entails, not to mention generally getting all departments within the company involved and engaged in the process and invested in its outcome.

These roles are reflected in the split of tasks between in-house and outside counsel working on the team.

Do you believe that in-house counsel can represent the company in arbitration proceedings? Does it work in case of small-scale disputes?

An in-house counsel may very well be suited to present his/her company and thus dispense with an outside team. However, as a practical matter, unless he/she has the support of a dedicated in-house team, I do not believe it feasible to manage a case, at least not the kind of multi -jurisdictional shareholder disputes we usually see on the Russian market, from beginning to end without the assistance of the outside counsel. There are several stages of a dispute where the workload is extremely heavy, such as document production, expert and factual witness statements, that often run in parallel and require very detailed coordination from in-house counsel. So already for that reason, most in-house legal teams would be overwhelmed by the sheer workload. In addition to this, the in-house counsel should first and foremost be an advisor to the company and, as such, intimately familiar with the company, the deal that lead to the dispute, management's goals etc., while the outside counsel should first and foremost be an expert in the law and in conducting proceedings. These are therefore highly complementary roles and difficult to unite under one umbrella.

I am happy with having stayed in-house, this is where I think I add the most value and enjoy the specific challenges an in-house job has to offer

Some say that an in-house career creates fewer opportunities for further professional/career development in comparison with the one in private practice. Do you agree with that? Would you ever consider moving to private practice?

This is a debate similar to whether or not it is best to start legal career in private practice or in-house. It all depends on the in-house position: I appreciate that many may be less exciting and challenging than private practice experience. When it gets to senior positions however, the balance often tips in favour of in-house because it invariably includes management responsibilities, which for many would be one of the most important catalysts for propelling their career to its peak. I have in earlier years of my career considered going to private practice, but Renova's M&A activity at the time was so fast-paced and exciting that luckily I did not have too much time to pounder that choice. I am happy with having stayed in-house, this is where I think I add the most value and enjoy the specific challenges an in-house job has to offer, while growing more holistically and developing skills within management, strategy, finance etc.

It happens that external counsels underestimate level of IHCs' experience telling them things they already know and offering them services they do not need. Have you ever faced this?

It has happened and it is natural for a first time engagement, as both sides need to go through a learning period in order to have a better idea of each other's capabilities and approaches to structuring client-counsel communication. Personally, I like to be involved in the process in detail. It is not a matter of control - I usually work with teams I know well and trust my advisers - but rather a matter of professional interest and development. I try to add value and act as a member of the team, rather than just being a supervising client, and I would like to think that the outside firms I work with enjoy this level of cooperation and involvement from my side - at the end of the day managing a dispute is a collaborative process.

What are the most influential factors for you in selecting outside counsel? Do you find rankings of law firms in directories a good source of information? Which one of the following factors is more important in choosing an outside counsel: the understanding of each particular client's business or general procedural skills and proficiency?

Fortunately, there are a number of firms whose arbitration teams possess both qualities and for me the choice have not been presented quite this way. However, if the issue is whether to choose a firm with a higher ranking over commitment and understanding of Renova's business, I will always choose the latter. All disputes are stressful marathons and having a loyal outside counsel as your partner who can provide calm support regardless of how the case develops, along the way is what often makes all the difference at the end.

In general, when it comes to rankings, I find them quite useful when researching firms in areas of law or jurisdictions that I am not very familiar with. I also frequently use ranking entries when compiling counsel profiles for management. However, when it comes to choosing an arbitration counsel I do my own due diligence and prefer to rely primarily on our own market intelligence.

Who is ultimately responsible for the outcome of arbitration proceedings?

Undoubtedly, the in-house counsel – unfortunately for me, this is where sharing of responsibility ends!

Some comments on the role of in-house counsel in contentious work

by Christer Söderlund, Advokatfirman Vinge

The role of in-house counsel

There is no doubt that the way in which in-house counsel supports and engages in any contentious matter, be it domestic litigation or international arbitration, is of a fundamental importance for success in the pursuit or defence of any litigious matter.

Choice of in-house counsel

In-house counsel has a vital role to play when it comes to the selection of outside counsel or a legal team to represent the company in contentious matters. Companies with extensive and far-flung operations may get entangled in legal hassles in a number of venues under a wide variety of laws and regulatory regimes. Disputes may be heard in different languages and involve particular industrial sectors or technical expertise. All of this impinges on the selection of outside counsel. I believe that in-house counsel should be quite active and meticulous in performing due diligence in respect of counsel selection.

In matters of certain economic (or policy) significance, in-house counsel could well include in its selection process personal interviews. This occurs rarely, but I think it could be recommended as a helpful screening tool.

Coming up with the facts

The most important part in preparation and pursuing any litigious matter is a process of laying bare all pertinent facts which may have a bearing on the case. A relevant and consistent presentation of facts supporting the company's case is of fundamental importance in any dispute. No elegant legal theories, however astutely conceived, can patch over any incorrect or misstated presentation of the underlying facts. A credible and verifiable account for the facts is also a prerequisite for maintaining credibility in any arbitration which is a sine qua non for the success of any particular action.

In this mission of fact-finding, there is a really important mediating role for in-house counsel to play, i.e. to assist outside counsel to gain access to pertinent company records and to individuals within the organisation who have first-hand knowledge of the disputed matters.

How should in-house counsel manage a case?

In-house counsel's management of any particular case presents a delicate balancing act. It is certainly so that in-house counsel is responsible to his or her organisation for the proper conduct of the particular action. It is, therefore, necessary to discuss submissions and time schedules with outside counsel on an on-going basis and also to continuously follow up that matters proceed smoothly. (Likewise, it is of course important for outside counsel to ensure that planned as well as performed activities are promptly and continuously reported to in-house counsel in order to ascertain that things are on the right track.)

In-house counsel takes on a particularly challenging aspect when it comes to the strategic decisions that have to be taken, particularly at the outset of any action, but also during its course of contentious proceedings. Such questions may concern whether to pursue a disputed claim or not after settlement attempts have failed, whether to appeal or seek invalidation of any court judgment, whether to reconsider litigation prospects at any point of the proceedings and whether to consider alternative dispute options if they are available.

In-house counsel will also normally have oversight of the financial aspects of arbitration. This may include the agreement on hourly rates for different members of the legal team involved in the particular activity, whether to include any contingency fees, success fee or the like and, not least, to require a cost estimate for defined parts (or the entirety) of proceedings, based on assumptions concerning the particular requirements of the dispute. It happens (in my experience) that in-house counsels may, although rarely, be prone to involve themselves in the nitty-gritties of the legal handling of the dispute. I believe that it is necessary for in-house counsel to have trust in the experience and insights of outside counsel and leave matters of legal argument and shaping of the pleadings very much to the decision of the outside counsel. I would even say that if in-house counsel too rigorously intervenes in the actual proceedings, this can, in the odd case, jeopardise the outcome.

Quite another matter is that in-house counsel should not shy away from adopting an inquisitorial approach to outside counsel and ask for explanations, when felt necessary, of certain procedural steps taken or lines of argument pursued. If outside counsel cannot explain such matters to in-house counsel in an intelligible way, he or she may well have difficulties explaining them to the arbitral tribunal!

Any horror story that I could tell in the in-house/outside counsel relationship?

There is no doubt that nowadays in-house counsel of any company of significance is highly versatile in dealing with litigation management, involving outside counsel. As a consequence, I can recall no horror story of recent date. However, in the beginning of the nineties, things were quite different. I recall where in-house counsel peremptorily demanded that I “start arbitration” without caring much to explain what the thing was about. When I after a lot of prodding managed to have the reluctant in-house counsel yield some documents pertaining to the “dispute”, I could easily see that there were no prospects of winning the case at all. I informed in-house counsel of this, who explained in a very annoyed fashion: “The boss has said: Start arbitration”. This made me understand that I had to deal with the boss directly to explain the hopelessness of the case. So, I asked to have the opportunity to do so. The in-house counsel reacted in an even more annoyed fashion and exclaimed in a very upset manner: “Are you out of your mind? Do you think that you, a lowly external counsel, may have the privilege of talking to our boss?”

This was in the days of strict top-down management. Nothing came of it.

A number of distinguished arbitration practitioners kindly agreed to share with us their thoughts on three quick questions on the role of an in-house counsel in arbitration. With their kind permission we now share their thoughts with our readers.

Aleksei N. Zhiltsov
Member of Presidium of the ICAC at the RF CCI, Head of Department, Private Law Research Center, General Editor, International Commercial Arbitration Review

Noah Rubins
Partner, Freshfields Bruckhaus Deringer

Alexei Dudko
Partner, Hogan Lovells CIS

Julia Popelysheva
Counsel, L&DR Department of Clifford Chance CIS, FCIArb

Q1. How is in-house counsel's contribution integral to the success of an arbitration?

Aleksei N. Zhiltsov:

Speaking of the role of in-house counsel in arbitration proceedings I have seen three major situations: 1) in-house counsel takes part in the arbitral proceedings on its own, without any external assistance from law firms; 2) in-house counsel takes part in the proceedings together with external counsel; 3) in-house counsel does not take part in the proceedings at all, these being fully entrusted to the external counsel.

It goes without saying that the choice of a particular model of participation in arbitration depends on whether the respective company has sufficient resources to employ an in-house counsel with expertise in arbitration and company's involvement in arbitrations justifies retention of such an expert.

Irrespective of whether the company decides to instruct an external counsel to deal with arbitral proceedings, having internal counsel closely follow and control the proceedings is highly advisable. The most sophisticated and highly professional external counsel may not be aware of all the intricacies of complex business relations between the parties to the arbitration. And knowledge of these is decisive particularly once settlement becomes feasible. It is advisable that in-house counsel directly takes part in the proceedings side by side with attorneys that are entrusted with the conduct of the proceedings.

Noah Rubins:

Obviously, everything depends on the nature of the case, and the nature of the relationship with in-house counsel. One area where the client's internal lawyers are always essential is in the gathering of facts, identifi-

cation of witnesses, and ensuring that the business side understands the importance of thoroughness and accuracy in the formulation of a case theory. But in-house counsel in my experience can do a great deal more, and contribute in many other ways to the success of an arbitration. Perhaps most importantly, in-house counsel can form a bridge to management to help the client company as a whole articulate its goals, interests and priorities. Also essential is working closely with in-house counsel to communicate the strengths and weaknesses of the client's case, so that expectations can be managed on an on-going basis as the arbitration develops and the contours of argument and defence become clear. And finally, the best in-house counsel are able to contribute their own expertise and ideas to testing the case theory and arguments – while preserving trust in outside counsel's ability to use this input in a final recommendation that is the optimal one for the client.

Alexei Dudko:

IHC's role is indeed very important to the success of an arbitration. Strategically, all major issues are agreed with IHC and unless IHC really understands the case and specifics of arbitration, it could turn into a mission impossible for outside counsel to successfully navigate the matter without IHC's support, apart from the situation where IHC opts not to intervene at all, which, of course, generates certain risks for IHC himself. Then, IHC ensures that the arbitration should have enough resources, both human, technical, operational and financial, internally and externally, to ensure a win. Next, IHC at the start has better knowledge of the matter, IHC should ensure there is no information asymmetry for the outside counsel both in terms of the factual preparation for the matter as well as achieving the client's specific objectives in the arbitration. Last, not least, IHC has to pick the arbitration team that has the maximum potential to win the case.

Julia Popelysheva:

The role of in-house counsel in a successful outcome of arbitration cannot be overestimated. An external counsel almost never has the final say over case strategy - it is ultimately for the client to decide how the arbitration should go, whether the parties should settle, and how extreme the position should be on procedural issues and the merits.

The in-house counsel is a key element to all the thinking that goes into resolving the above questions. He or she either ultimately makes the relevant decisions or communicates the pros and cons to the client's management - an indispensable role in both cases.

Q2. To what extent should in-house counsel manage an arbitration?

Aleksei N. Zhiltsov:

As is seen from my answer to the first question, in all situations the active role of internal counsel in the conduct of the proceedings is decisive for the successful outcome of arbitration. Extensive experience in arbitration and the related legal issues of external counsel should be coupled with the in-house counsel's understanding of business realities and details.

Noah Rubins:

Much will depend on the in-house counsel's resources and work load. In my experience, many general counsel are overwhelmed by non-contentious work, and will not be practically able to "manage" an arbitration. The most important thing for such counsel is to understand their own position and not to try to manage the arbitration, because this will create dangerous delays and bottlenecks in the approval process for various necessary steps, drafts, and filings. Other in-house counsel have as their primary job precisely the management of several litigation processes, and they need to be able to verify and approve each step that outside counsel is going to take. This can be very helpful, because it provides a second check on the common sense of actions being taken, and also maintains the interests and priorities of the client fully in view for outside counsel. But again, it's very important that if in-house counsel is charged with "managing" the arbitration, that he make time and internal resource available for that purpose, and provide a freer hand to outside coun-

sel during periods when he is going to be under pressure on other matters. On the whole, the most important thing is communication between inside and outside counsel at the outset of a mandate, so that the in-house counsel's contribution can be used to full potential without simply adding an extra layer of management.

Alexei Dudko:

I think that IHC should not micromanage the procedural aspects if he has trust in the outside counsel. IHC has to effectively co-manage the most important issues together with the outside counsel and be in control of the process. The sphere where IHC has to manage exclusively is costs.

Julia Popelysheva:

An easy answer would be, it really depends. Normally, a skilful external counsel would expect to be given broader management powers (subject, of course, to a proper reporting chain established with the client's in-house team). There may be cases, however, where this arrangement is unpractical for a number of strategic or economic reasons. Clearly, in this case the in-house counsel will be expected to play a more prominent role in the case management (and, quite possibly, in handling the case altogether).

Q3. What is the most memorable experience you had with an in-house counsel in arbitration?

Aleksei N. Zhiltsov:

In one case heard under the Rules of the International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry in-house counsel represented one of the Russian banks. The amount at stake was not significant, the bank was not among the biggest Russian banks, but the case appeared to be very complicated. Initially, I was uncertain to what extent the tribunal will be assisted by counsel in this case, given that the bank was not represented by a renowned professional counsel and that participation of inexperienced counsel in complex arbitrations frequently creates considerable difficulties for the tribunal. However, the in-house counsel conducted the case in a very professional manner, citing abundant volume of Russian and foreign legal authorities, making timely procedural motions and perfectly reacting to all the difficult issues arising in the course of the proceedings. This case convinced me that one cannot draw skeptical conclusions from the mere fact that a minor company in a small case is represented by an internal counsel and not by a well renowned international law firm.

Noah Rubins:

I have many memorable experiences. Most recently, I worked very closely with in-house counsel from a major oil company in relation to the damages phase of an arbitration arising out of a production-sharing contract in Africa. This in-house counsel is very deeply involved in every aspect of the cases for which he is responsible. This particular damages case was quite unique and conceptually complex, with no precedents that anybody could identify. We also had a number of experts, some of which were on technical geology matters, the detail of which were beyond the understanding of any of the lawyers (despite extensive experience in oil and gas arbitration). The in-house counsel worked as part of the outside counsel team to develop an economic approach to the core damages issues that would make sense and be acceptable to his management (and that of several co-venturer companies). He also drew on resource from his geology department to find people who could work directly with the technical experts up until the drafting of an initial report for review by the lawyers. In the end, we were able to be ready to file in a very short period of time, despite all the moving parts and technical issues. This was a truly synergistic experience.

Alexei Dudko:

When IHC forbade me to contact the potential witness with whom their CEO had a personal conflict. The person later turned to be the star witness in the arbitration, I managed to persuade IHC but had a hard time before it was accomplished as my credibility was at stake.

Julia Popelysheva:

Several years ago our firm represented a major shipyard in a multi-million dollar dispute against a Scandinavian shipowner. The in-house counsel who was in charge for collection of documents for a document production exercise revealed to me that he had bought a new pair of running shoes in order to promptly pick up the documents from different departments of the client scattered across a very large territory of the shipyard. One could say that it is a trivial example for the Digital Millennium, but in that particular case a pair of running shoes (and a very dedicated in-house counsel) really made a difference.

Arbitration Events to Attend

19 September 2014	**ABA Moscow Dispute Resolution Conference** Organiser: American Bar Association Location: Moscow, Russia http://www.americanbar.org/
19-20 September 2014	**Global Conference of the Co-Chairs' Circle** Organiser: Co-Chairs' Circle (CCC) Location: Berlin, Germany http://www.co-chairs-circle.com/
16 October 2014	**On-line Arbitration** Organiser: Russian Arbitration Association Location: Moscow, Russia http://www.arbitrations.ru/
19-24 October 2014	**IBA Annual Conference** Organiser: International Bar Association Location: Tokyo, Japan http://www.ibanet.org/
3-4 November 2014	**International Dispute Resolution in Sweden** Organiser: Arbitration Institute of the SCC Location: Stockholm, Sweden http://www.sccinstitute.com/
6-7 November 2014	**Kiev Arbitration Days 2014: Think Big!** Organiser: Ukrainian Bar Association Location: Kiev, Ukraine http://www.uba.ua/
11 November 2014	**LCIA European Users' Council Simposium supported by the Russian Arbitration Association** Organiser: LCIA and RAA Location: Moscow, Russia http://www.lcia.org/Conferences/Conference_Schedule.aspx
26 November 2014	**Freshfields Arbitration Lecture 2014** Organiser: Freshfields Bruckhaus Deringer LLP Location: London, UK http://www.freshfields.com/
28 November – 1 December 2014	**ICC Lex Mercatoria** Organiser: Belarus State University Location: Minsk, Belarus http://www.law.bsu.by/site/?64

RAA40 Events

RAA40 Meeting: Sanctions and Arbitration – October 2014

In October 2014 RAA40 will organize a meeting to discuss various ways in which sanctions may have an effect on arbitration. We will announce the exact date shorty: stay tuned.

Topic

Sanctions may become relevant for an arbitration practitioner in many different ways.

A party may claim that it can no longer perform the contract due to the sanctions or that the contract needs to be adjusted to take into account the sanctions (e.g. by changing the currency in which payments are effected). In the context of cross-border contracts any disputes between the parties are likely to be resolved by arbitration, raising many challenging issues including applicable law, application of mandatory rules etc.

Sanctions may influence the conduct of arbitration as well. If a person is sanctioned this may restrict the person's access to counsel or indeed ability to participate in the arbitration (e.g. deposit advances, use the services of an arbitral institution).

Finally, sanctions may influence enforcement of the award. For example, the losing party may argue that it may not perform the award due to the sanctions. In alternative, it may argue that the enforcement of the award would be contrary to the public policy as it frustrates the sanctions regime.

RAA40 meeting

We propose to discuss various effects sanctions may have on an arbitration, including the above-described aspects. In doing so we propose to look specifically at the existing precedents (such as Iran-related cases) and issues and jurisdictions most relevant for the Russian practitioners.

The experts in the field are invited and expected to speak at the meeting.

RAA40 and LCIA YIAG Tulney Hall Seminar – 10 November 2014

RAA40 and LCIA Young International Arbitration Group are organizing a joint seminar preceding the LCIA European Users' Council held in Moscow on the same day.

The seminar will adopt the traditional LCIA Tulney Hall format with discussion centred on the key issues proposed by the seminar's participants before the seminar. The discussion will be led by arbitration experts from Russia and other jurisdictions.

RAA40 will separately circulate a call for proposals of the topics for discussion and further information about the seminar.

RAA40 New Year and Christmas Drinks – Mid December 2014

RAA40 invites young arbitration practitioners to celebrate the very special holidays – the New Year and Christmas together in mid December. The event gives an opportunity to meet informally and discuss topical arbitration issues as well as to share past experiences and the plans for 2015.

The date and the venue will be announced in due course.

Become a Member of RAA40

RAA40 goes back to 2008, when Anton Asoskov, Francesca Albert and Richard Chlup established the Moscow Arbitration Forum 40 (MAF40). In September 2013 MAF40 became RAA40 joining forces with the Russian Arbitration Association.

RAA40 is a forum for the young arbitration practitioners in Russia to exchange ideas, meet renowned experts in the field and each other, share their experience and learn from the experience of others. To achieve this purpose RAA40 organizes regular seminars and other events to address the most pressing and current issues, publishes a newsletter and participates in other projects.

Membership in RAA40 is open to anyone interested in arbitration. There are no registration or membership fees and you do not need to be a member of RAA to become a member of RAA40. However, to become a member you need to possess either a degree in law or have practical experience in arbitration. As suggested by the name RAA40 members should be 40 or less.

Members of RAA40 gain the following advantages:

- the first to learn about RAA40 events and other projects and have priority access to them;
- a periodic newsletter covering arbitration-related developments in Russia;
- attend some the arbitration-related events on special terms.

To become a member please complete a form available at http://www.arbitrations.ru/en/raa-40/enter.php.

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For Notes

Newsletter #3

RAA 40

Russian Arbitration Association