



Russian Arbitration Association

Newsletter

Issue 5 // May 2015
www.arbitrations.ru



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Welcome from Co-Chairs

Dear friends and colleagues,

We are pleased to present to you the fifth issue of the RAA40 Newsletter, which is being released at the Russian Arbitration Day conference.

This Newsletter focuses on arbitrators. In this issue you will find interviews with Dr. Prof. Kaj Hober, a distinguished Swedish arbitrator with vast experience in disputes coming from the CIS region, and with Dr. Prof. Anton V. Asoskov, an academic and a distinguished Russian arbitrator. They discuss their career paths, their experience as arbitrators, their views on various issues in arbitration from the tribunal's bench, and certainly reveal their outstanding personalities. Ryan Bull and Izabella Sarkisyan of Baker Botts share with us a comprehensive set of strategies and factors to consider in nominating arbitrators.

In 2015 RAA40 kept organizing and contributing to various events (both professional and networking) and we refer you to the notes about the Arbitration in Singapore seminar (p.33), Women in Arbitration meeting (p.34), the Sixth Moscow Willem C. Vis Pre-moot and Emergency Proceedings Discussion held on the eve of the Pre-moot (pp.35-36).

You will also find in the Newsletter our regular columns – essential cases decided in Russia and abroad, cases to watch, case notes from our colleagues abroad and a list of arbitration events to attend.

We would like to use this opportunity to announce a change in the RAA40 leadership. Ivan Chuprunov was recently succeeded by Egor Chilikov as a co-chair of RAA40. Egor is an arbitration practitioner, formerly an associate at Baker Botts and currently at A Group, an arbitration and litigation investment fund. We are grateful to Ivan for being with us since the very launch of the RAA40 and certainly warmly welcome Egor.

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



Olesya Petrol



Egor Chilikov



Anna Shumilova

Courts and Arbitration in Russia

Overview of Key Court Decisions: January - May 2015

By Sergey Usoskin, Advocate, RAA40 Co-Chair

1. Non-Arbitrability of Public Procurement Disputes Does Not Create Constitutional Issues

*Application of City Clinical Hospital No. 15 of the Moscow Department of Health
(Ruling of the Constitutional Court No. 233-O/2015 dated 5 February 2015)*

The Constitutional Court held that setting aside an arbitral award does not affect the constitutional rights of the award-creditor. The applicant relied primarily on the right of access to court. The Constitutional Court noted that the applicant may still bring its claims before state courts, even if the award is set aside due to non-arbitrability of the subject matter. Accordingly, the Constitutional Court held that the setting aside itself does not affect the applicant's rights. It went on to observe that the Constitutional Court has no jurisdiction to review the commercial courts' finding that the underlying dispute arising out of a public procurement contract is a public one and therefore not arbitrable.

2. A Link Between an Arbitral Institution and a Party to Arbitration Not Necessarily a Problem

*LLC Realty Agency Apartments Shop v. JSC TsentrEnergMontazh
(Case No. A62-171/2014, Economic Disputes Panel of the Supreme Court, Ruling No. 310-ЭC14-4786 dated 19 March 2015)*

The Supreme Court held that the fact that the claimant was a member of a regional Chamber of Commerce and Industry did not justify a refusal to enforce an arbitral award against a non-member rendered by an arbitral institution the chamber had created. The court relied heavily on the respondent's failure to challenge the validity of the arbitration clause, jurisdiction of the arbitral tribunal or independence of the tribunal's members at any point before the tribunal rendered the award.

Following earlier decisions of the Constitutional Court, the Supreme Court explained that the existence of a link between an arbitral institution and one of the parties to arbitration the institution administers does not create the issue by itself. Rather an issue arises if the other party had been forced to agree to arbitration administered by the institution or where the relevant link affects the independence of the arbitral tribunal.

If a party had been forced to agree to arbitration or agreed to arbitration due to mistake or fraud, the proper remedy is for the party to challenge the validity of the arbitration agreement. Such a challenge can be brought before either a state court or the arbitral tribunal. A party which knows about a link between the arbitral institution and the other party, but fails to raise such a challenge is precluded from relying on the link in enforcement proceedings or proceedings to have an award set aside.

If a party considers that the link between the other party and the arbitral institution affects the independence of a member of the tribunal, the party should challenge the arbitrator. Again, failure to submit such a challenge may prevent the party from relying on the relevant circumstances before a state court in enforcement proceedings or proceedings to have the award set aside.

3. Partial Annulment Possible Where Only a Part of the Award is Contrary to the Public Policy

Corradino Corporation Ltd. v. JSC Russian Insurance Center
(Case No. A40-274/2014, Economic Disputes Panel of the Supreme Court, Ruling No. 310-ЭC14-2110 dated 24 February 2015)

The Supreme Court ruled that an arbitral award should be partially set aside, since the arbitral tribunal failed to apply deductible (franchise) provided for in the insurance contract. The court faced a unique situation in which the arbitral tribunal itself had acknowledged the mistake in an additional award, but the additional award was set aside for procedural reasons.

The Supreme Court held that an award which completely fails to apply a contractual provision without giving any reasons for this failure is contrary to Russian public policy. However, the court noted the need to maintain a balance between the rights of the parties to arbitration in determining an application to set aside an award. Applying this principle, it ruled that where a court may separate the offending part of the award from the other parts the court should only set aside the offending part.

4. Russian Court Unwilling to Grant Anti-Enforcement Injunctions

Kyrgyzstan et al. v. Stans Energy et al.
(Case No A40-64831/2014, Moscow Commercial Court, Ruling dated 25 February 2015)

In proceedings before the Moscow Commercial Court Kyrgyzstan sought to set aside an over USD 100 mln arbitral award in Stans favour. In parallel Stans sought to enforce the award in Canada against shares in a Canadian company held by a Kyrgyz state-owned company. Kyrgyzstan asked the Moscow Commercial Court to order Stans, its officers and external counsel to cease any attempts to enforce the award and to take all measures to remove asset freezes secured in support of such enforcement pending the Moscow Commercial Court's decision on the application to set aside the award.

The court refused to make such an order relying on three grounds. Firstly, Kyrgyzstan failed to prove that it would be impossible or much harder to enforce the decision of the court in the proceedings to set aside the award unless the court orders the interim measures that Kyrgyzstan sought. Secondly, the court doubted its jurisdiction to make the requested order. Finally, the court observed that Kyrgyzstan may bring the proceedings to set aside the award to the attention of the Canadian courts, which apparently the Moscow Commercial Court considered to be a more appropriate remedy available to Kyrgyzstan.

Optional Dispute Resolution Clause is Valid and Enforceable

By Maria Kiskachi, PhD Student, Lomonosov Moscow State University

Deutsche Bank AG (London) v. LLC Agrofirma “Razdolye”, LLC Rassvet and LLC Razvilenskoye

(Case No. A53-17338/2014, Ruling of the Rostov Region Commercial Court dated 27 November 2014, Judgment of the Fifteenth Commercial Appellate Court dated 12 March 2015)

On 12 March 2015 a Russian appellate court overruled the lower court's decision invalidating the optional part (the “Lender’s Option”) of a complex dispute resolution clause and referring parties to arbitration.

In July 2014 Deutsche Bank AG (London) commenced proceedings against three Russian companies - Agrofirma “Razdolye” Ltd, Rassvet Ltd and Razvilenskoye Ltd – before the Rostov Court to collect debt in the amount of approximately 500 million US dollars. Deutsche Bank relied on the optional clause in the facility agreement between the parties. The clause conferred jurisdiction on the English courts, but permitted Deutsche Bank (as the facility agent) to sue the guarantor in any competent national court. The contract also provided for an alternative dispute resolution mechanism: arbitration under LCIA Rules.

Since Agrofirma “Razdolye” Ltd, Rassvet Ltd and Razvilenskoye Ltd are incorporated and domiciled in Rostov, Russia, Deutsche Bank opted for the Rostov Commercial Court and submitted its claim there. The respondents in turn submitted a motion to stay proceedings and refer parties to arbitration.

The Rostov Region Commercial Court found the Lender’s Option incompatible with the principle of equality of arms, as interpreted in the several judgments of the Constitutional Court of the Russian Federation and the ECtHR case *Batsanina v. Russia* (App.no. 3932/02). In view of this finding, and emphasizing that the “valid part” of the dispute resolution clause provides for LCIA arbitration, the Rostov Court refused to hear the case.

Unlike the court of first instance, the Appellate Court concluded that the Lender’s Option must be enforced, since it is consistent with both Russian and English law. The appellate panel of three judges relied solely on the text of the agreement and did not discuss any procedural guarantees. In support of its position, the Appellate Court also cited jurisprudence of the Federal Commercial Court of Moscow Circuit, where in similar circumstances a Lender’s Option clause was upheld. Finally, the higher court remanded the case to the Rostov Court for reconsideration.

Cases to Watch in Russia and Abroad



Case: State Corporation Russian Automobile Roads v. LLC United Tolls Systems (A40-15622/15)
Forum: Ninth Appellate Commercial Court

Significance of the Case: (1) Russian law provides for the application of an international as opposed to a domestic arbitration regime in relation to disputes between two Russian companies, where one of them is foreign-owned. The Moscow Commercial Court ruled that this rule continues to apply even if the relevant party ceased to be foreign-owned after the parties entered into the arbitration agreement; (2) the first instance court's decision suggests that when assessing enforceability of an arbitration clause in the context of a motion to refer parties to arbitration, the courts should apply a lower standard deferring to arbitrators.



Case: Czech Export Bank v. Mezhtopenergobank (A40-83447/2014)
Forum: Moscow Commercial Court/Supreme Court

Significance of the Case: Czech Export Bank seeks to enforce an arbitral award in Russia, which related to a contractual dispute between the parties. The respondent opposed enforcement arguing that the underlying contract is void, had been procured by corrupt means and the claimant's commencement of arbitration constitutes an abuse of rights. The first instance court refused to enforce the award, however the Commercial Court for the Moscow Circuit quashed the decision and remanded the case pointing out that the arbitral tribunal had already considered and dismissed some of the respondent's arguments.



Case: Victor Melnik v. Omnilightstar Limited (A40-135118/13)
Forum: Moscow Commercial Court

Significance of the Case: The court is to decide the scope of corporate disputes with respect to Russian companies that are not arbitrable. Mr Melnik seeks to enforce an arbitral award rendered in a dispute arising out of a shareholders agreement between the shareholders in a Russian joint-stock company. The tribunal ordered the respondent to pay RUR 150'000'000 in compensation for a breach of the agreement. The Moscow Commercial Court's decision refusing to enforce the award on the basis of non-arbitrability has been reversed by the Commercial Court for the Moscow Circuit.



Case: Kyrgyzstan v. Lee John Beck, Central Asian Corporation for Development Corporation (A40-19518/14), Kyrgyzstan v. Stans Energy (A40-64831/2014, A40-127910/2014), Kyrgyzstan v. OKVV (A40-25942/2014)
Forum: Moscow Commercial Court/Commercial Court for the Moscow Circuit

Significance of the Case: Kyrgyzstan seeks the annulment of awards rendered by tribunals sitting under the rules of the Arbitration Court at the Moscow Chamber of Commerce and Industry. The main issue in all disputes is whether either (i) Article 11 of the Convention on the Protection of Investor's Rights or (ii) Kyrgyzstan's law on Foreign Investments contain Kyrgyzstan's consent to arbitration of disputes with any foreign investor.

Courts and Arbitration Abroad

Sweden

By Fredrik Ringquist and Anna Alriksson (Mannheimer Swartling Moscow and Stockholm, respectively)

Award upheld against the Russian Federation

Judgment of the Svea Court of Appeal (Stockholm), 23 January 2015, case No. T 2454-14 (the Government of the Russian Federation (the “Government”) vs. I.M. Badprim (“Badprim”).

Facts

In July 2007, Badprim, a Moldavian construction company, concluded a turnkey agreement with the Federal Customs Service of the Russian Federation (“Federal Customs Service”) for the design and construction of a border station between Poland and Russia (the “Turnkey Agreement”). In November 2010, Badprim commenced arbitration against the Federal Customs Service and the Government under the arbitration clause in the Turnkey Agreement. Following a jurisdictional objection by the Government, the Tribunal decided to try the Government’s objection as a preliminary and separate matter.

The Tribunal rejected the Government’s jurisdictional objections in a partial award on jurisdiction rendered in July 2012. In the final award, issued in October 2013, the Tribunal rejected Badprim’s request for damages vis-à-vis the Federal Customs Service but ordered the Government to pay EUR 1,8 million, together with interest, to Badprim.

The Government subsequently challenged the award with the Svea Court of Appeal, arguing that it should be set aside on three separate grounds. First, the Government claimed that there was no arbitration agreement between the Government and Badprim since the Government was not party to the Turnkey Agreement. Second, the Government argued that the arbitration agreement in any event was invalid since it provided that the SCC was to administer the arbitration under the ICC Rules. Finally, the Government claimed that the Tribunal in any case had departed from the parties’ joint instructions by not applying the ICC Rules.

Held

In a judgment dated 23 January 2015, the Svea Court of Appeal rejected the Government’s challenge application. As to the Government’s first claim, the Svea Court of Appeal held that the Government’s intention must have been that the Federal Customs Service would act on its behalf and that the Federal Customs Service also had signed the agreement as an *intra vires* act on behalf of the Government. In this respect, the Svea Court of Appeal relied on expert testimony regarding the status of the Federal Customs Service under Russian law. Hence, the Svea Court of Appeal concluded that Badprim had proved that the award against the Government was rendered on the basis of an arbitration agreement between the Government and Badprim. One of the three judges dissented with the majority and wanted to set aside the award due to the absence of an arbitration agreement.

As to the Government's second claim, the Svea Court of Appeal noted that although the arbitration clause was contradictory in that it provided that the SCC was to administer an arbitration under the ICC Rules, the clause had to be understood to mean that the parties' intent was to have disputes resolved through arbitration and that such arbitration was to take place in Stockholm at the SCC. In this connection, the Svea Court of Appeal noted that nothing indicated that there was a particular reason why the ICC Rules had been chosen. Nor was there any evidence to the effect that the Government had informed Badprim that the application of the ICC Rules was important for the Government. The Svea Court of Appeal went on to conclude that since the SCC also had successfully administered the case, the arbitration agreement was executable, and therefore it was also valid.

Finally, as regards the Government's third claim, the Svea Court of Appeal held that even though the Tribunal had adjusted the ICC Rules to fit with the SCC organizational structure, this did not constitute a departure from the joint instructions given by the parties to the Tribunal.

Review of challenges to Swedish arbitral awards

Former Swedish Supreme Court Justice Johan Munck, who leads a committee tasked with modernizing the Swedish Arbitration Act, has reviewed all challenges to awards filed with Swedish courts between 2004 and 2014. The study relates to actions under Sections 33, 34 and 36 of the Swedish Arbitration Act. Justice Munck's review, published in the most recent issue of *Svensk Juristtidning*, confirms the results of previous studies showing a low percentage of successful challenges.

Justice Munck found that Swedish courts registered 191 challenges to awards during the time in question. Only 6% of those challenges have resulted in the award being set aside, declared invalid or adjusted. The review also showed that the average duration of challenge proceedings has drastically decreased during the ten-year period studied. In 2004, the average time between the filing of a challenge and the issuance of a judgment was 20 months, whereas in 2014 it was only 7 months.

Court of Justice of the European Union

By Robert Dougans and Tatyana Talyanskaya, Bryan Cave LLP

Case C 536/13, 'Gazprom' OAO (Request for a preliminary ruling) 13 May 2015

Further to the opinion of Advocate General Wathelet (reported in the last RAA40 newsletter) the Court of Justice of the European Union ("CJEU") has delivered its decision in this case relating to the grant of anti-suit injunctions by the Courts of EU Member States.

In this case, an arbitral tribunal made an award holding that declared that certain Lithuanian court proceedings had been commenced in breach of the relevant arbitration agreement. The tribunal went on to order that the party bringing those proceedings withdraw certain requests and limit the scope of requests to avoid breaching the arbitration agreement. Upon applications being made to the Courts to enforce the award, the Lithuanian courts sought a preliminary reference from the CJEU as to whether the tribunal was able under EU law to deny the parties the right to apply to a court of an EU Member State.

Advocate General Wathelet had suggested in his opinion to the CJEU that the well-known decision in *West Tankers* was wrong and that anti-suit injunctions might be available in relation to arbitration proceedings under the new Brussels Regulation, as they would be considered proceedings ancillary to arbitration and be thereby excluded from the scope of the recast regulation.

The CJEU held that proceedings for the recognition and enforcement of an arbitral award are covered by the national and international law applicable in the Member State in which recognition and enforcement are sought. They are not covered by the Brussels Regulation. The CJEU accordingly concluded that EU law did not prevent a Member State from enforcing, or refusing to enforce, an arbitral award which contained an anti-suit injunction as EU law did not govern the recognition and enforcement of arbitral awards by the courts of Member States.

The CJEU declined to set aside the *West Tankers* case, noting that the *Gazprom* case did not involve an injunction issued by a court of a Member State, but rather concerned the question of whether EU law allowed a court to recognize and enforce an arbitral award making some sort of anti-suit injunction.

Main Theme

Choosing an Arbitrator: Factors and Strategies To Consider

By Ryan Bull and Izabella Sarkisyan, Baker Botts

Parties are often attracted to arbitration because it empowers them to select, or at least participate in the selection of, an arbitrator with the expertise and experience to decide their dispute fairly and efficiently. Arbitrators not only determine the quality of the decision-making and of the final award, but also influence the style and structure of the proceedings, their schedule, and often their cost. Precisely because arbitrators have such profound influence, selection of an arbitrator may be the single most important step in an arbitration proceeding. In this article, Ryan Bull and Izabella Sarkisyan of Baker Botts, review factors to consider in nominating an arbitrator to serve on a traditional tri-partite arbitral tribunal, and strategies for making a good choice. They also review the process of working with party-appointed arbitrators to nominate the chairman of a tri-partite tribunal.



Izabella Sarkisyan



Ryan Bull

Arbitrator selection can be a crucial, yet daunting, task. There is no list of arbitrators who are perfect fits for every dispute. Rather, parties should approach each case differently, identify the arbitrator characteristics most aligned with their case strategy, then nominate an arbitrator that possesses those characteristics. Depending on the arbitration agreement at issue and the number of arbitrators, the nomination and appointment process can vary considerably. In this article, we concentrate on providing strategies that can be used in nominating an arbitrator to serve on a traditional tri-partite arbitral tribunal, then working with that

arbitrator to identify and nominate a chairman for the tribunal. Many of the considerations discussed here would also be relevant in considering sole-arbitrator nominations, or providing input to an arbitral institution about appointments the institution will make.

There is no perfect arbitrator for every dispute

I. Factors to Consider When Appointing an Arbitrator

In considering what characteristics to look for in an arbitrator, there are some criteria that will be relevant in every case, e.g. the experience of an arbitrator candidate, and whether the arbitrator candidate has previously been involved with cases that presented issues similar to those at play in the case to be decided. Other factors may be relevant in some cases, but less so in others, such as the nationality of an arbitrator candidate, or whether the arbitrator has a common or civil law background. We review below factors commonly considered in nominating an arbitrator.

Experience as a Party-Appointed Arbitrator. Many party-appointed arbitrators view one of their roles as ensuring that the whole tribunal understands the arguments and evidence presented by the party that appointed it. These arbitrators do not believe that they must advocate the positions of the party that

appointed it. These arbitrators do not believe that they must advocate the positions of the party that appointed him or her, but just ensure that no argument is missed. The distinction is significant because an arbitrator that aggressively advocates his or her appointee's views might be perceived by the other members of the tribunal, and particularly the chairman, as lacking impartiality, causing the other members of the tribunal to invest less trust in the arbitrator. It is important to understand in advance what responsibility your arbitrator candidates understand they have, and whether they will be able to carry it out effectively.

Prior Cases Involving Similar Issues. Each case is unique, and one should not assume that they can know how an arbitrator will rule on given facts based on how that arbitrator has acted in prior cases (either as arbitrator or counsel). Nonetheless, arbitrators are human and their decision-making will be shaped in part by their prior experiences. Parties should therefore be sensitive to positions that potential arbitrators have taken — either as arbitrator or counsel — in prior cases. For example, in construction disputes, some arbitrators have a track record of ruling in favor of a contractor and others have a track record of ruling for an employer. In the context of investor-state cases, arbitrators may have previously decided cases involving similar treaty language. Parties should be aware of such decisions to the extent possible and assess their potential impact on the candidate's views.

Cultural Background. Parties often select an arbitrator that shares their cultural background, hoping that the arbitrator will be more predisposed to understand their positions. In some cases, it can be helpful to have an arbitrator familiar with specific business cultures. In other cases, a party may have a greater need for an arbitrator that understands the background culture of the opposing party — if, for example, the opposing party has articulated positions that are difficult to reconcile with the business culture where they operate. In either case, the cultural background of the arbitrator can be important.

Business or Professional Background. Many arbitrators have had previous careers and the experience gained, whether legal or otherwise, provides background that may enable them to more easily understand the dispute. Knowledge of a potential arbitrator's previous career may give an indication to a party as to that arbitrator's approach to issues that are in dispute and whether that arbitrator will appreciate the party's arguments. It may also be helpful to have an arbitrator who is familiar with the business practices of the region or industry at issue in the case. With Russian parties this is often the case, as arbitrators who have been involved in commerce in Russia and the CIS may be more attuned to the business culture and common practices (e.g. corporate governance issues, communications within a company, etc.).

Nationality. Parties and counsel are often also concerned with the nationality of an arbitrator. But nationality may be less relevant today than it has been historically as arbitrators can be born in one country, study in another, then practice law in several more. It should be noted though, that many arbitration rules still provide a general rule that a sole arbitrator or the chairman of an arbitral tribunal cannot share the nationality of any of the parties (e.g. SCC Rules Article 13(5), LCIA Rules Article 6.1.).

Reputation, Credibility and Personal Skills. The overall reputation of an arbitrator can be very important. An arbitrator's reputation can have an impact during the arbitration itself insofar as it can affect the extent to which the other arbitrators, particularly the chairman, take into account the arbitrator's opinions. An arbitrator's reputation can also sometimes be cited in proceedings to enforce an arbitral award, the implicit position being that an award made by a prominent arbitrator should be even less subject to judicial scrutiny. But positive reputation does not necessarily equate to seniority. Younger practitioners who have demonstrated good judgment and legal acumen may also have or earn the respect of fellow arbitrators.

Apart from overall reputation and credibility, one should also consider an arbitrator's personality and temperament. Sometimes a more flexible and a diplomatic arbitrator can be better equipped to influence a particular panel; in other cases a party might prefer to see a strong and aggressive personality in its appointed arbitrator (for example, if the other party has already chosen someone who is known to be a "bully").

Lawyer vs Non-Lawyer. Arbitrators may be qualified lawyers, but need not be. Arbitrators with legal training are likely to be familiar with procedural and legal aspects of any dispute. Where legal issues are not particularly complex and the dispute may turn on facts and expertise, an arbitrator with a particular industry

expertise might be better suited to deal with the dispute. One example is construction-related disputes, where construction experience can be helpful to understanding and deciding disputed fact questions. In some types of energy and complex financial cases, industry expertise can also prove helpful in resolving the dispute. Where both parties appoint technical specialists with no legal training, it is usually advisable that the presiding arbitrator be a trained lawyer with experience in arbitration. This will help to avoid possible improprieties in the procedure that can undermine the validity and enforcement of a future award. In all situations, however, selecting a non-lawyer carries risks, and should be carefully considered.

Civil Law Tradition vs Common Law Tradition. A lawyer's background as a civil lawyer or a common law lawyer can influence his perspective on the dispute resolution process. An arbitrator from one tradition may be more aligned with a party's procedural objectives or approach than an arbitrator from the other. Some of the commonly perceived differences between the civil and common law traditions include:

- **Adversarial v. inquisitorial proceedings:** Common law lawyers are often trained to operate in an adversarial style whereby they plead their case against opposing counsel. The civil law system can be much more driven by the judge overseeing a matter, with judges tending to assume an investigative role in proceedings and defining themselves the issues to be decided.
- **Scope of document disclosure:** In many civil law countries, there is no document "discovery" process analogous to the broad exchange of information commonly associated with the common law jurisdictions, and any disclosures are usually narrow and directed by the court. Even as between common lawyers, a U.S.-trained lawyer may be accustomed to far broader document discovery than an English lawyer accustomed to practice before the English courts.
- **Principles and codes:** Common law lawyers more readily rely on general principles to support their arguments. This can be seen in common law principles such as unfettered 'freedom of contract'. Though many civil codes expressly reference broad principles such as freedom of contract and good faith, many provisions are implied into a contract by law and parties' arguments based on general principles are thus limited.
- **Reliance on documentary evidence vs witness testimony:** It is often said that civil law courts place greater weight on documentary evidence, and de-emphasize witness testimony relative to common law countries. Ultimately, however, both systems deal with both types of evidence, though the concept of written witness statements is less commonly used in some common law jurisdictions.

It is important to stress that the above points are generalizations. The distinctions between the common law and civil law traditions can be overstated, and even within each tradition, experiences vary widely. Nonetheless, the differences in a specific arbitrator's personal experience can affect arbitrator's approach. For example, a common law lawyer from the U.S. may be more inclined to permit broader document disclosure than a civil lawyer from Germany. Likewise, a common law arbitrator may be more amenable to aggressive cross examination of witnesses, whereas a civil law arbitrator may be more likely to be persuaded by a party with a strong documentary case. Similarly, a civil law trained arbitrator may be more accustomed to use tribunal-appointed experts than a common law trained arbitrator.

Familiarity with the Applicable Law. Many arbitrators consider cases in which the governing law is not a law in which they are qualified, and it is not essential, for example, that a lawyer qualified to practice in the Russian Federation be appointed to hear disputes governed by Russian law. Counsel, and sometimes even expert testimony, can educate the tribunal about foreign law. Nonetheless, familiarity with the governing law can give an arbitrator an advantage, and potentially make the arbitrator more persuasive when discussing the case with fellow arbitrators.

Language. It is obviously important that the arbitrator is fluent in the language of the arbitration (including any technical elements). But a further consideration can be the fluency of the arbitrator in the language or languages spoken by the witnesses and in which key documents are written. An arbitrator who can

understand the witnesses in their first language may gain a deeper understanding of the witness's evidence. Sometimes, of course, one might regret having a tribunal that speaks the same language as the witness!

Practical Considerations. Some of the most important considerations are practical. One of them is availability. The most reputable arbitrators are often the busiest and their calendars may be full a year or more in advance. In practice this can mean no early hearing and, if there is any shift in the timetable, your arbitrator may not be available for a rescheduled hearing for many months. Prominent arbitrators may also have less time to dedicate to a case, whereas a less renowned arbitrator may have more time and be more engaged. Availability should also be considered

from a tactical perspective. Claimants are often interested in having their case resolved quickly. Some respondents will have less incentive for a quick resolution either because of pending parallel court proceedings or because they hope delay in the arbitration will promote a settlement.

To find the best arbitrator candidate for a particular case, a party needs to define the case it will present, the type and speed of arbitration proceeding that it hopes to establish

II. A Process for Selecting Party-Appointed Arbitrators

The process of selecting an arbitrator begins with a comprehensive understanding of the case you expect to present, and your goals for the arbitration. A case that emphasizes the application of established law to undisputed facts might call for a different type of arbitrator than a case that emphasizes broader notions of equity and justice, but perhaps lacks an established legal foundation. Similarly, a party pursuing fraud claims may need broader document disclosures from the opposing side to develop its position, and thus look for an arbitrator more likely to permit such discovery. Thus, a key early step in nominating an arbitrator is defining the case to be presented, the type of arbitration proceeding that you hope to establish, and how quickly you hope that proceeding will move.

Using this foundation, a party can then work through factors like those described above and identify those factors that are most relevant to your case strategy. The goal would be to define broad criteria for the arbitrator you hope to nominate. For example, you might aspire to nominate an English QC with substantial experience handling disputes in the CIS, and some experience with large infrastructure projects, but who has a sufficiently flexible schedule to complete the arbitration in a year or less.

Once the broad criteria have been established, the party and its counsel identify candidates that match the selection criteria. There is a lot of information in the public domain — for example, biographical data, scholarly publications, speeches at conferences and, sometimes, publicly available awards. But public information may not tell the full story about how someone will conduct himself on the tribunal, and it is often crucial to rely on prior experiences of the party and its in-house legal team, outside counsel, and outside counsel's contacts, to develop a comprehensive list of arbitrator candidates that meet the criteria set.

After considering the factors described above, a party can make a shortlist of candidates that appear to best match the criteria established, and approach the shortlisted candidates to see if they are free of conflicts, available and willing to serve. This is often done by counsel on the telephone with an e-mail to follow up to ensure the candidate has properly noted the names of the parties for the conflicts check. The arbitrator will likely inquire about the nature and size of the dispute and the expected duration of the arbitration to get an idea of how much time he will need to commit and the likely remuneration.

It may also be appropriate to conduct a limited interview of arbitrator candidates aimed at understanding their experience with the types of issues presented in the case. Such interviews are perhaps less common in parts of Europe than in the United States, but they can be an important part of the selection process. Institutional rules often provide little guidance as to the appropriateness or appropriate scope for such

Due diligence on a potential arbitrator may include review of public information, prior experiences and possibly an interview

interviews. Nonetheless, care should be taken to avoid lines of inquiry that might jeopardize the arbitrator's neutrality, independence or impartiality. In this regard, the IBA Guidelines on Party Representation in International Arbitration allow for ex parte communications with a prospective arbitrator regarding their experience, expertise, availability and any potential conflict of interest. Such communications should not involve discussion of the merits of the case. The Chartered Institute of Arbitrators has also provided guidelines for interviewing prospective arbitrators that

permit limited inquiry to assess the candidate's expertise, experience, language proficiency, and conflict status. Specific circumstances or facts giving rise to the dispute, arguments of the parties and the merits of the case may not be discussed. As a general rule, potential party-appointed arbitrators may be interviewed by a party ex parte, but party interviews of a potential sole arbitrator or presiding arbitrator should only be conducted by agreement of all parties.

III. Selection of a Chairman/Sole Arbitrator

Selecting a sole arbitrator or chairman can be a more difficult process than nominating a party-appointed arbitrator, as it requires consensus of the disputing parties if the decision is not left to an independent appointing authority. In addition, different considerations go into selecting the presiding arbitrator. The chairman is usually expected to be familiar with arbitration procedure, and should be capable of managing both co-arbitrators and the parties, and ensuring that the arbitration proceeds fairly and in full compliance with the arbitration agreement, applicable arbitration rules and national law to secure an enforceable award. It is also often the case that presiding arbitrators take the biggest role in drafting the final award, so the quality of the reasoning of the award can be determined by the expertise, skills and diligence of the presiding arbitrator.

It is often the case that party-appointed arbitrators are charged with agreeing on the candidate for the chairman. In this case, co-arbitrators are generally permitted to consult with their nominating parties about potential candidates, and the characteristics that would be ideal to find in a presiding arbitrator. Another consideration is the relationship between the party-appointed arbitrators and chairman candidates. The pool of arbitrators, particularly those with experience sitting in large international matters, remains relatively small, and the chances are high that party-appointed arbitrators will have had prior experience with potential chairman candidates. Ideally, one would not want to select a chairman with whom their party-appointed arbitrator had a poor personal relationship. Likewise, one would hope to avoid nominating a chairman who is a close friend of the arbitrator nominated by the opposing party.

The above-mentioned IBA Guidelines on Party Representation in International Arbitration allow parties to communicate with their appointed arbitrators regarding selection of a tribunal chairman. It is also prudent that both parties are aware of the existence of the other's communications with their appointed arbitrators during the process of the chairman's selection to eliminate any risk of the arbitrator's independence being later challenged. It should be noted that once the presiding arbitrator has been selected, virtually all international rules establish that parties may have no ex parte communications about the case with their appointed arbitrators.

Chairman is largely responsible for the quality of the award and the conduct of the proceedings

IV. Conclusion

It is cliché, but true, that an arbitration is only as good as its arbitrators. By following a rigorous selection process and considering a broad range of factors, parties can increase the likelihood that they find an arbitrator candidate that best fits their strategy for a particular arbitration.

The authors:

Ryan Bull is an the International Arbitration and Dispute Resolution partner based in Baker Botts' Washington D.C. office. Ryan has a broad international dispute resolution practice and has led commercial arbitrations on behalf of major Russian, American, Chinese, French and Korean companies. He has also prosecuted and defended claims raising a wide range of international legal issues in U.S. trial and appellate courts. He is proficient in Russian.

Izabella Sarkisyan is a Moscow-based Senior Associate in the International Arbitration and Dispute Resolution group of Baker Botts with a primary focus on international arbitration. Her practice includes both commercial and public international law disputes, involving parties from the CIS. Izabella has acted as counsel in both institutional and ad hoc arbitrations (including under the SCC, LCIA and UNCITRAL rules).

Securing Witnesses and Documents in International Arbitration – Use of the English Courts



By Robert Dougans
and Tatyana Talyanskaya,
Bryan Cave LLP

Arbitration is based on consent, and an arbitral tribunal derives its powers from an agreement between the parties. This can pose difficulties if witnesses need to be compelled to attend hearings, or if crucial documents are in the hands of a non-party.

The Arbitration Act 1996 (the “**Act**”) provides ways to redress the balance using the English courts. Two sections of the Act allow the English Court to compel witnesses to assist parties and/or to produce documents for hearings. Section 2(3) of the Act provides that these sections can be used even if the seat of the arbitration is outside England & Wales or Northern Ireland subject to the caveat that:

“the court may refuse to exercise any such power if, in the opinion of the court, the fact that the seat of the arbitration is outside England and Wales or Northern Ireland, or that when designated or determined the seat is likely to be outside England and Wales or Northern Ireland, makes it inappropriate to do so.”

Given London’s position as a financial and legal hub, as well as a home for many the world’s elite, it is common for witnesses and/or documents which may be required for arbitral proceedings to be present in London, no matter where in the world the arbitral proceedings may be taking place. These powers are accordingly relevant not just to those conducting arbitrations with a seat in London, but should be considered by practitioners worldwide.

Witness/documents in the UK, arbitration in England

Where a witness is in the United Kingdom and arbitral proceedings are being conducted in England & Wales, Section 43(1) of the Arbitration Act 1996 provides that:

“A party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence.”

These powers may only be exercised either by permission of the tribunal or after agreement between the parties.

What this means is that a party to an arbitration can obtain a witness summons (i.e. what used to be known as a subpoena) from the English Court to secure the attendance of a witness in England, or to require that witness to produce documents for a hearing, provided the arbitration is being conducted in England. It is not a requirement that the seat of the arbitration is in England. In the case of an international arbitration, a sensible practice would be to convene a short hearing in England to hear the evidence of the witness in question if permitted by the relevant rules.

The Court will not allow a witness summons to be served out of the jurisdiction – the witness must be in England when served with the summons.

However, when England is not the seat of the arbitration, the Court may refuse to grant a witness summons if the foreign seat would make a witness summons “*inappropriate*”. If there are differences between English arbitral law and the relevant law of the foreign seat, the English court will exercise its power sparingly.

If a summons to produce documents is requested, that summons should set out in as much detail as possible:

- The specific documents which a witness has in their possession; and
- The issues to which the documents relate.

The Court will not be satisfied with identification of generic classes of documents. Documents must be identified individually, or in specific groups.

In *Tajik Aluminium Plant v Hydro Aluminium AS* [2005] EWCA Civ 1218, the Court of Appeal confirmed that the powers of the Court to issue a witness summons in support of an arbitration did not extend to obtaining general disclosure of documents from a non-party. It held that *“ideally each document should be individually identified”* although it might not be possible to do so in every case. The relevant test was whether documents had been identified clearly enough *“to leave no real doubt in the mind of the person to whom the summons is addressed about what he is required to do.”*

The specific example given by the Court was that a request for *“monthly statements for the year 1984 relating to your current account with a named bank”* would be sufficiently clear. A request for *“all your bank statements for 1984”* probably would not be.

In *The Lorenzo Halcoussi* [1998] 1 Lloyd’s Rep 180, Mr Justice Steyn (as he then was) observed that: *“Since the purposes of the arbitral process are expedition, cost effectiveness and finality, it may fairly be said that in considering a [witness summons in aid of arbitration] the Court will be vigilant to ensure that it was issued for the legitimate purpose only, and that it was not cast too widely.”*

It is worth assuming that the Court may take a narrower view of its powers than it would when issuing a witness summons in litigation.

Witness/documents outside the UK and/or arbitration outside England

In High Court litigation a witness may be examined before trial by way of a deposition. Unlike the case in some jurisdictions, this procedure cannot be used to obtain pre-trial discovery but can only be used to obtain evidence for use at trial.

Where the witness is overseas, the Court can issue a Letter of Request to a foreign court to examine a witness in that court’s jurisdiction. The English Court will also enforce Letters of Request from foreign courts. The procedure allows for a witness to be deposed to give trial evidence, and also for a witness to be ordered to produce documents for use at trial in a foreign jurisdiction.

Section 44 of the Act states that *“unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings”*. Section 44(2)(a) makes it clear that such *“matters”* include *“the taking of the evidence of witnesses”*.

This provision of the Act gives the Court powers to conduct depositions and to issue and to enforce letters of request in support of arbitrations, subject always to the caveat that action by the English Court should not be *“inappropriate”*.

In *Econet Wireless Ltd v Vee Networks Ltd & Ors* [2006] EWHC 1568 (Comm), Mr Justice Morrison described the powers granted by section 44 of the Act as a “*long arm reach*” and went on to say that when the Court is faced with such an application “*the first question [should be]: ‘why are you asking for an order from this court?’*”. An applicant needs to be able to answer that question immediately. The Judge suggested good reasons would be that the arbitration is to be conducted under English procedural law, or that an order was sought in respect of assets in this jurisdiction.

In *Commerce and Industry Insurance Co of Canada v Certain Underwriters of Lloyds* [2002] 1 WLR 1323 Mr Justice Moore-Bick held that a foreign arbitral tribunal cannot of itself issue a Letter of Request to the English Court. The proper approach was for a party to a foreign arbitration to apply to their courts for a Letter of Request to be sent to the English Courts.

Guidance suggests that the English Courts will be wary of making such an order if foreign procedural law is very different to English law.

These powers are actually rarely used and (unlike the powers in the Act to order injunctive relief) are not widely appreciated. However, they are useful tools for parties to an international arbitration looking to obtain evidence from persons in England. As such they ought to be studied by practitioners worldwide.

Interview with Dr. Prof. Kaj Hober

Dr. Prof. Kaj Hober



*Arbitrator and Counsel,
Associated Member
of the Three Verulam Buildings*

Brief CV:

Dr. Hober has been practicing commercial and investment arbitration for over 30 years. He has acted as arbitrator in over 200 cases (including chairmanships), and as counsel in approximately the same number. Through his practice, he has been deeply involved in the legal aspects of Eastern European, and particularly Russian, trade and business. In 2015, Dr. Hober won GAR Award for “best prepared and most responsive arbitrator”. He is also a professor of International Investment Trade and Law at the Uppsala University. Furthermore, he could guide a bus tour through Russia, was entrusted by Mr. Putin to translate his dissertation, and runs marathons.

Dr. Hober’s detailed CV is accessible at <http://www.3vb.com/>

Education and Degrees:

- Bachelor of Arts (fil.kand.) University of Uppsala (1974) (modern languages: Russian, German, French and English)
- Master of laws (jur.kand.) University of Uppsala (1977)
- Master of Comparative Law (M.C.L.) University of Illinois College of Law (1978)
- Doctor of laws (jur.dr.) University of Uppsala (2001)

Please describe your current practice.

I have recently retired from my law firm, Mannheimer Swartling, where I practiced for a long time. I am now practicing on my own and am an associated member of the Three Verulam Buildings chambers in London. I continue to do most of the arbitration work I did before; I remain the lead counsel on a couple of big arbitrations with my old team at Mannheimer. One of these cases is Vattenfall v Germany, and another one is Micula brothers v Romania. These take quite a lot of time. Besides that, I sit as an arbitrator in about 12-15 cases; in 7 of which I act as sole arbitrator or as chairman of the tribunal. These cases include investment arbitration cases (both ICSID and non-ICSID) and more traditional commercial arbitration cases. I am also a professor of International Investment and Trade Law at the University of Uppsala, where, among other things, I run a one-year full-time masters course on Investment Treaty Arbitration.

You act as counsel, an arbitrator and a scholar. What is your greater passion?

I would say I like all of them equally. The fact that I can combine these things makes my professional life very rewarding. It is also very helpful, when I sit as an arbitrator I know how the counsel in front of me thinks, and vice versa. However, although I am still working as counsel, my plan is to gradually focus more and more on sitting as an arbitrator. Without the support of a law firm and other lawyers it will be difficult to act as counsel in the long run. However, I may continue to act as counsel in a barrister-type role, meaning that I may be helping law firms as an expert in international arbitration.

Why have you moved to the Three Verulam Buildings after more than 20 years with Mannheimer?

It is very simple - there is an age limit in the partnership agreement at Mannheimer Swartling. At one point in time the age limit was 65, but then it was changed to 60. Those of us who were already partners when the rule was changed were subject to different transitional rules. In my case the age limit was set at 62, and I reached this limit last year.

Where did your interest in arbitration come from?

After graduating from the University of Uppsala in the late '70s, probably in 1978, I pursued a master's program in the United States. One of my professors was interested in international arbitration and enforcement of foreign arbitral awards under the New York Convention, and he suggested that I write a paper as part of one of my courses which was eventually published. I think that paper was my first encounter with international arbitration.

Upon my return from the United States, I spent two years as a law clerk at the District Court of Uppsala and then another two years as a junior judge in the Svea Court of Appeal in Stockholm - that was quite a traditional way to begin a legal career in those times. I dealt with some arbitration matters in that position, but not very many. It was really not until I began working in private practice back in 1982, first as an associate at Wetter & Wetter and later at White & Case, that I started to practice arbitration.

What was your first appointment as an arbitrator?

It must have been around 1984-85. I was appointed by the Stockholm Chamber of Commerce because the respondent in that case (a German company) had not appointed its arbitrator and, hence, I was appointed by the SCC. It was a relatively small case dealing with the delivery of tennis court surfaces. I thought it was very exciting and I was honored, of course, because in the Swedish arbitration world it was, and still is, common to act as both counsel and arbitrator if you practice arbitration. Before this, I had only acted as counsel and so it was great fun to try the arbitrator's role.

Which factors secured your transition from counsel to arbitrator?

I am often asked similar questions by young professionals, and the truth is that it is a very difficult question to answer. In my case, I started out acting as counsel in arbitrations where I was surrounded by counsel on the other side and a tribunal which commonly consisted of practicing lawyers. If you show yourself to be a reasonable person and a reasonable lawyer then people come to know you and like you and sooner or later you will get appointed, typically by one of the parties. I think this is true for many arbitrators of my age. You would likely get the same answer if you were to ask Professor Lebedev or Professor Komarov. It is a very gradual development.

How did you come to know the Russian language?

I learned it in the Swedish army where I was trained to be a Russian interpreter when I was around 19 years old. Following that, I continued my studies in the Uppsala University and also during my trips to Russia. During the Soviet era, I was acting as a tour guide in the summer time which involved guiding Scandinavian tourists to Moscow and Leningrad by bus. This work offered me the chance to practice Russian, which would otherwise have been very difficult at that time. Another big advantage of being a tour leader was that I had to solve a lot of problems; travelling by bus through Russia in the 1970s could be a rather complicated thing, and the tourists were constantly complaining about everything. It was very good training in problem solving and knowing people. I recall one story. One time the brakes of our bus broke down and two guys passing on a motorbike took interest and came over to talk whilst the driver and I were trying to fix the problem. Eventually, I ended up going with one of the guys on his motorbike to the repair shop where the problem was fixed, after which he drove me back.

You study Russian law and are regularly involved in related publications. How did this come about?

The first time I became familiar with Soviet law was when I took a course on it whilst studying in the US. When I returned to Sweden I worked as a consultant to Swedish companies in my spare time, which at the

time were quite active in the Soviet Union, and that involved studying contracts with Soviet parties and things like that. Later, when I started working as a consultant in a law firm, the first case I was involved in was a big arbitration between an English glass manufacturer called Pilkington and a Soviet foreign trade organization called Technopromimport. This case involved both Soviet and English law, and hence I had further reason to develop my knowledge of Soviet law. After that case, I represented Soviet companies in a number of arbitrations in Stockholm and so I continued to work on Soviet law issues. But the real breakthrough came in 1987 when President Gorbachev issued the Joint Ventures Decree. Then I really started digging into the Soviet and then Russian law and writing articles and books about it, as in those times I was among the few non-Russians who knew about the Soviet/Russian law. Actually, my first book of 1989 was about joint ventures in the Soviet Union. Then, in the mid-90s, I was appointed as a professor of East European Law in the Uppsala University and in this role I continued to research and teach Russian law. And I still follow Russian law, especially the civil and commercial law areas. For example, my most recent article on Russian law was published in a book compiled in honor of William Butler. In that article I explain, focusing on provisions of the Civil Code and practice of arbitrazh courts in the last 7-8 years, that Russian law and practice came very close to recognizing what is commonly known in other jurisdictions as “apparent authority”.

I am also interested in Russian politics and history. I have published, for example, a book on impeachment of President Eltsin, another about evolution of boundaries between Russia and Sweden, and another about boundaries between Russia and China. It is impossible to do transactional and disputes work for, or relating to, Russian entities without looking at the issues from a historical perspective.

You once translated Mr. Putin’s dissertation; how did that come about?

That is an interesting story. I was representing Mr. Khodorkovsky and other shareholders in the Yukos cases and, whilst preparing, I came across various references to Mr. Putin’s dissertation which led me to try to get a copy of it in Russia. But, as I’m sure you know, things like this are not always publicly available in Russia, even if it is a public dissertation. We were looking for it in different libraries and public institutions and were always getting the “nety” answer. Eventually I managed to get a copy of it through my personal contacts and it ultimately became part of our argument in the Yukos cases. Further, I started to refer to the dissertation in speeches I was giving at various events, and many people who do not speak Russian, primarily from the energy sector, were interested in having an English translation. So I wrote a letter to Mr. Putin, whilst he was still president, asking for his permission to translate his dissertation. I hadn’t really expected a reply, but about 8 days later I received a letter from him, through Dmitry Piskov, authorizing me to go ahead with the translation and saying that he was glad that I was interested. I did not mention that I was representing Mr. Khodorkovsky, but I think he could have found that out if he had wished to.

When you are offered a new appointment as arbitrator, which factors influence your decision of whether to take it or not?

It is very different being a member of a firm, as I have been for more than 30 years, and not being a member of a firm. When you are a member of a firm you must first check whether there are any conflicts of interest and then, at least in big firms, you need to have a discussion with the partners about possible strategic conflicts of interest. Even if you are not representing a company today, you may like to work for it at some point in the future. Secondly, you need to establish whether you have enough knowledge and expertise in the particular field that the dispute in question is about. And thirdly, you have to consider whether you have sufficient time. I have previously declined appointments from time to time, mostly due to conflicts of interest. Since I became an independent arbitrator I have declined one or two appointments; one because of a conflict of interest and another because of insufficient time.

Is it common for parties to request a pre-appointment interview with you?

It happens, but not very often. As a matter of principle I do not see any problem with it, but of course it depends on what questions they ask. I can understand why someone who has never talked to me or met me before may want to. Obviously, I do not accept them putting questions about the case or any legal issues that may come up.

From an arbitrator’s standpoint, do you have any preference as to arbitral institutions?

No, not really. All the leading institutions are fine. They are structured in different ways and work in different ways but for me, as an arbitrator, they are all fine.

Please tell us about your experience with the International Commercial Arbitration Court in Moscow.

I have been sitting as an arbitrator in MKAS for 15 years, if not more, and I usually have a couple of cases there every year, though not so far this year. So I sit there on a regular basis. And I sit in the Kiev arbitration court on a regular basis as well.

Global Arbitration Review has recently awarded you as one of the “best prepared and most responsive arbitrators”. What do you do to be best prepared and most responsive?

I try to be as prepared as I can, which means that I try to read and understand everything and I try to focus on what I believe the most important issues are. It is also important to keep in mind that it is the parties who are in charge of the arbitration; it is their case, their dispute, and they are paying you to adjudicate it, so I am usually quite flexible and listen to how the parties want to do it. I try to read documents when they are submitted, because to try to read everything just before the hearing simply does not work, and then I usually re-read the materials when it gets closer to the hearing to focus on the relevant details. Generally, I just try to stay on top of the arbitration from day one.

I like counsel who focus on the relevant issues

Do you practice any special “Hober method”?

Generally, I think, no. Maybe one thing - when drafting an award, I always focus on the decisive aspects of the case or, to put it otherwise, I am always looking for the weakest or the strongest link that may decide the case. I try not to spend time and energy on other aspects which are not important in the case.

If you consider that something is relevant in a case, but the parties do not focus on it in their pleadings, what would you normally do?

That is a very tricky situation. On the one hand, I am the firm believer of party autonomy. I am not comfortable deciding a case based on something that was not pleaded by the parties. On the other hand, I may ask questions to help the parties understand what I believe is relevant or irrelevant in the case. The risk of doing this, however, is that one of the parties may say that I am helping the other party, so it is a very tricky balancing exercise. Sometimes, when you sit down after the hearing and deliberate with the other arbitrators, you discover that there is one aspect, perhaps a decisive aspect, which none of the parties have talked about. In that situation, I would normally go back to the parties after the hearing and ask them to submit written comments and documentation on the respective issues.

Are there habits which counsel appearing before you should avoid?

In most cases I do not find this to be a problem; I have never dealt with counsel who are problematic from this perspective and I have never had an experience where I have needed to sanction counsel for its conduct. I do not think being aggressive, impolite or arrogant is a good thing to be in arbitration; in most cases it is just counterproductive. I like counsel who focus on the relevant issues. The tribunal usually comes to the hearing knowing what the big problems are, and counsel typically know too so if they talk about side issues it can be irritating. In these cases I will usually try to gently encourage them to focus on the more relevant aspects.

Is there anything unique about Russian parties or counsel in arbitration?

Yes and no. If you take Russian parties or counsel who are experienced in international arbitration then there is usually no difference as against any other party or counsel. The main difference is only in the degree of experience and sometimes their language skills. There are more differences with Russian counsel who are less experienced with arbitration. They may, for example, underestimate the importance of oral evidence and cross-examination. But, again, I see it more as a question of lack of experience than anything else.

What are your usual tactics to control time and costs?

There are different possibilities, of course, and it is difficult to give general rules. First of all, when I issue the first procedural order I usually have an agreement with the parties as to the time plan and various procedures for the entire hearing. In that procedural order there are possibilities of introducing various limitations and restrictions which may help to control the time schedule and costs. This procedural order, depending on the case, may be preceded by a procedural hearing (this is common in investment cases or big commercial cases) or a telephone conference where I will discuss with the parties their views of the proper procedures and a respective timetable. Sometimes, at a certain stage of the proceedings, it may be appropriate to specify issues for the parties to focus on. Usually, you cannot do this at a very beginning. I may be doing that after having read the statement of claim and the statement of defence. Then, I may have a telephone conference or a meeting in person with the parties and ask them to focus on certain critical issues, or ask the parties to instruct their experts to focus on certain issues. Other times, the parties themselves are very good at identifying and focusing on the important aspects and there is no need to issue any instructions.

We may be on our way to a situation where the only person who can act as an arbitrator is someone who has never been an arbitrator before

Which stage of the arbitral process is usually the most useful for determination of the case?

It is difficult to say but there are usually various stages in the oral hearings where you can engage with witnesses of fact and experts in person and better understand the strong and weak points of their position.

What major changes are happening in the world of arbitration now?

There is some truth to the statement that international arbitration has become Americanized in the last 10-15 years; that is to say there are many more requests for production of documents now than you would have seen before. However, I do not see this as a big problem if the process is properly managed by the tribunal. Furthermore, a production of documents exercise may be quite helpful for the determination of the case.

One thing which does worry me is the rather hysterical attitude towards conflicts of interest. The requirements on the impartiality and objectivity of arbitrators are becoming rather ridiculous, especially in investment arbitrations. For example, some observers do not understand how you can practice both as an arbitrator and as counsel. In my view; when I'm pleading a case as counsel I am expressing the views of the client, not my own personal views, and therefore this does not per se create an issue of conflict when I encounter a similar subject matter when acting as an arbitrator. We may be on our way to a situation where the only person who can act as an arbitrator is someone who has never been an arbitrator before. If we value experience and knowledge, then having been involved in an arbitration dealing with an issue should not preclude you from being involved in another arbitration dealing with the same issue.

There are reforms underway in Russia with the objective of making Russia a more attractive seat for arbitration. Do you think this is achievable in the near future?

I have not followed the reform, but in general I think there are two main things which make a country attractive for arbitration. Firstly, any country which has legislation drafted in such a way as to allow party autonomy to be the guiding principle, such that the parties may agree on almost anything and the local courts may not interfere, has the potential of becoming a popular place for arbitration. Secondly, it is important that the judiciary and the courts understand their role properly. For example, the grounds for challenging arbitral awards should be as narrow as possible and the courts should apply those rules strictly. We have, unfortunately, seen examples in Russia where this has not been the case. Without observing these two criteria, I believe it will be difficult to build a leading jurisdiction for arbitration.

What do you like to do when you are not counseling, arbitrating or teaching?

When I was a teenager I used to be an ice hockey player, hokeist, and almost become a professional but my parents would not let me go down that path. I do not play ice hockey any more, but I run marathons. And I also do judo, just like Mr. Putin; I have a black belt in judo. And I'm a grandfather, I have two grandchildren and I spend my spare time with them, of course.

Interview with Dr. Prof. Anton V. Asoskov

Dr. Prof. Anton V. Asoskov



*Doctor of law,
Professor of the International Private Law Department
at the Russian School of Private Law
and Associate Professor of the Civil Law Department
at M.V. Lomonosov Moscow State University*

Brief CV:

Since 2001, Prof. Asoskov have been a Reporter at, and in 2009 became an Arbitrator of, the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC). He is also an Arbitrator of the International Arbitration Court at the Chamber of Commerce and Industry of Kazakhstan, the Arbitration Commission at OJSC MICEX-RTS (Russian stock exchange) and the Arbitration Court of the Association of Russian Banks. Prof. Asoskov participated in over sixty international arbitration proceedings, including under the ICC, LCIA and UNCITRAL rules. He is a member of the Working Group at the Council for Codification of the Russian Civil Legislation responsible for preparing the amendments to the Russian Civil Code (section «International Private Law»). Prof. Asoskov is a Member of the Chartered Institute of Arbitrators (MCI Arb) and a Member of the LCIA European Users' Council. He frequently acts as an expert on Russian law in foreign court and arbitration proceedings.

Education:

- Specialist Degree (Hons), M.V. Lomonosov Moscow State University, 1998,
- LL.M. (Hons), Russian School of Private Law, 2000;

Areas of academic interests

Russian civil law, international private law. Prof. Asoskov has authored 4 books and over 60 articles in law journals on various aspects of Russian civil law, comparative and international private law.

Was arbitration or private international law a popular choice at the time of your studies? Why did you choose to focus on arbitration?

In the early '90s only a very small group of people were interested in private international law in Russia. In the Soviet era, the demand for specialists of this kind was limited due to the State's monopoly of foreign trade. Practice in, and knowledge of, international commercial arbitration in Russia was at that time "handcrafted" by about two dozen individuals. Even the Moscow State University did not have a specialist qualified to lecture on private international law, and had to invite scholars from other institutions; for example, I was taught first by Prof. Dmitrieva from the Moscow State Academy of Law and later by Prof. Makovsky from the Research Centre of Private Law.

My experience with real-life arbitration started with ICAC where, thanks to the recommendation of Prof. Zykyn (an opponent to my dissertation thesis), I was offered the opportunity to become a reporter in ICAC

(this position is similar to an administrative secretary to an arbitral tribunal). This was an invaluable experience which cannot be learned from a textbook, no matter how great the textbook is. This position secured my understanding of many important details of the arbitral procedure; without which one cannot understand the real essence of international arbitration.

You have graduated from the Lomonosov Moscow State University. Can you give us the names of any lecturers and scholars who significantly influenced your views?

I consider Prof. Sukhanov as my main mentor who shaped my understanding of private law. I got addicted to civil law because of his brilliant lectures, which the students listened to in astonishment. Later, I was lucky enough to have Prof. Sukhanov as my scientific supervisor whilst I was writing my dissertation thesis. He is sometimes quite strict with his students. In fact, he literally induced me to study private international law even though I had planned to write my thesis on Russian corporate law; insisting that the faculty lacked specialists in this sphere. I am very grateful to him now for introducing me to this sphere of law.

How should ICA be taught?

In the modern world, it is very easy to gain access to information through various internet sources and databases. Therefore, lectures as a means of teaching the basics lose their meaning. What is really essential nowadays is the ability to process and structure legal data and apply it to the circumstances of a specific case and, for this reason, the most crucial element of teaching ICA is the case studies. However, this teaching method will only be effective with small groups of 20-25 students. But the new standards of the Russian Ministry of Education prescribe the ratio “one teacher or professor for not less than 8 students” which means that the university is not able to organize lessons in such small groups for many special courses. Moreover, in MSU only hours spent in lectures (and not those in seminars where the case studies can be done) are considered when a professor’s workload is assessed. Plus, the lack of financial support adds further restrictions. Therefore, and unfortunately, I think that the best teaching practices will remain an idealism which is very difficult to achieve.

Have you ever appeared as counsel before a State court? Do you remember your first case?

I worked for ten years as the head of a legal department in a rather large Russian service company. Whilst there, I had my first experience participating in proceedings before the Russian State courts. I remember being unpleasantly surprised by the unwillingness of the judges to study the details of the case. I often had the feeling that the judge had determined the outcome of the case based on his or her (not very careful) reading of the case file before I had even entered the courtroom. Hence, the judges often tended to sharply reject any line of reasoning which was different from that which they had formed in their minds beforehand.

Probably only drafting laws is harder than drafting expert opinions

I think this is one of the main reasons why ICA is so popular in our country, including as a means of dispute settlement between Russian companies with foreign investments. Russian State courts resolve cases in an extra-fast and extra-cheap fashion; one can hardly compete with them in this respect. However, if the parties want to be heard and want to have proceedings of high quality, they usually consider alternative forums for their disputes.

What do you find more exciting – being an academic, an expert or an arbitrator?

I really like combining all of these capacities in my work. Each of them requires different skills.

A good teacher should be able to explain basic theoretical concepts in a precise and comprehensive manner, and demonstrate why certain practical problems are being resolved in one way or another. I really like the saying: “if you are good at something, then you are able to explain it in a very clear and comprehensive language”. If a teacher uses complicated and incomprehensible wording, then he is either a bad teacher or does not know the subject very well.

Being a legal expert,; one needs to concentrate on the law as it is now without long academic discussions and analyses of the way that it ought to be. Since expert opinions are mostly prepared for foreign courts or tribunals, they should be as simple and as precise as possible, since the addressee will be a foreign lawyer who may lack a Russian legal background. This is truly an art; probably only drafting laws is harder than drafting expert opinions. I realized this whilst I was participating in the Working Group of the Council on Codification of the Civil Law. Whilst drafting amendments to the part of the Russian Civil Code which deals with private international law, my colleagues and I had to choose the wording very carefully in order to make it easy to use and to preclude incorrect interpretations.

An arbitrator should know how to listen to the parties carefully and how to create the most beneficial conditions for the counsel to do their job, i.e. to deliver their positions.

In your opinion, what kind of skills should a good arbitrator have?

In my view, it is crucial for an arbitrator to have a good understanding of the facts of the case in the early stages of the proceedings in order to structure the proceedings properly and to ultimately render a high-quality award on the merits of the case.

There is a requirement under the ICC Rules that the parties and arbitrators execute a procedural document called the Terms of Reference at the outset of the proceedings. One of the principal parts of this document is a list of issues to be determined by the tribunal. There are those who consider this document to be a useless and burdensome formality. In my view, every arbitrator should make just such a mental list at the outset of the proceedings and make sure that the parties have had the opportunity to present their case on all of the issues, either in their written submissions or during their oral presentations. If the award presents an unfair surprise to one or both of the parties, e.g. if a party did not consider a particular issue to be important but that issue ultimately becomes a cornerstone of the award, then it will be a bad award even if it is perfectly reasoned.

Which of your activities do you find the most challenging?

I would say standing cross-examination as a legal expert. I was recently a party-appointed legal expert in a case before an English court, and the opposing party's counsel cross-examined me for one and a half days. When it was over, I felt completely exhausted. I was impressed that the foreign counsel, questioning on Russian law which is foreign to them, demonstrated a deep understanding and asked complicated questions which may not have crossed the mind of a Russian lawyer. As for the cross-examination techniques,; I think we have a lot to learn from our English and American colleagues.

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Which of the ICA textbooks do you prefer and why?

All of the famous textbooks are useful in one or another way. For example, textbooks by Redfer/Hunter or Lew/Mistelis/Kroell are perfect to gain a basic overview of ICA. A more advanced reader, looking for an answer to a specific question, should use the monograph of Prof. Born which contains an impressive number of references to various authorities on each topic. If looking for the most liberal approaches to ICA, one should read the

French textbook of Fouchard/Gaillard/Goldman. If one is interested in a more conservative approach, I would refer him or her to the Swiss textbook of Poudret/Besson.

Whom among ICA's living stars would you be happy to have as a co-arbitrator?

I have already had the opportunity to sit on a panel with very distinguished specialists. For example, I sat on a panel chaired by Stanimir Alexandrov in a recent case under the UNCITRAL Rules. It was a very complicated and interesting case involving one of the first disputes relating to a Russian concession agreement. I believe we will hear more about this case since one of the parties has already applied to a Russian State court requesting to set aside the award.

Right now, I am also arbitrating an LCIA case together with a distinguished Swedish arbitrator, K. Hober, on the panel.

In the future, I would be happy to sit on the same panel with Gary Born. In one of my recent LCIA cases he was nominated as a presiding arbitrator but had to decline it because of a conflict of interest.

Have you noted any features of arbitration proceedings in Russia that are unique to this culture alone?

Arbitral proceedings are usually influenced by the procedures which are commonly practiced in the State courts of the country. Russian lawyers (and sometimes the arbitrators as well) copy the behaviors which they are familiar with in the State courts. For example, one rarely encounters document production in Russian arbitral proceedings, whereas this is widely used in foreign arbitrations. Also, and unfortunately, Russian tribunals rarely fix any procedural schedule and generally will not give directions on the key procedural questions - you will rarely find anything similar to the Procedural Order No. 1 which is adopted by most international tribunals at the outset of the proceedings.

This can be very confusing for the parties. For example, at a hearing in an ICAC case the presiding arbitrator suggested that the opposing counsel ask each other questions. This is a procedural model commonly used in Russian State courts, but it was a puzzling and peculiar practice for the foreign lawyers involved in this ICAC case.

If you understand that a State court would set aside your award but you strongly disagree with their position, which award would you render in your role as arbitrator?

I would of course take this into consideration because an arbitrator has an express or an implied obligation to render an enforceable award. However, in general, the considerations of fairness are more important than the threat of annulment of the award. Moreover, there have been a number of cases where arbitral awards, set aside at the seat of arbitration, have been recognized and enforced in other countries.

Can you give an example of anything odd in terms of parties' conduct which you have encountered in your role as arbitrator?

Unfortunately, I have many such examples from my Russian practice. It is the result of a lack of efficient disciplinary control over lawyers in Russia. Many Russian counsel do not consider themselves bound by any ethical rules at all.

There are a lot of examples of abusive challenges to arbitrators in the ICAC practice. In one case that I was involved in, a party representative challenged the same arbitrator on seven (!) consecutive occasions; each time using completely unsubstantiated arguments which were ultimately dismissed. The last of these arguments was on the grounds that the arbitrator could not possibly remain impartial after the party representative had sent a letter, alleging unethical conduct, to the arbitrator's main working place, causing problems in his office.

To prevent such ungrounded challenges, the Russian Chamber of Commerce and Industry has adopted the Rules of Impartiality and Independence of Arbitrators which are drafted on foreign standards (mainly the IBA Guidelines on Conflicts of Interest in International Arbitration). I actively participated in the development of this document.

What are your recommendations to young arbitration practitioners who wish to become arbitrators?

As a student, I would recommend participating in international moot court competitions, in particular the Willem C. Vis Moot. After graduation, I would recommend pleading in real arbitrations or taking part in arbitration proceedings as reporters or administrative secretaries. Moreover, I would advise reading a lot on this matter and writing publications. One venue where a young specialist may have a chance to be noticed is the Russian Arbitration Day which we organize each year with the assistance of the Russian Chamber of Commerce and Industry and a number of law firms. After each conference, we publish a digest of the

speakers' articles. Additionally, one can publish papers in the special Russian journal devoted to this field – the ICA Bulletin. The editors (including me) are happy to consider the works of young specialists, provided that they are of a high level.

What were the benefits of coaching the Lomonosov MSU team in Willem C Vis Moot for many years; a commitment which takes significant time and effort?

Working with law students is always interesting. It is like turning the clock back and, moreover, I am pleased to watch my former students becoming brilliant lawyers and outstanding specialists in their sphere.

Willem C. Vis Moot has become more of a show

The maximum grade in a Willem C Vis Moot is '50'. Would you award '50' to many counsel you have encountered in real arbitration?

There should be no doubt that the Willem C. Vis Moot and real arbitration are different. Over recent years, Willem C. Vis Moot has become more of a show where the legal arguments are not as essential as the oral skills, including the right pace, body language, eye contact, etc. In the real hearings, not many counsels have these skills. Therefore, very few of them would receive a '50' at the Willem C. Vis Moot. However, as for the legal arguments, many of my colleagues would of course receive the highest grade.

What is the difference between a good and a very good counsel?

A very good counsel is someone who makes his or her arguments with precise and simple wording, but also has brilliant knowledge of the facts in the case. It is really bizarre to watch leading counsel seeking help from his younger colleagues in regard to very basic factual questions.

Is there room for a good joke during arbitration proceedings?

Certainly. The atmosphere at an oral hearing can sometimes become too tense and a good joke from an arbitrator can take the heat off. One of the differences between ICA and State courts is that the arbitrators receive their mandate from the parties who have entrusted them to resolve the case, and they do not need to keep the same distance that State judges do. Obviously, an arbitrator should nevertheless always abide by his or her ethical obligations and should remember that risky jokes addressed to one of the parties can be treated as prejudice.

You are the author of many legal writings. How do you structure your work on a new paper?

I am a perfectionist; therefore I cannot write a paper until I have read all basic Russian and foreign authorities on the issue. There may be dozens of them, therefore it is impossible to memorize the contents of all of these sources. That is why I usually divide the work into sub-issues and assign a separate electronic or hard-copy file for each of them. Whilst reading, I copy the most crucial thoughts and ideas into these files. Therefore, when I start writing the paper I already have summaries of various opinions on every sub-issue, which helps me to cover all possible views on the matter. I think it is this method which allowed me to write my doctoral thesis and two monographs on its basis, which refer to over three hundred authorities.

Which book would you take on a plane?

An interesting fantasy novel; it helps me to relax. However, in reality it is usually case files for an upcoming hearing or students' papers.

Arbitration Events to Attend

4-5 June 2015

4th DIS Baltic Arbitration Days

Organiser: DIS-Baltikum, Riga Graduate School of Law
Location: Riga, Latvia
<http://www.balticarbitration.com>

19 June 2015

International Commercial Arbitration in Sweden and Russia

Organiser: Ural State Law University, SCC Arbitration Institute
Location: Yekaterinburg, Russia
<http://www.sccinstitute.com>

23-24 June 2015

Women in Dispute Resolution

Organiser: C5
Location: London, UK
<http://www.c5-online.com/WDR>

25-27 June 2015

5th ICC YAF Global Conference

Organiser: ICC YAF
Location: London, UK
<http://www.iccwbo.org>

30 June 2015

Allen & Overy Young Arbitration Practitioner Drinks

Free of charge

Organiser: Allen & Overy LLP
Location: London, UK
<http://www.allenoverly.com>

1-3 July 2015

CIArb London Centenary Conference

Organiser: CIArb
Location: London, UK
<http://www.ciarb.org/centenary/conference-lon>

6-9 July 2015

ICC Summer Course on International Commercial Arbitration

Organiser: ICC International Court of Arbitration, College of Law and Business
Location: Paris, France
<http://www.iccwbo.org>

11 September 2015

Young International Arbitration Group (YIAG) Symposium

Organiser: LCIA YIAG
Location: Tylney Hall, UK
<http://www.lcia.org>

11-13 September 2015

LCIA European Users' Council Symposium

Organiser: LCIA
Location: Tylney Hall, UK
<http://www.lcia.org>

18-19 September 2015

International Arbitration Conference

Organiser: ICDR Y&I, ICCA, Young ICCA, ICC YAF
Location: Cyprus
<http://www.arbitration-icca.org>

28 September 2015

ICC YAF: What you need to know about quantum

Organiser: ICC YAF
Location: London, UK
<http://www.iccwbo.org>

3-4 October 2015

LCIA European Users' Council Symposium

Organiser: LCIA
Location: Vienna, Austria
<http://www.lcia.org>

4-9 October 2015

IBA Annual Conference

Organiser: IBA
Location: Vienna, Austria
<http://www.ibanet.org>

22-23 October 2015

LCIA and AIPN Symposium on Oil and Gas Dispute Resolution

Organiser: LCIA, AIPN
Location: London, UK
<http://www.lcia.org>

5 November 2015

LCIA European Users' Council Symposium

Organiser: LCIA
Location: Moscow, Russia
<http://www.lcia.org>

12 November 2015

7th Annual IBA Mergers and Acquisitions in Russia and CIS Conference

Organiser: IBA
Location: Moscow, Russia
<http://www.ibanet.org>

RAA40 Events

Arbitration in Singapore Seminar

On 19 January 2015 RAA40 members met to discuss in interactive format the various practical issues relating to arbitrations seated in Singapore and particularly under the SIAC Rules. Ms Seok Hui Lim (CEO of the SIAC) and Mr Aloke Ray (Partner, White&Case (Singapore)) kindly agreed to answer the questions of the audience which included private practitioners, in-house counsel and academics. White & Case (Moscow) supported and hosted the seminar.

The discussion began with questions about how SIAC compares to other arbitration institutions Russian parties favour such as the ICC and the LCIA as well as the HKIAC. Speaking about SIAC's advantages compared to traditional European institutions Ms Lim highlighted the lower arbitration costs as well as the SIAC's secretariat drive to ensure speedy progress of arbitration. Comparing to HKIAC she noted the SIAC's more extensive track-record of emergency arbitrator proceedings as well as more predictability in long-term supporting stance to arbitration of Singaporean courts.

In discussing Singapore rapid development as a leading arbitration center both Ms Lim and Mr Ray underlined consistent cooperation in this endeavour of all stakeholders including state authorities, courts, the SIAC and law firms. In particular, Singaporean authorities adopted an arbitration-friendly legal framework and regularly consult all interested parties on whether any amendments are desirable. Furthermore, they have for a long time supported SIAC's efforts to promote itself internationally, including by direct funding. SIAC in turn has been equally open to discuss its rules and procedures with arbitration users and take on board they suggestions. SIAC's ambition of being an international arbitration center is reflected in international composition of its Court as well as the secretariat. One of the ways in which the secretariat interacts with the users is by being available to discuss any practical issues regarding the rules or SIAC arbitration by phone or email.

Ms Lim noted with satisfaction the growing interest of Russian parties to SIAC arbitration. She said that during the last few years SIAC has seen only a small number of disputes involving a CIS party. This may explain in part why there is only one Russian arbitrator on the SIAC list of arbitrators (Ilya Nikiforov (Egorov, Puginsky, Afanasiev & Partners)). However, Ms Lim stressed that the institution is certainly prepared for the increase in the number of 'Russian' disputes and if it occurs will proceed accordingly including by potentially putting more Russian lawyers on the list of arbitrators.

The participants next turned to the practice of Singaporean courts in arbitration-related cases. Mr Ray stressed that the courts are generally 'arbitration-friendly' and awards are rarely set aside – an important advantage for an arbitration seat. However, he noted that it is by no means impossible to set aside an award, where the court finds that one of the grounds for setting aside is present. In this respect he referred to the recent decisions in *Astro v First Media*, where Singaporean courts refused to enforce an award, finding that the tribunal lacked jurisdiction.

RAA40 is grateful to White&Case and to Mr David Goldberg and Ms Yulia Zagonek for assistance with organizing the event and for hosting it.



Ms Seok Hui Lim



Mr Aloke Ray

Women in Arbitration – 6 March 2015

On the eve of the International Women's Day RAA40 ladies gathered together to discuss the position of women in legal profession and in particular, in arbitration. Being aimed at portraying an arbitration woman, elaborating on difficulties that she faces and working out the tips for her, the event was very welcomed by the community. Experienced female arbitration practitioners - **Maria Yaremenko** (Hogan Lovells), **Ekaterina Kobrin** (Baker & McKenzie) and **Lilia Klochenko** (AKP Consulting) shared their thoughts with the younger at tea surrounded by friendly atmosphere of a tea house.

The event was kindly sponsored by **Hogan Lovells** and **AKP Consulting**.

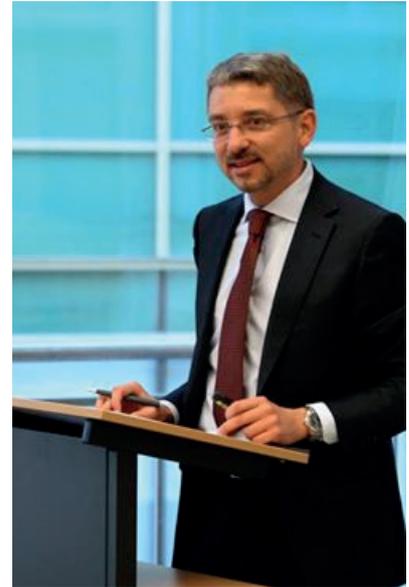


Emergency Proceedings Discussion – 13 March 2015

By Mikhail Kalinin, Lomonosov Moscow State University, Faculty of Law

On 13 March 2015 the 6th Moscow Pre-Moot to the world's leading moot competition in private law and arbitration, the Willem C. Vis International Commercial Arbitration Moot, began with the discussion "Emergency Proceedings in International Arbitration" hosted by Moscow Office of White & Case. Dozens of Vis Moot team members and coaches, arbitrators and practicing lawyers attended the discussion.

Darya Shirokova, Deputy Counsel at International Court of Arbitration of ICC, started by demonstrating the contrast between the ICC Pre-Arbitral Referee and the ICC Emergency Arbitrator introduced by the 2012 amendments to the ICC Arbitration Rules. Thus, the goal of ICC was to make the order of the Emergency Arbitrator binding upon the parties. The other goal was to ensure that the order takes form of an award and is, therefore, enforceable under the New York Convention. Ms. Shirokova continued with the Emergency Arbitration procedure, timetable and statistics. In the second part of the presentation, Ms. Shirokova gave an insight into the recent Emergency Arbitration practice and analysed the requirements for granting an interim order under the ICC Rules. Importantly, one Emergency Arbitrator found that under the Art. 29(6-a) of the ICC Rules, the Emergency Arbitration provisions do not apply even in cases where the arbitration agreement which was concluded before the ICC Rules came in force is contained in a contract which was amended after this date.



Christian Aschauer

Christian Aschauer, Professor at Karl-Franzens-University of Graz and Partner of Andreas Reiner & Partners, discussed the issues relevant to this year's Vis Moot Problem. Prof. Aschauer further addressed the issue of enforceability of Emergency Arbitrator's interim orders under national laws and case law of several jurisdictions. As the pre-arbitral procedure capable of granting binding conservatory or interim measures is comparatively new, different jurisdictions take opposite positions on the matter.

Ekaterina Kobrin, Associate at Baker & McKenzie, commented on the Emergency Arbitration under the Stockholm Chamber of Commerce Rules. Ms. Kobrin pointed out the application for an emergency measure must always be directed to a signatory to an arbitration clause, however, the Emergency Arbitrator may, for instance, order a parent company to instruct its subsidiary to take particular action or to refrain from acting. Ms. Kobrin also noted that a declaration of acknowledgment of an obligation by responding party may be sufficient for an emergency arbitrator to refuse to grant an interim order.



Ekaterina Kobrin

Stepan Guzey, Partner at Lidings, made a very practice-oriented survey of Russian courts' decisions on enforceability of foreign emergency arbitration orders in Russia. The courts used to refuse to recognise and enforce such orders because of formal reasons but a decision of the Russian Supreme Arbitration Court in the case of 1 March 2010, No. VAS-17095/09 (BAC-17095/09) changed this practice in the arbitration-friendly way. The SAC stated that the courts may order provisional measures in support of arbitration even if the arbitration is seated abroad.

6th Willem C. Vis Moscow Pre-moot – 14-15 March 2015

By Ani Astabattsyan, Lomonosov Moscow State University, Faculty of Law

On 14 and 15 March 2015 Lomonosov Moscow State University hosted the 6th Willem C. Vis Moscow Pre-moot. The Willem C. Vis Moot is a leading competition for students, where the teams from all over the globe prepare written and oral submissions on the matters related to the international sale of goods and international commercial arbitration. This year's moot case involved the issues of jurisdiction over a non-signatory to an arbitration agreement and emergency arbitration (the proceedings were governed by the ICC Rules), as well as the problem of avoidance for fundamental breach in commodity sales under the CISG.



While the main competition takes place in Vienna, each year various pre-moots are organized in leading law schools of the world with the aim to help the teams to train their arguments before Vienna. Lomonosov University hosts the Pre-Moot since 2010. The participating teams include Russian and foreign teams. This year, together with Russian teams, the University was happy to welcome Karl-Franzens-Universität Graz team (Austria) and Ankara team (Turkey).

Not only the Moscow Pre-Moot is a helpful step in preparation to Vienna rounds for those competing in the Moot, but is also a great networking experience. The Pre-Moot gathers partners and lawyers from various Russian and international law firms, such as Quinn Emmanuel, White & Case, Baker & McKenzie, Cleary Gottlieb, Morgan Lewis, Alrud, EPAM, as well as academics, former Vis Moot participants and coaches of the teams. It is therefore a unique opportunity for any interested lawyer or a law student to interact with other people sharing the same interests and working in the field of dispute resolution and commercial law.

Each year, based on the scores given to the teams and individual speakers (which plead for both claimant and respondent at least once) the organizers of the Pre-Moot announce the three top teams and speakers of the Pre-Moot. This year the winner was the team of **Peoples' Friendship University**. The **Graz** team finished second, and the **MGIMO** team – 3rd. The Best individual speaker of this year is **Oleg Blinov** (MGIMO), the second – **Ani Astabattsyan** (Lomonosov Moscow State University), and the 3rd place went to **Vladislav Osykyn** (MGIMO).

Organizing the Pre-Moot would be impossible without the support of its partners. The Lomonosov University would like to thank the main partners – **Monastyrsky, Zyuba, Stepanov & Partners Law Firm** (and Yury Monastyrky personally), **Cleary Gottlieb Steen & Hamilton LLP** (and Scott Senecal and Yury Babichev personally) and **White & Case** (and personally David Goldberg and Julia Zagonek) and supporting partners – **Morgan Lewis & Bockius** (and Jonathan Hines personally), **Lidings** (and personally Stepan Guzey) and **Baker & McKenzie** (and personally Vladimir Khvalei).





The University is also grateful to the media partner of the event – Russian Law Journal (www.russianlawjournal.org).

Essential assistance to the event was kindly provided by the members of **RAA25** Organizing Committee – **Ays Lidzhanova, Roman Kuzmin, Andrey Chernov** and **Alexandra Shmarko** and by **Olga Narkaeva**.

Additional information about the pre-moot can be found on its web page www.vismoot.ru. If you have any questions, please do not hesitate to contact the organizers at moscowpre moot@gmail.com.

Welcome to the 7th Moscow Pre-Moot on 27 and 28 February 2016!

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>.