RAA 40

Russian Arbitration Association

Newsletter

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Welcome from Co-Chairs

Dear friends and colleagues,

We are pleased and proud to present to you, after a long pause, the latest issue of RAA40 Newsletter.

The issue comes on the heels of a truly exciting year for the Russian arbitration community and we accordingly have a lot to report. A comprehensive reform of both domestic and international arbitration laws has been signed into law and comes into force on 1 September 2016 (see pages 7 to 11). Courts around the world have been busy dealing with Russia-related arbitration cases: Tyumenneftegaz succeeded in setting aside an SCC award (see pages 14 to 15) and the High Court of England and Wales decided that a tort claim alleging a 'corporate raid' by the government of Moscow is covered by the arbitration clause in a shareholders agreement with a government-owned company (see pages 12–13). In the meantime, Russian courts continued to struggle with the concept of 'objective impartiality' of arbitral institutions (see pages 4–7).

We continue with our series of interviews with leading Russian arbitration practitioners and recent graduates of arbitration-related LLM programs. This time we have been truly fortunate that Professor Alexander Komarov, one of the preeminent Russian arbitrators, agreed to discuss with us his career in law and arbitration (see pages 25 to 32). Elena Cherkasova shared with us her very exciting experience of pursuing an LLM in dispute resolution at Pepperdine University Law School, one of the top US programs in the sphere (see pages 33 to 37).

We were excited to welcome you at the various events organized or co-organized by RAA40 (see pages 43 to 47) culminating with the annual RAA40 New Year Awards and Drinks! We take this opportunity to once again congratulate the recipients of the 2015 Top 10 Young Arbitration Practitioners Award (see page 47)!

Finally, we would like to invite you to the main arbitration event of the spring - the VII Moscow Vis Pre-Moot on 27-28 February, and to the preceding workshop and conference on 26 February 2016 (see pages 40 to 41). The event gather teams from Brasil, Austria, Switzerland, Netherlands, Czech Republic, Serbia and CIS countries. Over years Moscow pre-moot proved to be an attractive platform for professionals to communicate and discuss topical ICA issues. If you are a practicing lawyer please consider signing up as an arbitrator to get the most exciting and rewarding experience of all!

Yours sincerely,
RAA40 Co-Chairs


Sergey Usoskin


Olesya Petrol


Egor Chilikov


Anna Shumilova

Courts and Arbitration in Russia

Overview of Key Court Decisions: May – December 2015

By Sergey Usoskin, Attorney, Double Bridge Law

1. Supreme Court Takes Ambiguous Stance on Arbitrability of Disputes Concerning Publicly Funded Works

(OJSC Dagenergoremstroy v. OJSC MRSK of Northern Caucasus, no. A63-1891/2013, Supreme Court Ruling of 2 December 2015)

The dispute concerned validity of an arbitration clause in a contract between two private companies for the creation of a complex electric power metering system. These works were undertaken as part of a state-funded program to increase energy efficiency. The contractor argued that since these works were undertaken for a public purpose and were ultimately publicly funded, any disputes between the parties would be of public nature and therefore non-arbitrable.

The Supreme Court upheld the lower court's decision to dismiss the claim, but on a very narrow basis. Specifically, the Supreme Court pointed out that the claimant had failed to prove any injury resulting from the challenged clause. The arbitration clause had not yet been invoked and accordingly the tribunal had not yet ruled that it may exercise jurisdiction. The court added that in any event in such cases the state court retains the power to refuse recognition and enforcement on public policy grounds "to protect public interests" leaving wide room for post-award review.

The Supreme Court previously held that public procurement disputes are not arbitrable, but to reach this conclusion it relied on the complex contracting process prescribed by the law. In this case two private companies entered into the contract and the state's involvement was only indirect. The Supreme Court's refusal to expressly confirm arbitrability of such disputes may be seen as a sign of disagreement within the court itself as to the proper position. The risk nevertheless remains that in the future the Supreme Court will hold such disputes non-arbitrable.

2. Structural Links between the Arbitral Institution and a Party May Void the Arbitration Clause if They Create Even 'Slightest Doubts' as to Independence of Arbitrators

(M.V. Smolyanov v. OJSC Moscow TV Plant Rubin, no. A40-91439/2014, Supreme Court Ruling of 26 October 2015)

Supreme Court provided an important clarification as to the effects of affiliation between the arbitral institution and a party. It held that the court should invalidate the arbitration clause referring the dispute to a party-affiliated arbitral institution even if only 'slightest doubts' as to the independence of the tribunal cannot be ruled out.

Several years ago the Supreme Commercial Court decided that where an arbitral institution is affiliated with one of the parties to the dispute no arbitration administered by the institution may be considered independent. The Constitutional Court disagreed and decided that affiliation as such is not enough and something more is required before a court can refuse to enforce the award rendered by a tribunal administered by such an institution.

The case before the Supreme Court was a dispute between a lessee and the lessor. The lease contained an arbitration clause referring any disputes to arbitration. The general director and a major shareholder of a company affiliated with the lessor also owned and managed the arbitral institution. The lower courts relying on the Constitutional Court's decision found that this affiliation as such was insufficient to taint the arbitration and the lessee failed to prove that the arbitrators in the specific case would not be independent.

The Supreme Court found that the lower courts should have scrutinized the practical implications of the affiliation for the particular dispute. If the lower courts were to establish that a risk of 'slightest doubts' as to the independence of the tribunal exists, they should have invalidated the arbitration clause. The Supreme Court observed that affiliation in itself is not a basis for invalidation, but this does not mean that the courts should ignore it and focus exclusively on the independence of the individual tribunal members.

3. Supreme Court Reaffirms Validity and Enforceability of Clauses Permitting the Claimant to Choose Between Arbitration and Litigation

(LLC Piramida v. LLC BOT, no. A62-1635/2014, Supreme Court Ruling of 27 May 2015)

Supreme Court reversed lower courts' decisions refusing to recognize and enforce a domestic arbitral award. Lower courts relied on the *Sony Erickson* decision of the Supreme Commercial Court to find that the dispute resolution clause in the underlying contract violated the principle of procedural equality and held that the tribunal had had no jurisdiction. The Supreme Court panel disagreed; it pointed out that the clause in fact provided equal rights to both parties to the contract, since obviously each of them could have been claimant.

The decision is a welcome rebuke to the *Sony Erickson* principle being taken to the extreme. Indeed, as the Supreme Court noted clauses providing the right to choose forum to the claimant are common in Russian commercial practice and the Supreme Commercial Court had already confirmed their validity. They do create problems when it comes to enforceability and potential conflicts of jurisdictions where both parties sue each other in different fora. However, the court did not need to address this issue in the case before it.

A more problematic aspect of the case is that the Supreme Court did not reject in principle the possibility of refusing to recognize and enforce an award on the basis of the arbitration clause failing to respect the principle of procedural equality. Indeed, *Sony Erickson* decision suggested that where the arbitration clause gives only one of the parties the right to choose between arbitration and litigation the same right should be accorded to the other party. In other words, the court did not rely expressly on the invalidity of the entire clause. As the result, any award rendered by a tribunal constituted under such a clause would be enforceable since the 'arbitration' part remains valid. The Supreme Court chose not elaborate on this issue. One should be cautious about attributing too much weight to this choice, since the Supreme Court may have been motivated by reasons of judicial economy or arguments before it.

4. Service of Process Rules from the Mutual Legal Assistance Treaties Do Not Apply to Arbitration

(LLC Noviy Druk v. LLC Agromax-Inform, no. A08-4781/2014, Ruling of the Supreme Court of 5 November 2015)

The Supreme Court reversed the decisions of the lower courts that had refused to recognize and enforce an arbitral award rendered by the tribunal under the Ukrainian Chamber of Commerce Rules. The lower courts

relied on the fact that the arbitral tribunal had failed to give to the respondent adequate notice of arbitration. Mutual legal assistance treaties concluded by CIS states provide for a special procedure for the service of process, which the arbitral tribunal had failed to follow.

The Supreme Court began by pointing out that the mutual legal assistance treaties do not apply to arbitration. They govern service of process in international cases before national state courts. In arbitration the rules concerning correspondence are primarily reflected in the relevant rules. If the arbitral tribunal observed these rules and the respondent received the relevant correspondence, the court may not refuse enforcement due to inadequate notice.

Furthermore, the Supreme Court criticized the lower courts for raising the notice issue on their own initiative. The respondent in the enforcement proceedings failed to expressly rely on this ground. The Supreme Court drew the attention of the lower courts to Article V of the New York Convention, which provided that the inadequate notice is a ground for non-enforcement only when invoked by the respondent.

5. Consent Awards Should Reflect Parties' Agreement

(Latvijas Tilti v. JSC Vozrozhdenie, no. A56-14627/2015, Resolution of the Commercial Court for the North-Western Circuit)

The courts refused to recognize and enforce a consent award rendered by the tribunal sitting under the Russian Chamber of Commerce and Industry rules. They upheld the respondent's argument that the tribunal violated the respondent's right to be heard, when it rendered the award, which contained only part of the terms the parties agreed to without giving the parties and opportunity to comment on this.

The original dispute arose out of construction contract between the general contractor and a subcontractor. The subcontractor commenced arbitration to recover the sum the general contractor failed to pay for the works performed. The parties eventually agreed to settle the case, with the respondent agreeing to pay certain sums and the claimant waiving all the claims under the relevant contract. They asked the tribunal to record the agreement in a consent award. The arbitral tribunal rendered an award that reflected only part of the agreement (the general contractor's obligation to make payment).

In refusing to enforce the award the courts agreed with the respondent that the arbitral tribunal should have given the parties an opportunity to make submissions on the scope of the award. The nature of the consent award presupposes that it should reflect the agreement of the parties. The parties may not dictate to the tribunal the content of the award; if the tribunal considers itself unable to issue an award the tribunal should refuse to do so rather than put into a 'consent' award only those parts of the parties' agreement that it considers appropriate.

6. By Agreeing to the Finality of an Arbitration Award the Party May Completely Lose the Right to Apply to Set the Award Aside

(Government of St. Petersburg v. LLC Nevskaya Concession Company, no. A40-66296/15, Resolution of the Moscow Circuit Court)

The Moscow Circuit confirmed the lower court's decision terminating set aside proceedings the Government of St. Petersburg had commenced. The court ruled that since the parties have agreed to the finality of the award, they have waived the right to apply to set the award aside.

The Government of St.Petersburg applied to set aside an award rendered against it by a Moscow-seated UNCITRAL tribunal. It argued that the award was contrary to the Russian public policy and hence should be set aside.

The circuit court ruled that the finality of the award agreed to by the parties constitutes an absolute bar to set aside even on public policy grounds. It distinguished an earlier case, where such a challenge had been permitted, by pointing out that there the challenge had been brought by a non-party to the underlying arbitration.

The exact effect of the decision remains unclear. In terminating the proceedings the courts received comfort from the fact that parallel recognition and enforcement proceedings were already underway in St. Petersburg and apparently decided to avoid any inconsistent rulings.

It remains to be seen whether similar approach would be adopted in a case, where the enforcement must take place outside of Russia. Nevertheless, parties agreeing to 'finality' of the arbitration award must bear the possible consequences in mind.

The New Russian Arbitrations Laws: What Awaits Us After 1 September 2016?

Sergey Usoskin, Attorney, Double Bridge Law

The Russian Parliament passed two laws[1] which substantially overhaul the legal regime of domestic arbitration as well as the rules on arbitrability, form of the arbitration agreement and setting aside of arbitral awards applicable to international arbitrations and rules on administration of arbitrations seated in Russia. The laws will enter into force on 1 September 2016

The reform initiated back in 2012 pursued twin aims of making the arbitration in Russia a more convenient and attractive option for businesses and preventing the use of arbitration for abusive purposes. Perhaps it is not surprising that in the end many provisions of the law appear unusual and restrictive to foreign observers and it remains to be seen whether in these circumstances arbitration in Russia will become an attractive option.

These provisions should be seen in light of the government's concern that unscrupulous parties use many of the existing 2500+ arbitral institutions in Russia for improper purposes: 'creating' debts of insolvent companies, ensuring a 'guaranteed win' for one of the parties or syphoning property from companies both private and state-owned. The desire to clean up the act of arbitration by a set of radical and harsh measures is somewhat understandable, and perhaps once this aim is achieved the government will repeal or relax many of these measures.

The article below discusses the most important changes to the law focusing on the ones that affect parties to arbitrations rather than the arbitral institutions. The following elements of the reform are examined separately: (i) arbitrability of disputes (including arbitrability of corporate and public procurement disputes); (ii) ad hoc arbitration; (iii) form and content of the arbitration agreement; (iv) recognition and enforcement and setting aside of arbitral awards; (v) new legal regime for Russian arbitral institutions and foreign institutions administering arbitrations seated in Russia and (vi) immunity of arbitrators and arbitral institutions.

This article provides only a short summary of the relevant changes as understood by the author at this stage. Many of the provisions are less than clear and the Russian arbitration community will spend the next 9 months before the law enters into force trying to ascertain their meaning and exact effect. In the meantime I hope this article will provide a helpful introduction to the interested readers.

I. ARBITRABILITY OF DISPUTES

Under the revised law any civil law dispute may be submitted to arbitration, unless the law expressly provides otherwise. This reference to civil, that is private, nature of the dispute continues to leave the door open to

[1] Federal Law On Arbitration in the Russian Federation dated 29 December 2015, No. 382-FZ and Federal Law On Amendments to Certain Laws of the Russian Federation... dated 29 December 2015, No. 409-FZ.

restrictions on arbitrability of disputes involving the state or state agencies if the court decides that the underlying relations are public rather than private in nature.

There is a broad list of disputes that are not arbitrable or may only be referred to an arbitration seated in Russia or an arbitration seated in Russia and administered by a authorized arbitration institution. Below I look separately at (a) 'corporate' disputes; (b) public procurement disputes; (c) other non-arbitrable disputes.

A. Arbitrability of 'corporate' disputes

In the infamous *NLMK v Maximov* set aside decision, the courts ruled that the disputes under a share purchase agreement with respect to a Russian company are not arbitrable (the courts relied on some of the conditions precedent in the agreement requiring the target company to issue shares to explain the 'corporate' nature of the dispute). The revised law will expressly allow parties to refer 'corporate disputes' to arbitration under agreements parties enter into on or after 1 February 2017, but with certain important exceptions and subject to stringent conditions. The same provision of the law purports to render unenforceable all agreements providing for submission of 'corporate disputes' to arbitration the parties entered into before 1 February 2017.

The revised law will expressly allow parties to refer 'corporate disputes' to arbitration under agreements parties enter into on or after 1 February 2017

'Corporate disputes' are defined widely and cover disputes concerning creation, reorganization and liquidation of a company, disputes concerning the management of the company between the shareholders and/or the company, officers' liability, appointment of the managers as well as disputes arising out of share purchase agreements and other transactions involving shares in a company (pledges, etc).

Corporate disputes are arbitrable, however parties may only refer them to arbitration administered by an arbitral institution and not ad hoc arbitration. Furthermore, for corporate disputes, except these concerning transactions with shares in a company

I the arbitration must be seated in Russia and administered by an authorized arbitration institution under the rules of corporate disputes arbitration;

II all the shareholders of the company and the company itself must be party to the arbitration agreement.

The disputes involving companies of 'strategic importance' (as defined by the Russian law) are generally not arbitrable. The relevant law contains very broad criteria for deeming the company of strategic importance, so that for example a diary producer may be deemed to be of 'strategic importance' due to the license it holds to produce bacteria the producer then uses to make yoghurts. Disputes concerning title to shares in these companies are arbitrable, provided the underlying transaction does not require prior approval under the law on companies of strategic importance.

B. Public Procurement-Related Disputes

Russian law contains an extensive set of regulations governing procurement of goods, works and services by state organs and agencies as well as state establishments. The law provides that such disputes are not arbitrable codifying the existing case law. It has been suggested that in the future the government may agree to allow submission of such disputes to arbitration after it selects reliable and reputable arbitral institutions to administer them.

C. Other categories of non-arbitrable disputes

The revisions to the relevant procedural codes record other categories of disputes that are not arbitrable:

- disputes concerning privatizations of state and municipal property;
- family law disputes except disputes concerning distribution of property following a divorce;
- employment disputes.

II. *AD HOC* ARBITRATION

Many commentators saw ad hoc arbitration as the way to circumvent the reform's attempts to prevent abuse of arbitration by applying stringent requirements to arbitral institutions. It is not surprising that as the result the law attempts to make ad hoc arbitration an unattractive option by several means:

- Certain types of disputes cannot be referred to an *ad hoc* arbitration (e.g. corporate disputes).
- *Ad hoc* arbitral tribunals may not request or authorize parties to request court assistance in the procurement of evidence.
- Parties to an *ad hoc* arbitration may not agree on limiting court intervention into the arbitration in the form of (a) setting the award aside; (b) serving as an appellate instance for challenges to arbitratorsand as the fall back option for the appointment of arbitrators.

In addition, following completion of an *ad hoc* arbitration the tribunal must deposit the entire file (submissions and evidence and a copy of the award) with an arbitral institution the parties have agreed on or in the absence of such an agreement with the state court at the place of potential enforcement.

The law attempts to make *ad hoc* arbitration an unattractive option by several means

The parties may delegate certain functions relating to an *ad hoc* arbitration, such as acting as the designating authority or fee administration, only to an authorized Russian arbitral institution or a foreign institution.

III. FORM AND CONTENT OF THE ARBITRATION AGREEMENT

The requirements concerning the form of the arbitration agreement differ depending on whether the arbitration is international or domestic.

With respect to international arbitration the revised law in essence adopts 2006 UNCITRAL Model Law Option 1. The agreement must be in writing, but the requirement is met if the content is recorded in any form, which makes it accessible in the future, including by exchange of electronic communications.

For domestic arbitrations the requirements are more stringent. The agreement must be in writing and if it has been entered into by exchange of electronic communications there must be conclusive evidence that the documents originate from the respective parties.

The other rules apply to both domestic and international arbitration and address some difficulties Russian courts faced in applying the existing law:

- a presumption in favor of validity and enforceability of an arbitration agreement;
- extension of the arbitration clause in a contract to disputes concerning validity and enforceability and termination of the contract as well as to disputes concerning transactions entered into in performance contract, unless the parties have otherwise agreed;

- automatic extension of the arbitration clause in a contract to the assignees of the contractual rights and obligations; the arbitration clause continues to apply as between the assignor and the other party to the contract as well.

Everyone drafting an arbitration clause contemplating an arbitration seated in Russia must consider that the law requires the parties to expressly agree on certain terms and conditions

The shareholders of a company may include an arbitration clause in the charter of the company, provided (i) the respective provision receives unanimous approval; (ii) the clause provides for the arbitration seated in Russia and for the application of arbitration rules for corporate disputes (iii) the company has less than 1000 shareholders.

Everyone drafting an arbitration clause contemplating an arbitration seated in Russia must consider that the law requires the parties to expressly agree on certain terms and conditions. A reference to the arbitration rules will be deemed insufficient to evidence parties' agreement. These are:

- exclusion of recourse to state courts: (i) to appoint an arbitrator in the event the procedure for appointment the parties agreed to fails; (ii) to decide on a challenge to an arbitrator;
- exclusion the right of a party to challenge the arbitral tribunal's decision on jurisdiction before state courts;
- waiver of the right to apply to set the award aside.

Such an agreement of the parties will only be valid if they agree to institution-administered arbitration and not ad hoc arbitration.

IV. RECOGNITION AND ENFORCEMENT AND SET ASIDE PROCEEDINGS

The Russian law will continue to limit the grounds for both refusal to recognize and enforce an award and for setting aside of the award to these provided by the New York Convention. In domestic arbitration public policy will replace 'contravention to the fundamental principles of Russian law' as the ground for refusal to enforce the award. Currently some courts rely on the 'fundamental principles' ground to engage in the review of the award's the merits.

Revised laws will expressly provide for the unprecedentedly broad waiver of the right to apply to set the award aside. If the parties expressly agree to the finality of the award they may not apply to set the award aside even on public policy or non-arbitrability grounds. This sets Russia apart from most other jurisdictions, where finality means that neither party may appeal the awards on the merits. In light of this difference drafters using international templates or sample arbitration clauses should be careful. If the parties wish to retain the right to challenge the award they must exclude the word 'final' or expressly stipulate that they retain the right to apply to set the award aside.

In an attempt to expedite enforcement of arbitral award revised laws require the court of first instance to rule on an application to recognize and enforce the award within a month (this rule will enter into force from 1 January 2017). Currently, the first instance court has three months to consider such an application. The change is important, since the decision of the first instance court is immediately enforceable, unless the cassation instance court decides to stay enforcement on application of the respondent.

The law permits the court to refer the award back to the arbitral tribunal if the court identifies certain procedural defects the tribunal may remedy. In this case, the tribunal has 3 months to remedy the defects.

Finally, the amendments to the relevant procedural code set out a procedure for dealing with recognition of judgments and arbitral awards that do not require enforcement (such as a declaratory award). The law places the burden on the losing party to file an objection to recognition in Russia based on any of the grounds provided for the refusal to recognize and enforce an award. The objection must be lodged within a month of the date the party becomes aware of the judgment or award.

V. REGISTRATION OF ARBITRAL INSTITUTIONS

The revised laws provide different regimes for Russian arbitral institutions and foreign institutions administering arbitrations seated in Russia.

Revised laws will expressly provide for the unprecedentedly broad waiver of the right to apply to set the award aside

For foreign institutions that would like to administer institutional arbitrations seated in Russia the procedure is rather straightforward. They may apply for a right to administer such disputes and the Russian government shall confer on them such a right if the institution possesses "widely recognized international reputation". If the foreign institution does not obtain such a right the arbitrations seated in Russia it administers will be deemed ah hoc. This will entail certain negative consequences (see section II above). If the foreign institution wishes to administer arbitrations for the settlement of corporate disputes it must adopt a separate set of rules for such disputes meeting certain requirements set out in the Russian law.

For Russian institutions the procedure is far more complicated with the International Commercial Arbitration Court (MKAS) and the Maritime Arbitration Court (MAK) at the Chamber of Commerce and Industry being two exceptions. The other arbitral institutions must obtain the right to administer institutional arbitration. To obtain such a right the must meet a set of requirements (a) be created by a non-profit organization that (b) possesses reputation ensuring orderly organization and financial sustainability of the arbitral institution (c) the institution must have a list of 30 recommended arbitrators with at least half of the arbitrators on the list having more than 10 years of experience of settling disputes as an arbitrator or a judge and at least a third of the arbitrators having a relevant postgraduate degree (PhD or doctorate).

A Russian arbitral institution must deposit its rules with the designated state organ and comply with certain transparency requirements, such as maintaining a web-site and disclosing information with respect to its management team and founders. If the institution fails to comply with the applicable requirements the yet-to-be-designated state organ will issue a warning and order the institution to remedy the non-compliance. If the institution engages in gross violations of the applicable requirements a court may order to shut the institution down on application of the state regulator.

VI. IMMUNITY OF ARBITRAL INSTITUTIONS AND ARBITRATORS

The revised law provide for a set of immunities applicable to both arbitral institutions and arbitrators.

- Arbitral institutions are only liable for damages caused to the parties if the damages result from willful misconduct or gross negligence of the arbitral institution.
- An arbitrator is only liable if the damage was caused by a criminal offence the arbitrator committed as determined by the final judgment in the criminal case.
- An arbitrator may not be called as a witness in either civil or criminal proceedings with respect to the information the arbitrator has learned in the course of an arbitration.

Courts and Arbitration Abroad

England

Egiazaryan and Gogokhiya v OJSC OEK Finance and The City of Moscow [2015] EWHC 3532 (Comm)

By Robert Dougans and Tatyana Talyanskaya, Bryane Cave LLP (London, UK)

The Arbitration Act 1996 allows a party to an arbitration with an English seat to appeal a decision on jurisdiction made by the arbitrators. Appeals usually involve a party seeking to argue that a tribunal ought not to accept jurisdiction. This case is a rare example of a successful appeal against a tribunal deciding to decline jurisdiction.

This case arose out of the redevelopment of the Moskva Hotel, to be carried out under the aegis of a BVI company. A number of agreements concerning the management and control of the BVI company were entered into, with disputes to be resolved by an LCIA arbitration seated in London. OJSC OEK Finance ("OEK"), a company owned by The City of Moscow ("Moscow"), was a party to these agreements. Moscow was not a party to these agreements.

A so-called *"corporate raid"* was then alleged to have taken place. Supposedly it was orchestrated by OEK under the direction of Moscow. The result of this was that OEK gained sole effective control of the BVI company and, accordingly, the redevelopment of the Moskva Hotel. The Claimants commenced an LCIA arbitration against OEK and Moscow, and sought to introduce claims including a tortious claim under Article 1064 of the Russian Civil Code in respect of this corporate raid. They also sought to argue that Moscow should be joined to the arbitration as a co-tortfeasor.

The arbitration tribunal held that they did not have jurisdiction to hear the tort claim, nor did they have jurisdiction to hear the claim against Moscow. Mr. Gogokhiya appealed to the High Court.

Mr Justice Burton identified the following 3 issues to be decided:

- Whether the Russian law tort claim fell within the arbitration clauses ("Issue 1").
- Whether Moscow, as a non-signatory to the arbitration agreement, could be joined to the arbitration ("Issue 2").
- If the answers to Issue 1 and Issue 2 was yes, should the Court remit the matter to the arbitrator or hold that the claim was an abuse of process ("Issue 3").

The Court first considered Issue 2, then Issue 1, then finally Issue 3.

Issue 2

The tribunal had decided that English law ought to be applied to this issue as the agreement was governed by English law. As Moscow was not a signatory to the arbitration agreement, the tribunal concluded that it had no jurisdiction over any claim against Moscow. Burton J decided that the question to be determined was whether there was jurisdiction to join a non-signatory to the arbitration agreement. He held that this was a matter to be decided by the law of the place of incorporation of the signatory, i.e. Russian law as OEK was incorporated in Russia. As the parties had agreed to accept evidence that Russian law provided that a holding company was bound to accept the obligations of its subsidiaries (pursuant to Article 105 of the Russian Civil Code) – including an obligation to arbitrate disputes – Moscow could be joined to the arbitration.

Issue 1

The tribunal had decided that the Article 1064 claim did not fall within the scope of the arbitration agreement. Burton J did not agree. Considering that the tortious claim was essentially a claim for mal-performance of the various agreements he held that the principle identified in Fiona Trust & Holding Corporation & Ors v Privalov & Ors [2007] EWCA Civ 20 applied and that the Court should assume that parties to an arbitration agreement intended all disputes related to the business relationship to be resolved in the same forum.

Issue 3

OEK and Moscow argued that as this claim had been brought by Mr. Egiazaryan, that it would be an abuse of process for Mr. Gogokhiya to bring it. Burton J decided that the earlier claim had been brought in a different form and by a different party, so there was no abuse of process. He accordingly exercised his discretion to remit the claim to the tribunal.

This decision is likely to be of considerable wider interest. Corporate raids are a feature of the Russian and wider CIS business environment, and business agreements between Russian and CIS parties often are governed by English law and governed by an arbitration with a seat in London. In particular:

- The Court will draw a distinction between ascertaining the parties to the arbitration agreement (dependent upon the agreement's governing law) and ascertaining the parties to the actual arbitration. In determining the latter, it is necessary to apply the law of the place of incorporation of the signatory to the arbitration agreement. This may be different from the governing law of the agreement itself.

- Exclusively tortious claims, including claims for conspiracy, can be brought in arbitration even if not all conspirators may be caught by the arbitration agreement.

- Practitioners should consider whether arbitration agreements should cover tort claims and, if so, whether the governing law for any potential claims ought to be specified.

Svea Court of Appeal sets aside arbitral award against Russian company

By Cecilia Möller Norsted, Counsel, Vinge (Stockholm, Sweden)

Judgement of the Svea Court of Appeal (Stockholm), 25 June 2015, case no T 2289-14 (OAO Tuymenneftegaz ./. First National Petroleum Corporation)

Facts

In 1992, OAO Tuymenneftegaz (”TNG”) and First National Petroleum, a company registered in Houston, USA (”FNP”) entered into an agreement (the ”Agreement”) to establish a joint venture for the purpose of developing an oil field in Siberia. At a meeting in Paris in 1993 the parties decided not to pursue the project. The reasons for this decision was subject to disagreements between the parties in the subsequent arbitration. In 2011, FNP initiated arbitration proceedings against TNG, claiming, inter alia, that TNG had breached the Agreement by deliberately conveying misleading information to FNP at the meeting in Paris regarding the oil flow rates in the oil field and the possibility of transfering the license (to extract oil) to the JV-company. The purpose of conveing such misleading information was, according to FNP, to persuade FNP to leave the project. Had such misleading information not been conveyed FNP would have continued the project and would have received future profits from the oil field. FNP also claimed that TNG had committed other breaches of the Agreement. FNP claimed damages for lost profits during the years 1993 – 2011 and future lost profits, in total approximatley USD 184 million plus interest. The Tribunal concluded that TNG had committed breaches of contract on all points submitted by FNP and awarded FNP approximately USD 173 million plus interest.

TNG’s challenge

TNG challenged the award with the Svea Court of Appeal. TNG submitted several grounds for setting aside the award, one being that the Tribunal had exceeded its mandate by adjudicating grounds – legally relevant facts – that were not invoked by FNP.

In the arbitral proceedings the parties had, at the initiative of the Tribunal, prepared a joint document setting out the legally relevant facts that they relied on (the ”Summary”). In communications to the parties, the Tribunal made clear that they would only adjudicate facts that were clearly invoked in this document. Still, on TNG’s case, the Tribunal adjudicated facts that were not set out in the Summary. In the Summary, FNP invoked that TNG had conveyed misleading information about oil flow rates in the oil field at the meeting in Paris. In the award, the Tribunal adjudicated whether TNG had provided misleading information about oil flow rates and oil reserves in the oil field, and concluded that such misleading information had been conveyed. There was according to TNG no mentioning of misleading information about oil reserves in the Summary and consequently TNG had not defended itself against such allegation. By adjudicating circumstances not invoked in the Summary the Tribunal had exceeded its mandate.

The Svea Court of Appeal

The Svea Court of Appeal first examined the status of the Summary (which was included in the award in its entirety). The Court concluded that it was clear that the Tribunal intended the Summary to define the scope of its adjudication and thereby its mandate. It was also clear that the parties eventually accepted this. Accordingly, the Court concluded that the Summary constituted the framework for the Tribunal’s mandate and that the adjudication would thus not include any other grounds – legally relevant facts – than those set forth therein. The Court further found that the Summary should not be interpreted otherwise than according to its wording and it only included the allegation that TNG had provided misleading information on oil flow rates, not oil reserves.The Court found it clear from the Tribunal’s reasoning that the Tribunal had adjudicatet facts relating to oil reserves as constituting breach of contract. Such facts had not been invoked by FNP in the Summary. The Tribunal thereby exceeded its mandate.

The Court subsequently examined whether setting aside the award required that the excess of mandate had affected the outcome of the case and concluded that if the excess of mandate did not affect the decision in the award in any part, the arbitral award should not be set aside. FNP argued that the excess of mandate did not affect the outcome of the case since the Tribunal found that TNG had committed other breaches of contract that independently led to the entire damage awarded to FNP. The Court however held that it was not possible to conclude that the excess of mandate did not affect the decision in the award in any respect. The award should therefor be set aside.

Switzerland

Swiss Supreme Court defines the role and limits of use of administrative secretaries and "consultants" to arbitral tribunals

By Anna Kozmenko and Alexey Bardin, Schellenberg Wittmer (Zurich, Switzerland)

In decision *4A_709/2014*, the Swiss Supreme Court dealt with the role of a "consultant" appointed by an arbitral tribunal and administrative secretaries in international arbitration. It found that arbitrators are entitled to rely on the assistance of consultants and administrative secretaries as long as they do not delegate their decision-making functions.

The dispute arose in relation to a general contractor agreement between a Swiss company (A) and a Luxembourg company (B). B initiated ad hoc arbitration proceedings against A by submitting a request for arbitration to a sole arbitrator, Mr. D.

After Mr. D had decided in favor of B, A petitioned the Swiss Supreme Court to have the award set aside. The main argument raised by A was that the sole arbitrator had not decided the case alone, but together with another lawyer (Mr. E) and with the assistance of an administrative secretary (Mr. F). A claimed that Mr. E effectively ran the hearing, "taking numerous notes", while Mr. D remained passive. A claimed "improper constitution" of the tribunal and violation of the arbitration agreement, which provided that Mr. D was to act alone as sole arbitrator.

Dealing with the issue of the administrative secretary, the Swiss Supreme Court stated that the arbitrators must fulfil their mandate themselves, without delegating it to a third party (*intuitu* personae). The unwritten rule is that in order to properly perform their duties, arbitrators are required to know the file, to deliberate and to take part in the decision-making process. Otherwise, the award may be set aside. Yet, arbitrators may rely on the assistance of an administrative secretary. The appointment of a secretary does not, as a matter of principle, require the prior approval of the parties, but a secretary may not be appointed if the parties have agreed to exclude that option.

It should be noted that in Switzerland, a state-court clerk's tasks may even include drafting judgments without this being seen as a delegation of core judicial functions. The Swiss Supreme Court compared the tasks of administrative secretaries with the responsibilities of a state-court clerk and found that under the supervision of the tribunal, secretaries may provide "a certain degree of assistance" in drafting the award in accordance with the tribunal's instructions. This implies that administrative secretaries are allowed to attend the hearings and to sit in on the deliberations of the arbitral tribunal. However, secretaries are prohibited from exercising any judicial functions, as these are exclusively in the remit of the arbitrators.

Under the same restrictions, arbitral tribunals are basically not prevented from relying on external assistance, in particular, as long as they do not delegate their decision-making functions. The Swiss Supreme Court pointed out that where arbitral tribunals faced complex technical or commercial issues they often seek assistance from external consultants to help them to deal with specific non-legal questions that they would not otherwise be able to fully comprehend. If the parties have not agreed on rules of procedure, the arbitral

arbitral tribunal is free to organize the proceedings as it sees fit. This includes the right to appoint a consultant of its own initiative, without requiring the prior consent of the parties.

The court's finding that arbitrators may rely on external assistance as long as they do not delegate any judicial functions is in line with international opinion. However, the exact scope of "judicial functions" is still subject to debate. Practitioners should bear in mind that a more restrictive approach might be adopted in circumstances different from the present case.

Swiss Supreme Court finds that at the enforcement stage principle of good faith precludes petitioner from raising the allegations of bribery in Russian proceedings.

Decision 4A_203/2014 can be particularly interesting for practitioners in jurisdictions where alleged corruption may become an issue in international proceedings.

The present case involves an insurance company based in Moscow (B) and an insurance company with its seat in Zurich (A). The companies entered into a reinsurance contract relating to the insurance of several hydroelectric power plants and buildings. Following an accident on the site on 17 August 2009 in which 75 people were killed, B sued A at the Moscow Arbitrazh Court. The court found in favor of B, A's appeals at all instances were unsuccessful. Consequently, B initiated recognition and enforcement proceedings in respect of the Russian judgment before the Zurich District Court.

A unsuccessfully claimed that the Russian judges had been bribed and that therefore the judgment was incompatible with essential norms and values of the Swiss legal system (ordre public). The Swiss Supreme Court noted that A brought the arguments related to the alleged corruption for the first time before the Swiss courts, which was contrary to the well-established principle of good faith and justice in Swiss law. According to case law, complaints of a formal nature (such as corruption) shall be brought as early as possible and the principle of good faith and justice shall also apply in international proceedings.

The Swiss Supreme Court pointed out that in the present case, accusations of corruption did not go beyond vague clues. In the dispute settlement agreement with B, A agreed on jurisdiction of Russian courts. Furthermore, in the proceedings before the higher courts in Russia, A deliberately remained silent on corruption issues and thus waived his rights to a remedy. The Swiss Supreme Court also found misleading the fact that B, while claiming that all Russian judges were bribed and that the appeals seemed to be pointless from the beginning, still had gone through all the Russian instances.

The Swiss Supreme Court confirmed that a challenge on the ground of violation of public policy cannot succeed if the arbitral tribunal did not establish the fact of bribery.

In two decisions *4A_532/2014* and *4A_534/2014*, issued as one judgment, the Swiss Supreme Court confirmed that bribery was contrary to public policy. However, corruption as a ground for annulment only exists where bribery was established, but was not taken into account in the award. Such a scenario rarely occurs in practice.

In the arbitration proceedings, Respondents indicated that the British Serious Fraud Office was conducting criminal investigations on projects, suspected to involve bribery, in which several companies of one of the Respondents were involved. Therefore, Respondents had withheld payment of Claimant's commissions as payment would have exposed them to criminal sanctions. They requested a stay of the arbitral proceedings until further clarification with respect to Claimant's role in these projects.

The arbitral tribunal rejected the request for suspension of the arbitration and decided the dispute in favor of Claimant. Consequently, Respondents challenged the awards before the Swiss Supreme Court claiming that the awards were incompatible with public policy.

The Supreme Court confirmed its practice that it cannot review the assessment of the evidence by the arbitral tribunal. Therefore, in situations where the arbitrators did not find any conclusive evidence of corruption and

came to the conclusion that allegations of bribery have not been conclusively evidenced, challenging the award on the basis that the arbitral tribunal violated public policy would not succeed.

The Swiss Supreme Court rules that communication of an award by email may trigger deadline for appeal.

In decision *4A_609/2014*, the Swiss Supreme Court dealt with the method of communication of the award. The case involved a dispute arising from a sponsorship agreement between an Italian company and the Spanish management company of a cycling team. In the ad hoc arbitration, the parties had not expressly agreed on a method of communication, in particular, on a method by which the tribunal was to communicate its final award to the parties. The arbitration rules were silent on the issue too.

On 23 September 2014, the president of the arbitral tribunal sent the award to the counsel of the parties by email. On the same day, the president of the arbitral tribunal also sent a hard copy of the award to the counsel of the parties by post. The counsel of the Italian company received the award in hard copy on 24 September 2014. On 24 October 2014, the Italian company filed a petition to set aside the award. The counterparty argued, among other things, that the petition had not been filed within the deadline of 30 days from the date of notification of the award.

The Swiss Supreme Court reviewed the method of communication used between the tribunal and the parties and found that the communication had been conducted by email. Therefore, the Swiss Supreme Court considered that the starting point for the 30-day deadline to petition for setting the award aside should also be based on the notification by email, irrespective of the date on which counsel for the Petitioner received the original award in hard copy. The SwissSupreme Court therefore stated that the petition to challenge the arbitral award was inadmissible as it had not been filed within the prerequisite time period of 30 days.

To sum up, if the parties agree on an ad hoc arbitration, they should either expressly agree on the method to be used by the arbitral tribunal for communicating awards, or, in the absence of such an express agreement, file their petition for set-aside well within 30 days from the notification of the award according to the method of communication adopted by the parties and arbitrators.

Main Theme

Adverse Inferences as a Consequence of Non-Production of Documents and Other Evidence in International Commercial Arbitration

By Oleg Todua, Associate, White & Case, Moscow

1. Introduction

Oleg Todua

The issues of burden and standard of proof, as well as the assessment of evidence are among the most important and at the same time still most debatable issues in the theory and practice of international commercial arbitration.

The arbitration rules of leading arbitration institutions generally vest tribunals with widest discretion in relation to the assessment of evidence. In determining disputes, tribunals may take into account not only the evidence produced during the course of proceedings, but also the missing evidence, as well as the circumstances of and reasons for non-production of such missing evidence.

Under certain conditions, failure to produce evidence by one of the parties may lead to the tribunal drawing an inference that the evidence which has not been produced is adverse to that party. According to some commentators, such adverse inferences can be considered as indirect, secondary or circumstantial evidence.[1]

Usually, issues relating to the consequences of failure to produce documentary evidence, including drawing adverse inferences, arise within the framework of disclosure, or document production.

The concept of document production, in turn, is alien to the Russian and CIS legal culture and is often still puzzling for Russian and CIS practitioners. It originates from the common law system and has no equivalent in Russian law – despite the relatively recent developments in the area of standard and burden of proof driven by the now defunct Russian Supreme Commercial Court. This raises serious practical challenges; explaining the nature and purpose of document production to clients can sometimes take many hours, and such educational sessions do not necessarily result in an acceptable level of understanding.

One of the most frequent (and legitimate) questions asked by clients about document production is what happens if a party fails to disclose documents requested by another party and/or ordered to be produced by the tribunal.

The answer, in short, comes down to the following two key points. On the one hand, tribunals, unlike state courts in some jurisdictions, have no effective ways of actually enforcing their orders on document production, and, notwithstanding provisions for judicial assistance in certain national legal systems, it is extremely difficult for a party to make another party to produce documents it refuses to produce. On the other hand, there are certain tools available to tribunals which they can use to influence or punish the non-complying party, among which the two key ones are: (1) taking lack of cooperation into account when deciding costs and (2) drawing adverse inferences in relation to the non-complying party's position on the merits, which is considered in further detail below.

Although this article is primarily focused on the consequences of non-production of documents, some comments and remarks are also relevant to failure to produce other types of evidence, *e.g.* failure to make available a witness for a hearing.

2. Nature of the Concept and Powers of a Tribunal

Different authors adopt different definitions of drawing adverse inferences by a tribunal, however the essence of this concept is clear in that it means that a tribunal may adopt positions on the evidence that are contrary to the arguments of the party who has failed to comply with its obligation to produce the relevant documents. In particular, a tribunal may accept the existence of a fact that is adverse (or, on the contrary, the non-existence of a favourable fact) to the non-complying party, which adversely affects that party's position on the merits and benefits the other party.[2]

The questions of the role of adverse inferences, as well as how and when they should be drawn, are a part of the broader concepts of burden and standard of proof, which, in turn, lie between, or at the interface of, applicable substantive law on the one hand and procedural law on the other. In this regard, most of the legal systems rely on the principle of free assessment of evidence by arbitrators/judges according to the inner conviction and put the burden of proof on the claimant (whether for the principal claim or for the counterclaim), such that each party has the burden of proving the facts necessary to establish its claim, defence or counterclaim.[3] Provisions to that effect are sometimes included in the arbitration rules.

In this regard, document production may be viewed as an instrument for obtaining missing evidence required to support the case of the party requesting relevant documents, and sometimes – as an instrument for shifting the evidential burden,[4] although some commentators point out that it is the burden of proof that is shifted.[5]

It is often stated that document production is an area in which the differences between the civil law and the common law systems (where the concept originates from) are most strikingly visible. In practice this can result, *e.g.*, in different approaches being adopted by arbitrators depending on their background. Leaving aside the debates regarding the relative weight of documents as a type of evidence, as well as how useful and important document production is, one can hardly doubt that it has become an integral part of modern international commercial arbitration. It is an almost mandatory and, to an extent, key stage in large-scale and high-profile arbitrations.[6]

The arbitration rules of leading international arbitration institutions usually address tribunals' powers in relation to document production in very broad terms and vest them with the widest possible discretion with regards to assessing and determining the relative weight of evidence. Although most of them do not expressly empower the tribunals to draw adverse inference, this power is widely referred to and accepted by commentators and arbitration practitioners.

Drawing adverse inferences in case of non-production of evidence in certain circumstances is an element of the free assessment of evidence by the tribunal

As precisely stated by one commentator, drawing adverse inferences in case of non-production of evidence in certain circumstances is a possible element of the free assessment of evidence by the tribunal. [71]

From a practical point of view, the key document which expressly provides for drawing adverse inferences is the IBA Rules on the Taking of Evidence in International Arbitration (2010), to which parties and tribunals nowadays often refer to even where their application is not expressly agreed. In addition, the possibility of drawing adverse inference is sometimes expressly provided for by national laws on arbitration, as is the case with the English Arbitration Act 1996.

There is a debate as to whether drawing adverse inferences should be considered as a sanction. According to one of the opinions, rather than a sanction, it is a rule of evidence which, if the elements are made out, creates an indirect piece of evidence that needs to be assessed together with all the other evidence.[8] However, provided that this concept is considered within the context of burden and standard of proof, this debate does not seem to have great practical significance.

3. Criteria and Conditions for Drawing Adverse Inferences

The IBA Rules contain the following provisions on adverse inferences:

> *9.5 "If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party".*
>
> *9.6 "If a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitral Tribunal to be produced, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party".*

Accordingly, a request of another party, to which the requesting party has not objected in due time, or an order of the tribunal are the prerequisites for drawing adverse inferences pursuant to the IBA Rules.

According to one commentator, it follows from the provisions of Article 3 of the IBA Rules that a party is only obliged to produce a document if so ordered by the tribunal, and, therefore, the provisions of Article 9 on adverse inferences may be interpreted as meaning that no adverse inference may be drawn unless an order of the tribunal has actually been disregarded.[9] However, there appears to be no contradiction since both Articles 3 and Article 9.5 coincide in that a party becomes obliged to produce a document following a request of another party only if it fails to object in due time.

Sometimes specificity, relevance and materiality of the evidence sought, as required by Articles 3(a) and 3(b) of the IBA Rules, as well as giving to a party an opportunity to object to the request and explain its failure to make the evidence available, which is an application of the general rights of defence, are also named among the prerequisites for drawing adverse inferences.[10]

However, the IBA Rules leave the limits of the power to draw adverse inferences and other practical questions, in particular criteria as to when such inferences should be drawn, unaddressed.

Such criteria, or conditions, following a thorough analysis of cases considered by the Iran-United States Claims Tribunal (as the most comprehensive publicly available collection of awards relevant to the topic), were defined by one commentator almost ten years ago as follows: [11]

1) the party requesting an adverse inference must produce all available evidence corroborating the inference sought;
2) the party requesting an adverse inference must establish that the requested party has or should have access to the evidence sought;
3) the inference sought must be reasonable, consistent with facts in the record and logically related to the probable nature of the evidence withheld.
4) This criterion appears to be of particular importance. Although drawing adverse inferences is usually considered to be a sanction for procedural non-compliance or lack of cooperation, such inference, as stated above, must be consistent with the evidence as a whole.[12] In this regard, tribunals often reserve making any decisions on adverse inferences for the final award. This does not mean that tribunals do

5) not warn the parties of the possibility of drawing adverse inferences early on – it is not uncommon to see such warnings prior to the actual disclosure, e.g. in the first procedural orders;

6) the party requesting an adverse inference must provide prima facie evidence to support its case, in particular, it must provide reasonably consistent, complete, formal and detailed evidence;
the tribunal should afford the requested party sufficient opportunity to produce evidence prior to drawing adverse inferences against it.

Obviously, the list set out above places a significant burden on the party seeking an adverse inference. However, a number of questions remain open from a practical perspective, in particular whether a tribunal may draw an adverse inference without an express request of another party.

In this context, it may be sensible to distinguish between two forms of adverse inferences:

1) adverse inference as a sanction expressly applied by a tribunal, and

2) adverse inference as a part of the process of the free assessment of evidence as a whole, which is not expressly recorded in any formal way.

As a number of commentators state,[13] and consistently with the author's observations, arbitrators are generally reluctant to draw adverse inferences expressly, openly and giving reasons for applying it as a sanction. It is not uncommon for tribunals not to state whether they have drawn adverse inferences or, if they do, what particular inferences have been drawn notwithstanding making references to requests to draw adverse inferences in the award.

When drawing adverse inferences is considered as a part of the informal process of the assessment of evidence as a whole, it becomes obvious that tribunals, in light of the nature of their powers and wide discretion in relation to the assessment of evidence, can use this tool in one way or another even in the absence of a request of a party to that effect.

It appears, accordingly, that among the criteria or conditions listed above the key ones are those numbered (2) and (3): the missing evidence is or should be in the non-complying party's possession and the inference sought is consistent with evidence on the record.

Some commentators identify further, additional criteria by which tribunals may or should be guided, *e.g.* the absence of satisfactory explanation or good reasons for the non-production and relative certainty concerning the (likely) contents of the missing evidence,[14] but they overlap with those listed above.

However, as follows from the author's own experience, even where the issue of drawing adverse inferences is expressly addressed by tribunals, arbitrators may, using their discretion under the arbitration rules, arrive at a particular decision regardless of whether the relevant conditions have been formally met. One example includes a tribunal sitting in an arbitration in which the IBA Rules applied concluding that it had, in principle, the power to draw adverse inferences even where it earlier refused to order production of the relevant documents.

4. Certain Practical Issues

It is commonly accepted that if a party provides a satisfactory explanation as to its failure to produce the evidence sought, no adverse inference should be drawn. In principle, all types of valid excuses are listed in Article 9.2 of the IBA Rules, which sets outs the grounds for excluding documents from evidence or production. Such grounds are usually considered during the course of document production, such that if a party has valid objection, it is unlikely to be ordered to produce the documents sought and, accordingly, the issue of adverse inferences should not arise. However, it may still be useful to outline some of the key possible excuses a party can invoke to avoid adverse consequences, either during the stage of document production or afterwards.

Arbitrators dealing with cases involving Russian parties, especially those with significant Russia and CIS experience, are often prepared to face "creative" approaches of working with evidence and familiar with the relevant techniques. Strange as it may seem, this sometimes takes by surprise not only clients and lawyers inexperienced in international arbitration, but also those working in reputable law firms

One of the most commonly invoked explanations is the loss or destruction of documents (Article 9.2(d) of the IBA Rules).

Depending on the circumstances of the case and the amount of time elapsed between the relevant events and the commencement of the proceedings, a tribunal may accept, upon reasonable explanation, that a party has lost or destroyed the relevant evidence without drawing an adverse inference.[15] Tribunals may take into account such factors as legal requirements in accordance with which documents must be preserved for a particular period of time and/or prevailing practices of dealing with documents in a jurisdiction where the main or relevant administrative center of the relevant party is located.[16]

If, for example, it follows from the business practices of the relevant jurisdiction that a party would normally keep the records in the circumstances where the party claims that they have been destroyed, the tribunal is likely to conclude that the relevant documents either have not been destroyed or have been destroyed intentionally, and draw an adverse inference.[17] Various commercial and common sense considerations may also be taken into account.

A tribunal may also take into account whether the dispute was pending or contemplated at the time when the documents were lost or destroyed. If the documents were destroyed after the commencement of the proceedings or when they were clearly forthcoming, it diminishes the chances of the non-complying party avoiding adverse consequences. In this context, a questions arises as to what standards should be applied to assess the party's behaviour and whether, e.g., the common law concept of litigation or legal hold is applicable to Russian and CIS parties (and, if yes, to what extent).

Further, tribunals traditionally excuse parties from the duty to produce evidence where it has been lost or destroyed as a result of natural or social disasters,[18] provided that such parties offer reasonable and self-consistent explanations.

Another excuse commonly invoked (not often successfully) by Russian and CIS parties is compelling grounds of commercial or technical confidentiality (Article 9.2(e) of the IBA Rules). Tribunals often tend to disregard unspecified claims of confidentiality or business secrecy, and a party which seeks to reply on confidentiality must offer a clear explanation as to how disclosing the documents sought can damage it.[19]

References to confidentiality are sometimes concerned with a possible breach of the duty of confidentiality owed by the disclosing party to third parties. Understandably, tribunals deal with such claims on a case by case basis, in particular by considering the conditions of the underlying confidentiality undertakings, sometimes reviewing the relevant documents *in camera*.[20] There are many intermediate options available to tribunals at the stage of document production, such as ordering a review of the relevant documents by an independent expert to determine whether the objection is valid or ordering a party to produce redacted versions of documents (for example, with some names or figures deleted). In any event, the IBA Rules provide that the tribunal must find the concerns of confidentiality to be *"compelling"*, which is a rather high test.

Another possible excuse is *"legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable"* (Article 9.2(b) of the IBA Rules). In practice, this raises a variety of questions (for example, what happens if the parties originate from jurisdictions with completely different concepts of privilege, secrecy or legal ethics, which is often the case), some of which are in broad terms addressed in the non-binding guidance on determining the applicable privileges in Article 9.3.

Having said that, one should not overestimate the role of the possible excuses.

Tribunals rarely explicitly draw adverse inferences from a party's failure to produce documents, although it does not mean that they do not silently take non-production

It is no secret that in the world of international arbitration, the parties from Russia and the CIS have earned a very particular reputation associated, *inter alia*, with their attitude towards production of evidence, both documents and witnesses-wise.

Arbitrators dealing with cases involving such parties (including when they are "hidden" under several layers of Belize or BVI corporate vehicles), especially those with significant Russiam and CIS experience, are often prepared to face "creative" approaches of working with evidence and familiar with the relevant techniques. Strange as it may seem, this sometimes takes by surprise not only clients and lawyers inexperienced in international arbitration, but also those working in reputable law firms. For arbitrations involving clients from Russia and the CIS, it may be sensible to consider being guided by the following principles – which are very basic and may seem self-evident, but are often disregarded – in order to mitigate the risks associated with the possible non-production of documents:

1) give thoughtful and thorough (and, to an extent, educational) briefings to clients on the nature and features of international arbitration in general and the importance of document production in particular;
2) avoid putting off the work with large amounts of clients' documents and analyse all relevant information as early as possible;
3) identify sensitive issues in advance, forecast how they can work out during the course of proceedings and address them accordingly;
4) in case of loss or damage to (important) documents, make an appropriate record of it as quickly and thoroughly as possible;
5) avoid behaviour that can be seen as compromising or leading to suspicions as to the attitude towards working with evidence;
6) given the complexity of the process of the assessment of evidence by arbitrators, take proper note of informal aspects associated with this process and consider all possible factors, including reputation and background of arbitrators etc.;
7) gain as much benefit as possible from inconsistencies and flaws in the opponents' evidence.

5. Conclusion

The core of the concept of drawing adverse inferences lies in the field of the assessment of evidence, as to which tribunals are vested with a very wide discretion, which is, in turn, one of the cornerstones of international arbitration.

One the one hand, it is correct and apparent that adverse inferences have reduced evidential weight, that their value is relative and depends on the existence and weight of other evidence, and that they always remain secondary evidence.[21] On the other hand, while their weight and effect should not be overestimated, drawing adverse inferences can – and should – be a relatively efficient instrument for punishing parties who

act in bad faith or have overly relaxed approach towards production of documents. This instrument appears to be particularly relevant both in arbitration in general, where tribunals have very limited coercive powers, and arbitrations involving Russian and CIS-parties in particular.

However, as revealed by a recent large-scale arbitration survey[22] and as several commentators agree,[23] tribunals rarely *explicitly* draw adverse inferences from a party's failure to produce documents. Although it does not mean that tribunals do not *silently* take non-production of documents without a satisfactory explanation into account when deciding the merits, interviewees of the survey confirmed that arbitrators are very hesitant to draw adverse inferences *explicitly* since they are afraid that this may be a ground for challenging the award.[24]

The fact that tribunals are generally reluctant to expressly rely on adverse inferences is further confirmed by the analysis of ICC awards rendered between 2004 and 2010, which reveals that in more than half of the cases (58%), the tribunals stated that it was not necessary to draw adverse inferences to reach their conclusions. As pointed out by the authors of that analysis, sometimes tribunals skirt around the issue and decide the case by other means, apparently in an effort to avoid creating due process concerns.[25]

Unfortunately, this reluctance is not something that can or will change quickly, but hopefully fellow practitioners can contribute to improvement by addressing the issue of adverse inferences in their cases in an appropriate and thorough manner.

About author

Oleg Todua is an associate in the Dispute Resolution practice of White & Case (Moscow). He focuses on international arbitration and commercial litigation. Oleg has advised on a number of complex international disputes involving various jurisdictions and has had experience in arbitrations conducted under the auspices of leading arbitration institutions. Oleg is currently seconded to the LCIA and based in London.

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[1] Vera van Houtte, Adverse Inferences in International Arbitration in Teresa Giovannini and Alexis Mourre (eds), Written Evidence and Discovery in International Arbitration: New Issues and Tendencies, Dossiers of the ICC Institute of World Business Law, Volume 6 (2009), p. 198.
[2] Nathan D. O'Malley, Rules of Evidence in International Arbitration: An Annotated Guide (Lloyd's Commercial Law Library, 2012), § 7.40.
[3] Van Houtte, p. 196.
[4] Van Houtte, p. 196; Jeremy K. Sharpe, Drawing Adverse Inferences from Non-Production of Evidence, 2(4) Arb. Intl. (2006), p. 552.
[5] Simon Greenberg and Felix Lautenschlager: Adverse Inferences in International Arbitral Practice, ICC International Court of Arbitration Bulletin, Vol 22/Number 2 – 2011, p. 43.
[6] The spread and importance of document production are confirmed by The 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process – see pp. 20-23.
[7] Van Houtte, p. 197.
[8] Greenberg and Lautenschlager, p. 48.
[9] Van Houtte, p. 202. The author refers to the previous version of the IBA Rules, however the comment is also relevant to the Rules 2010. The source of the possible confusion may be the words "within the time ordered by the Arbitral Tribunal" (underline added) included in Article 3.4.
[10] Ibid.
[11] Sharpe, pp. 551-570.
[12] O'Malley, § 7.40.
[13] See, e.g., van Houtte, p. 202, Greenberg and Lautenschlager, p. 56.
[14] Van Houtte, p. 204-205.
[15] O'Malley, § 9.79.
[16] Ibid, note 8.
[17] O'Malley, § 9.79.
[18] O'Malley, § 9.82.
[19] Ibid, § 9.85.
[20] Ibid, § 9.86.
[21] Van Houtte, p. 198.
[22] The 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, p. 21. A significant majority of respondents (86%) said that tribunals have explicitly drawn adverse inferences in a very limited number of arbitrations (0-2).
[23] See, e.g., van Houtte, pp. 209-210.
[24] The 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, p .21.
[25] Greenberg and Lautenschlager, p. 49.

Building your Profile in International Arbitration

Interview with Prof. Komarov Alexander Sergeyevich

Komarov Alexander Sergeyevich

Doctor of Law, Professor, Head of the International Private Law Department of the Russian Academy of Foreign Trade

Education:

Moscow State Institute of International Relations, Faculty of International Law, 1972

Professional Activities:

- USSR Ministry of Foreign Trade, Treaty and Law Department (1972-1974, 1977-1981)
- USSR Trade Mission in West Berlin (1974-1977)
- USSR Trade Representation in Sweden (1981-1984)
- USSR Ministry of Foreign Trade, Deputy Head of Treaty and Law Department (1985-1988)
- International Commercial Arbitration Court at the Chamber of Commerce and Industry of Russian Federation, President (1993-2010)
- Arbitrator (since 1983), institutional and ad hoc, in Warsaw, Vienna, Geneva, Kiev, London, Moscow, Paris, Sofia, Stockholm, Zurich

Why did you decide to apply for admission to the faculty of law of MGIMO?

I became a lawyer by chance

Frankly speaking, I applied to the faculty of economics. After I passed the exams (foreign language and economic geography) I was surprised to find myself in a group of law students. I had no idea about an expertise of an international trade lawyer. At that time this program was just resumed after a long pause. The first group of law students was enrolled in 1966. I was admitted to the second group, which began the studies in 1967. Actually, it was not yet a faculty rather a group of law students (about 20 students). The faculty of International Law was established at MGIMO only two years later and we had been moved thereto; it consisted of two departments – international public law and international private (foreign trade) law. Hence, I became a lawyer by chance.

Do you regret not getting a degree in Economics?

Not really, I was always interested in law, I enjoyed reading detective stories and admired characters who fought for justice. Law being an intellectual instrument which helps to achieve justice always impressed me. To some extent, I was even glad to be admitted to the law students group. At that time I knew little about law, everything seemed to be so of a mystery and adventure. I had no idea of what I will be doing as a lawyer.

I enjoyed reading detective stories and admired characters who fought for justice

I enjoyed studying law. I even had a feeling of superiority over other students because we were covering such aspects of international relations that our peers did not touch yet. We did not know yet for sure that law plays an underlying, special role, but we suspected, we felt that. I was an excellent student and graduated with honors. As one of the best students, I was invited to work for the Central office of the Ministry of Foreign Trade of USSR, for its contract and law Department, foreign commercial law section. This happened because I focused both on international private law and private law of foreign states. I had great teachers on these courses at the Institute.

Could you please give their names?

First of all, I would name my research advisor, professor Rimma Leonidovna Naryshkina, also Sergey Nikolayevich Lebedev and Vitaliy Alekseevich Kabatov. Also others who gave lectures on private law courses. Sergey Nikolayevich Lebedev delivered lectures on law of foreign trade, on international arbitration; Rimma Leonidovna Naryshkina – on civil and commercial law of foreign states. These lectures were very interesting. Through them we received basic ideas of private law. They grasped my attention and I began to focus on private law of foreign states. Not because it was 'foreign', but because it was developing as 'private' law based on the principles of party autonomy, freedom and equality, and freedom of contract.

When did you first hear about arbitration?

Arbitration was not delivered to us as a special course. Sergey Nikolayevich Lebedev taught arbitration to us, as a part of the course on law of foreign trade. One of my friends decided to devote his thesis to foreign trade arbitration. I was surprised about the topic because it was not popular among students. It later turned that he made choice at his father's advice who was an experienced lawyer specialized on foreign trade.

Please, describe your studentship.

I look back at my studentship with great pleasure. It was a unique time, time when one does not stand firm on foot but has great plans. There were many illusions about how everything will be in the future, in personal and professional life. It was the period of students' unrest in Western Europe. Students were viewed as rebels. We had an opportunity to read foreign literature, our teachers told us a lot. You probably do not know what happened in France in 1968. There was almost a revolution, students' riots, 'new socialists'. Students in Paris occupied Sorbonne and only French President Charles de Gaulle was able to restore the order.

Did you discuss these events in the Institute?

Of course, we did, a new revolutionary wave raised, it was a stroke to capitalism again. We studied political economy carefully, we were preparing ourselves for work in the sphere of international relations, that is why we had to be on top of everything relevant.

Did you share the feelings of French students?

No, not really, neither me, nor my close friends. We were interested in our future profession, international specialization, and more than that, we did not want to ruin anything, we wantedto create. The ideology of students' riots in Western Europe was based on the desire to destroy the existing order. To the contrary, we realized we were building something new. They wanted to destroy old system and to build a new and just

society, like ours, for example. We considered that these riots reflected an overall crisis of the capitalism. At that time in the USA racial contradictions sharply raised, these had an economic ground, too. The world came to a boil, in Western Europe the communist ideas were becoming popular. It was a birth of what later was called the Eurocommunism.

Please, describe your first trip abroad.

My first trip abroad was for a 4 months pre-degree training in England, it was a part of studying at MGIMO. We travelled by train, crossed many borders, sailed across the English channel, everything around us was very impressive. It was curious to hear native English language. All in all, a new world was in front of us.

What impressed you most?

I was impressed by their progress in some areas, especially in technologies. And also by their view of life and of the world around. We were used to some viewpoints, and they often looked at things differently. We arrived to work as interns to the Trade mission of USSR when a serious diplomatic conflict happened: a solid group of Soviet officials working in London was deported being accused of espionage. Because one of the accused was the then legal adviser of the USSR Trade mission in UK, I and my colleague-intern had to work at our full capacity as lawyers of the mission. While still being students, we fully and quickly experienced what it was to work in the USSR Trade mission adroad as lawyers.

What seemed most interesting to you in England from the professional point of view?

For a lawyer, England is interesting for its approach to law. I learned there how things from the law textbooks work in practice. Particularly, I understood the roles of barristers and solicitors. I watched legal proceedings involving barristers in the High court of England and commercial negotiations involving solicitors. I genuinely realized that this division of lawyers' functions is meaningful; it ensures the high level of professionalism. That conclusion proved true 15 years later (1986-87) when I was involved in the process of enforcing the decision

With Prof. Loukas Mistelis (Director of the School of International Arbitration of Queen Mary University of London) at the Seminar of the Chartered Institute of Arbitrators in 2008

by Foreign Trade Arbitration Commission of CCI USSR (FTAC) in the case Soyuznefteexport vs Jock Oil. It was the biggest arbitration case in the Soviet times in terms of the sums at stake. As far as the enforcement of the award was pursued in an English law jurisdiction (in Bermuda), Soyuznefteexport was represented by counsels from England and from other countries. Two barristers – senior and junior – were on our side. The senior barrister was a really famous one, a Queen's Counsel. The case was driven based on materials prepared by English solicitors, who were assisted by lawyers from other jurisdictions. In consultation with the barristers we worked out the case strategy – ways to persuade the judge, legal arguments and documentary evidence to be employed in the proceedings etc. It was very interesting to be present at that legal backstage.

After graduation you worked for a long period in the Ministry of Foreign Trade. Do you remember your first business trip abroad?

My first business trip abroad was to Japan. I was a legal counsel of the Soviet delegation which was tasked to negotiate the General cooperation agreement with Japanese companies on mining of the Yuzhnoyakutskiy coal basin. There I was negotiating some legal aspects of the General agreement with Japanese colleagues. The negotiations were rather difficult but we were able to reach a compromise, and I was glad to make a contribution to successful negotiations.

My first long-term business trip was to West Berlin. In 1974 I was appointed as a senior legal advisor to the Bureau of Soviet foreign trading organizations in the western sectors of Berlin, or, how it was known, of West Berlin. Nowadays you probably do not fully realize what it was like there, in West Berlin. It was a reflection of the complicated political situation which existed in Europe after the Second World War. In fact it was a battlefield of Cold War. According to Potsdam agreements of 1945, Berlin was divided into four sectors. After the Federal Republic of Germany and the German Democratic Republic were created, West Berlin was in fact isolated from the surrounding territories. It was viewed as a special political unit, where the supreme power belonged to the authorities of three Allies – England, the USA, and France. But under a special procedure FRG law was applied in the western sectors. FRG territorial claims to the West Berlin was the constant point of stumbling between the three western Allies and the USSR. In 1961 West Berlin was surrounded by the Wall. For many years it was the center of tensions. In 1971, to calm down the tensions the four victorious Powers signed the Agreement which, in fact, was a continuation of the Potsdam Agreements of 1945. This Agreement envisaged establishment of permanent missions of Soviet organizations in the western sectors.

I was appointed to the foreign trade mission in West Berlin because I was the youngest of all the candidates. It was not because of my achievements, although I had some experience with legal issues of West Berlin before the appointment. It was just because neither of my more experienced colleagues wished to take the position. Everyone, who could be appointed, considered West Berlin to be a difficult, unstable place and found a way to reject the offer. I was 25 years old when I was offered this position. I considered this offer as a professional challenge and accepted it. From the very first days, I had to do everything on my own: organize legal department in the mission, interact with local military and civil authorities, build relations with local lawyers and judicial bodies. Since everything had just started, I had no one to rely on. I organized my office myself: I frequently went to bookshops, bought legal books, subscribed to official bulletins, studied a lot of documents issued by the Allies which governed the western sectors, sent legal information to the Ministry. Overall I spent three years in West Berlin, but from the professional point of view every year could be counted for two.

Did you feel unsafe in West Berlin?

> I could not even imagine that the Wall would fall down, and it would be possible to calmly walk along the Friedrichstrasse

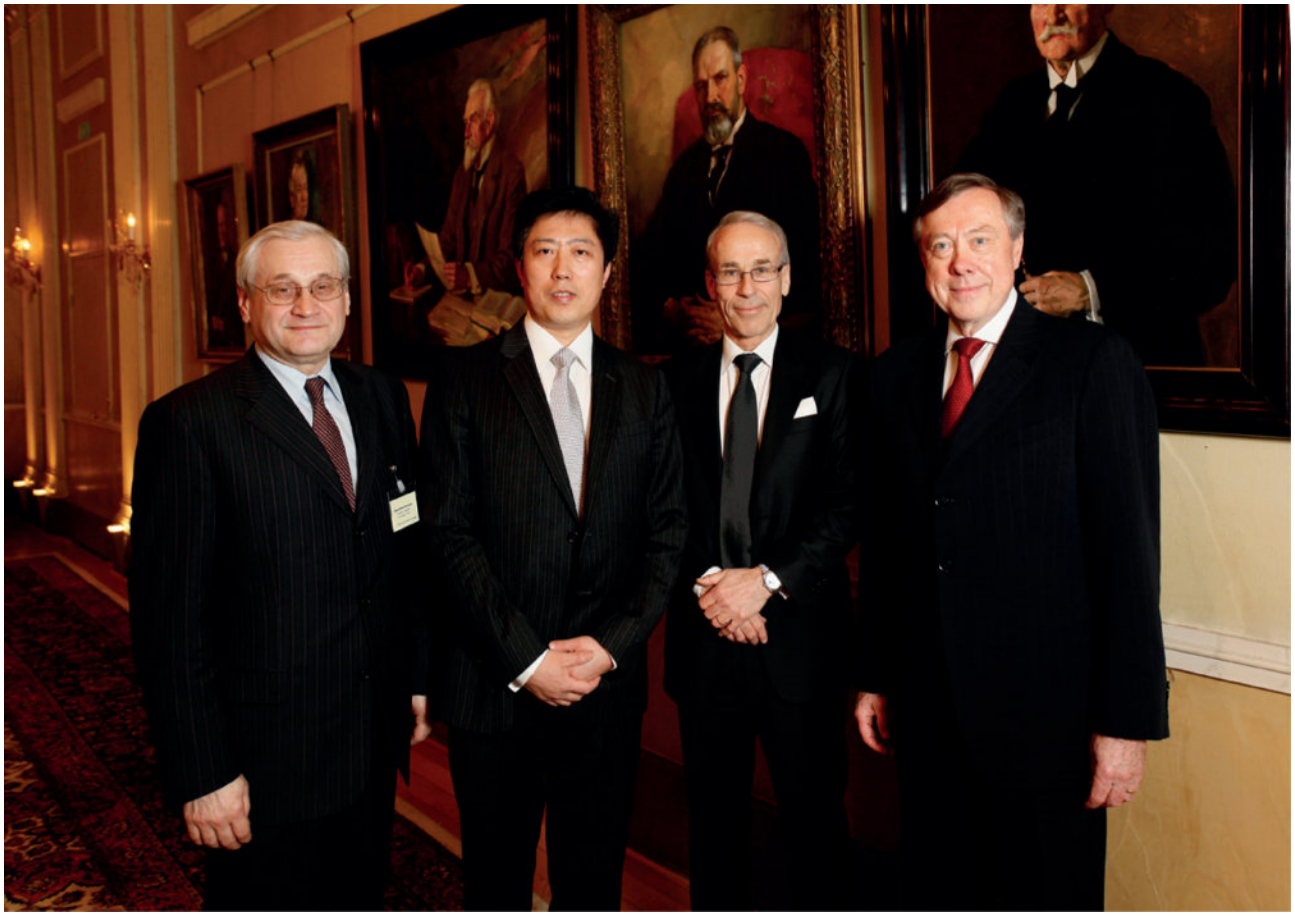
I did not feel unsafe, but I had to be on alert, I had to be concentrated all the times, since sometimes I had to cross the state (sector) border every day, sometimes even twice a day, across the famous Checkpoint Charly (Friedrichstrasse). Germans (GDR) border guards were on the one side, military of the Allies – on the other. For me and for my colleagues crossing the border was a routine whereas for the ordinary people it was a formidable obstacle. During the decades of existence of the border hundreds of people died at the attempts to cross it; that was very dramatic. A feeling

of that was in the air and caused sad thoughts. Demonstrations were frequently happening in the Western part of the border. I had to carry my passport while moving around in West Berlin. A Soviet in West Berlin was viewed as an individual with a special status. In a professional capacity I had to communicate with police and local authorities a lot. In those years, I, as many others, could not even imagine that the Wall would fall down, everything would be different and it would be possible to calmly walk along the Friedrichstrasse.

Please, describe your first case as an arbitrator. Did you play an active role in the process?

My first case was in Stockholm when I worked as a senior legal counsel of the USSR Trade mission in Sweden. A Soviet foreign trade organization commenced the proceedings, a hearing was scheduled in Stockholm, but a Soviet arbitrator did not obtain a visa in time and it was made clear that he would not be given one at all. I was appointed as a replacement arbitrator. No final decision was made by the panel in that case as the parties reached a settlement. It was in 1981, during my first year in the Trade mission of the USSR in Sweden. Second case I was involved in happened just before my departure from the mission in 1984. In that case initiated I was appointed by a soviet organization as an arbitrator from the beginning. This time there was a regular full hearing in Stockholm, parties attended it, and the Tribunal issued a final award on the merits. A few times in between those two cases I participated in the arbitration hearings in Stockholm as a consultant. It was interesting and allowed to gain valuable experience.

The unique feature of Stockholm arbitration is a maximum adversariality. The arbitrators are rarely active during the proceedings. This is because of the fear that the parties may interpret an active role of a party-appointed arbitrator, for example asking suggesting questions to the appointing party, as evidence of the arbitrator's partiality. Presiding arbitrators enjoy wider freedom in terms of asking questions, but even they may be then criticized for questioning one of the parties more than the other. That is to say, party-appointed arbitrators have to be very careful in this respect. For example, this is what happened in a case two years ago. The case was heard in Stockholm with me participating as a party-appointed arbitrator There was a very strong panel in this case, involving really experienced arbitrators. Ultimately, the losing party moved to set the decision aside. It submitted many



With Members of the Board from China, Sweden and USA of Arbitration Institute of the Stockholm Chamber of Commerce. 2011

arguments and one of the arguments was that the arbitrator appointed by the winning party asked too many questions that signaled his personal interest in the matter. That arbitrator was not a Swede, there were no Swedes in that panel. The arbitrators were from the USA, from Western Europe and myself. In my experience, presiding arbitrators not from Sweden, for example from France, Germany, and Austria – are more active, they practice inquisitorial process. Anyway, when asking a question, an arbitrator needs to think carefully about how the question should be asked in order not to cast any shadow on his/her impartiality.

Can you remember any confusion during the proceedings where you acted as an arbitrator? How did you react?

I had to watch the proceedings where one of the parties was represented by an inexperienced counsel and the other party – by a very experienced counsel, say, from the USA or UK. Experienced counsel employed weaknesses of the opponent to his advantage, behaving not really ethical from the professional point of view. And the arbitrators could not do anything to hold him up.

Sometimes, when interpreters are involved, you may hear that translation is wrong, but as an arbitrator you can do nothing about it. There was a case where the interpreter was translating obviously poor, it is difficult to translate legal terms perfectly, nuances matter. I leaned to the presiding arbitrator and told him about that. Other party's representative noticed that and raised objections – he argued that the language of arbitration was English, and if Professor Komarov would make any further corrections, then they would object as only what was said by a party in English mattered. Counsels sometimes behave quite aggressively, they think their aim is to win the case by all means and professional ethics takes a back seat.

> One should never be dishonest. Such conduct may entail adverse inferences

What should counsel never do in arbitration?

One should never be dishonest. Counsel should not show disrespect both towards arbitrators, or towards the other side. Subject to circumstances, such conduct may entail adverse inferences. Of course, the way counsel delivers its party's case is of a high importance, but it is very unattractive when counsels behave unethically or impolitely. Even more unattractive is when one tries to behave so to hide his/her incompetence, when one starts saying absurd things and looks absolutely confident, displaying hence an elementary unprofessionalism.

Can you name women – experts in arbitration? Do they master the arbitration process differently?

Speaking of international disputes I would, first of all, name Gabrielle Kauffmann-Kohler from Geneva, she masters the procedure very confidently, she knows arbitrator's role very well. Also I would name Teresa Cheng, a head of International arbitration court in Hong Kong. Among Russian women-arbitrators I would give credit to Nina Grigorevna Vilkova. I also met talented women-counsels, who skillfully, diplomatically and tactfully lead cases, were confident and well-prepared, and did not employ gender aspect. Still women, as I see it, usually manage proceedings with 'softness' which is peculiar to women.

Is there a city which is favorable for arbitration?

For me it is Moscow. For me, as an arbitrator, it is most comfortable, convenient, no matter how difficult a matter might be, that the case is heard in Moscow. While abroad it does not really matter where: London, Paris, Vienna or Stockholm.

You have a great experience as an arbitrator. What are unique features of Russian arbitration comparing to arbitration in other jurisdictions?

I believe that currently our arbitration continues developing in a unique way, it is a post-Soviet league arbitration. Our arbitration is less strict and formal, less complex, than arbitration in foreign jurisdictions, where arbitration practice has been developing for decades. Prerequisites for that are mainly historical. We are yet to gain own experience in arbitration which will not enable us to convert our arbitration into a sort of a complex

judicial procedure and hence to give up the advantages, the flexibility of arbitration. In this sense, our arbitration is less subjected to such procedural (strategy) techniques, and a well-experienced lawyer may even find it primitive.

"Arbitration system cannot be more advanced than legal system where the arbitration is carried out". I totally agree

We are now facing the so-called "americanization" of the international arbitration, it becomes more complex from the procedural point of view. To some extent we are losing the idea of arbitration as a less formal alternative to the judicial process. American lawyers are focused on the process, they use every single chance to find a solution in the procedural sphere. I believe one should remember that the process is not a goal, it is an instrument which helps to settle disputes. Arbitration exists not for lawyers or counsels, it is for businessmen and companies, and we should assess an arbitration system in accordance with its effectiveness in meeting demands of the business community. If such demands are satisfied, then the system serves its purpose. Recently I came across a phrase by a leading specialist in international arbitration: "Arbitration cannot be more advanced than national legal system where the arbitration is carried out". I totally agree.

One of specific features of arbitration under the Rules of ICAC is the list of arbitrators. Do you think it will be abandoned at some point?

Existence of the list is reasonable for our country. The arbitration community is rather small, there is no great awareness about it in the society, therefore, those who need to refer a dispute to arbitration have no idea as to whom to appoint as an arbitrator. By means of the list the Chamber of Commerce and Industry helps to find a proper professional. Originally, many arbitration institutions had lists. In 50s-60s leading European arbitration centers abandoned official lists, but, probably, some unofficial lists still exist. Official lists have been retained in Austria and in some other Eastern European countries and also in Singapore. In Russia and CIS where arbitration takes its first steps the lists are useful, I believe.

What would you change in the ongoing Russian arbitration reform?

Recently, the changes to the law on international/domestic arbitration have been finally adopted. From my point of view, unfortunately, these changes will unlikely promote wide use of arbitration as alternative means of economic disputes resolution in Russia. The main idea of the reform is the increase of the control over arbitration by the state. This, however, will lead to the loss of one of the main advantages of arbitration –parties' ability to exercise their autonomy to decide how a dispute should be resolved and, therefore, create procedural rules which suit their interests and abilities. Abuses associated with institutional arbitration (in the real estate sector, "pocket" arbitration courts and etc.) were declared as the driving incentive of the reform. The incentive seems to be largely artificial. The abuses indeed sometimes take place, but they do not come from the nature of arbitration. At large, the practice shows that arbitration positively influences the development of self-regulation of the business community, so that positive aspects overweigh negative ones. One could and should fight the abuses, however with proper means. For the state the main task shall be to strengthen and develop arbitration. Unfortunately, the reform does not account for the necessity to create an advantageous environment for Russian business circles to agree to resolve disputes with foreign partners by arbitration in Russia. Existing international experience and practice in arbitration were not sufficiently taken into account – to a certain extent this omission undermines the opinion which had evolved abroad in recent years that Russia has a pro-arbitrational legislation and fairly positive practice of international arbitration.

I am not very optimistic about the future. Of course, there are positive elements in the new regulation, but all-in-all it may be described by recalling the title of the Lenin's work "One step forward, two steps back". This phrase could be a title of the reform – instead of resolving questions which would strengthen the positive practice we are moving towards building of rigid boundaries, it is contrary to international standards. If we speak about international arbitration we shall meet international standards. These are well-known. Take, for example, the UNCITRAL Model law. Almost nothing of the new edition of this important document has been reflected in the adopted regulations.

What is your opinion on the dissolution of the Supreme Commercial Court? Will its winding up somehow influence development of arbitration in Russia?

I am not aware of true reasons behind this step. Probably, some subjective factors were in place. No doubt this event will influence the practice of international and domestic arbitration in Russia. The Supreme Commercial Court always tried to restrict arbitration institutions, while the Supreme Court recently authored several pro-arbitration judgments.

Older I grow, more I become a fatalist

You said above that you became a lawyer by chance. Would you change anything in your life if you had an opportunity?

At the "Arbitration and Conciliation" Awards. 2014

Well, it is both difficult and easy to answer. I definitely can say that I regret nothing that happened in my life. Over years (I am practicing law for over 40 years) I faced some difficult, unpleasant moments, but I believe everything happened as it should have happened. I always try to take an advantage of the situation, not to regret about misfortunes. Not to live by illusions, not to think of how it could have been better. Older I grow, more I become a fatalist. There is such an idealistic thing as Destiny. In other words, it is the way destined by the Lord. I think I achieved quite a lot in my profession. I think, I earned respect. I cannot say certainly whether I would have become an outstanding economist.

Pursuing an LL.M. Degree in Arbitration

Interview with Elena Cherkasova, a Graduate of Pepperdine University School of Law, Malibu, USA

Elena Cherkasova

MOSGO&PARTNERS

Associate, Mosgo & Partners, Moscow

Expertise: Elena Cherkasova is a Russian attorney specialized in corporate law, M&A, commercial litigation and arbitration. Her spheres of practice also include debt-restructuring, bankruptcy and labor law. She works with big European companies, advising them both in English and German.

Education:

- Master of Laws, Pepperdine University School of Law, Malibu, CA, 2015
- Master of Laws, Westfälische Wilhelms-Universität, Münster, Germany, 2013
- Law Specialist Degree, Moscow State University, School of Law, Moscow, Russia, 2012

Why have you decided to do LL.M in arbitration?

Before the start of the program, I was an associate attorney at Sirota & Mosgo. Some of the firm's projects involved international commercial arbitration (ICA). Although challenging, these proceedings greatly increased my interest to expand the knowledge of arbitration through academia.

The foundational steps however were initiated at the Moscow State University, particularly, through the pedagogy of Professor Asoskov and Professor Kucher. They gravitated my focus toward the unique characteristics of arbitration: the interaction of different legal systems, the inherent flexibility, and the high professional standards. At the same time, Russian law schools pay only limited attention to arbitration. At MSU, only students specializing in civil law were exposed to arbitration, though still in a limited fashion. Students specializing in other fields of law were not required to possess even a rudimentary understanding of alternative dispute resolution. As such, it was immediately apparent to me that if I wanted to further my knowledge of arbitration, I would have to pursue an LLM degree with ICA concentration.

Therefore, when I thought of continuing my education, LL.M programs with ICA concentration were top priorities for me.

What LL.M programs did you consider and why did you choose Pepperdine?

Pepperdine Law School's Straus Institute for Dispute Resolution has the number one ranked dispute resolution program in the United States. Therefore, as my goal was to find a narrow program focused on international arbitration, it was a great choice for me. Even though I also considered Georgetown University, Pepperdine was one of my top choices from the very beginning.

Simultaneously, my decision to attend Pepperdine was made easier by the fact that I was fortunate enough to earn a Fulbright Scholarship. Financial considerations were critical for me, and the scholarship I was granted completely covered Pepperdine's tuition fees.

Was it hard to gain admission? What one should be focused at?

I guess, my way of gaining admission to a U.S. law school was different from most of other applicants. I applied not to the school directly, but to the Fulbright scholarship program. The Fulbright program is a U.S. scholarship organization operating all over the world on a bilateral exchange basis.

The application process was very lengthy. To start the program in Fall 2014, I had to file an application in May 2013, which is more than one year in advance.

The application process consisted of several steps. First, all applicants must submit motivation letters. Next, the Russian Fulbright committee chooses the applicants for the next round – the interview with the Russian-American scholarly committee. Then the applicants must submit a writing sample in the field of their interest. Lastly, the Russian Fulbright office sends all your record to the New York colleagues, who make the final decision. The New York affiliates also take care of the placements, contacting the schools named in your application. Due to the fame and prestige of the Fulbright program, schools are usually thrilled to accept Fulbright scholars. Ultimately, the placement is determined by two factors: preferences of the candidate and financial terms negotiated between the school and the Fulbright program.

In my view, at least half of the victory in the admission process lies in writing a strong and emotional motivation letter, where a candidate should clearly set the goals and show his/her personality. It is impossible to give a more detailed advice; the approach to a motivational letter will greatly depend on the applicant's unique experiences and desires, rather than an artificial formula designed to captivate the committee.

LL.M. Students on Commencement Day

Tell us how the program was structured?

Some classes were similar to the lectures in Russian schools: held in big classrooms with over sixty-seventy students. These were classes of the general law school (J.D.) program. They consisted mostly of American students and lasted during the whole semester. Unlike Russian schools, American lectures require much more class participation. Assignments, usually cases, are distributed in advance and students need to present cases (explain facts, rules and the court's reasoning to the class) or answer questions before the professor explains the law. In the end of the semester, students take written exams. For an exam, the test presents several fact patterns, which students have to analyze: spot the issues and apply the law to the facts.

Other classes, mostly on arbitration, were more private, no more than twenty students a class. A distinct feature of Pepperdine LL.M program is the intensive format of its courses: several weeks with classes during weekends. These small classes reminded me of seminars in Russian schools a little bit, however, far more practice oriented and case based. To get credit for the class, either a theoretical final paper or a take-home written exam consisting of several facts patterns for the analysis were required. During classes, professors sometimes assigned short writing assignments, usually also requiring case analysis.

A highlight of the program was a VIS moot class taught by a Dutch professor and arbitrator, Professor van Ginkel, where we drafted memoranda on the current VIS problem and participated in the VIS pre-moots.

Interestingly, this was a mandatory class for everyone seeking a degree in ICA.

What courses were offered, which have you chosen and why?

To receive an LL.M degree with ICA concentration students were required to take several mandatory classes, such as arbitration theory (explaining the basics of ICA), ICA principles and practice, international investment disputes, ICA and national courts, and, the aforementioned VIS moot class.

Students could get additional credits by taking any classes offered in the law school, except those, which require prerequisites. For example, those who were interested in M&A had to attend corporate law first, for the business planning federal income taxation was mandatory, etc. Aside from that, the choice was free. As my program was a part of a Straus Dispute resolution Institute, I also took classes on mediation and negotiation. Students particularly interested in mediation could take part in mediation clinics with small claim courts and settle actual disputes.

J.D. classes could be taken as well. International students who were planning to sit for the New York or Californian bar usually preferred classes that were considered to be the most difficult or time-consuming, such as constitutional law, civil procedure, property or remedies. To be eligible for the bar, professional responsibility was mandatory for everyone.

What courses or lecturers are worth emphasizing?

All ICA classes were very interesting. Particularly intriguing were the classes of Prof. Coe, the associate reporter for restatement on the U.S. law on international commercial arbitration (unofficial U.S. code on international arbitration). Prof. Coe heads the ICA department of Pepperdine law and teaches several arbitration classes (international investment disputes, ICA and national courts, ICA principles and practice). His charismatic personality and exceptionally deep

During 4th LL.M. ICA Moot in Washington DC

analysis of elaborate fact patterns, underpinned with a unique sense of humor, were distinct features of Prof. Coe's classes.

I also enjoyed working with my research advisor Professor Thomas Stipanowich and Professor van Ginkel, who put a lot of effort in the VIS moot class and the preparation of the Pepperdine team. Overall, the level of professors' engagement in classes and open discussion was remarkable.

With Prof. van Ginkel (left) and Prof. Coe (right) on Commencement Day

How much time did you spent studying (both in classes and in preparations)?

Studying took most of my time to be honest. Structurally, I spent more time studying at home or in the library compared to the time in class. During some weeks I had to attend class six days a week. Particularly, the amount of writing assignments was very challenging in the beginning. To fulfil course requirements we had to submit more than one solid writing sample, be it a memo, a theoretical paper or a case study. After the initial legal education in Russia, I was more used to reading assignments. However, I hardly ever had time to read every assignment thoroughly.

Tell us about financing your degree?

Being a Fulbrighter, I did not have any financial issues. The school gave me a considerable tuition waiver, the remainder of the tuition was covered by the U.S. department of state, which also took care of my insurance, plane tickets to the U.S. and back to Russia, as well as paid monthly stipend, enough to cover rent, utilities and other basic expenses.

Have you engaged in any extracurricular activities? Both professional and leisure. Were there a lot of opportunities for this in Pepperdine?

Classes and preparation took most of my time in the U.S. However, thanks to a professor's offer, I had a chance to arbitrate at the Foreign Direct Investment International Arbitration Moot, which was held at Pepperdine, as well as at the VIS pre-moot. I also helped coach the Pepperdine VIS moot team. Together with my classmate, a fellow Fulbright scholar from Russia, we participated at the fourth LL.M. ICA Moot Competition in Washington DC. It is a relatively new arbitration moot designed specifically for LL.M. students. That year the participants were dealing with an ICC Rules in an ICDR administered arbitration and an interesting risk distribution problem that occurred during an amusement park construction project.

Aside from that, I was able to travel a bit during school breaks and, thanks to the location of the school in Malibu, tried surfing. This was however very scary and did not captivate me.

Has your LL.M. program provided significant networking opportunities?

It has. We had an extensive international class at Pepperdine with students from Germany, Denmark, France, Belarus, Mexico, China, Southern Korea and Egypt. The professors also had different professional and ethnic backgrounds. Of course, Fulbright creates a special community for its alumni all around the world, and needless to say, this is a wonderful opportunity to network for those who are interested.

Do you think gaining an LL.M. degree helped you and in what ways? Do you plan to pursue (keep pursuing) a career in arbitration?

Certainly, an LL.M experience was very beneficial. It gave me not only deeper knowledge in arbitration and the American legal system, but also a wider perspective on different approaches to education and case

the American legal system, but also a wider perspective on different approaches to education and case analysis. Moreover, it was simply great to look at the world from its opposite side.

Arbitration remains the focal point of my professional interests, and I hope to be involved in arbitration projects in my current firm, Mosgo & Partners. Needless to say, an LL.M degree is very helpful in dealing with foreign clients on everyday basis.

Arbitration Events to Attend

19 February 2016	**ICC Investment Pre-Moot Paris 2016**
	Organiser: ICC Location: Paris, France www.iccwbo.org
26-28 February 2016	**7th Moscow Premoot to the Willem C. Vis International Commercial Arbitration Moot**
	Organiser: the Faculty of Law of Lomonosov State Location: Moscow, Russia http://www.c5-online.com/WDR
3 March 2016	**Young Practitioners' Symposium**
	Organiser: IBA Arb40 Subcommittee and LCIA YIAG Location: Shanghai, China www.lcia.org
3-4 March 2016	**19th Annual IBA International Arbitration Day 2016**
	Organiser: International Bar Association Location: Shanghai, China www.ibanet.org
7-12 March 2016	**9th Frankfurt Investment Arbitration Moot Court**
	Organiser: the Wilhelm Merton Centre for European Integration and International Economic Order Location: Frankfurt, Germany www.investmentmoot.org
22-24 March 2016	**Final Rounds of the 23rd Willem C. Vis International Commercial Arbitration Moot**
	Organiser: the Association for the Organization and Promotion of the Willem C. Vis International Commercial Arbitration Moot Location: Vienna, Austria vismoot.pace.edu
14 April 2016	**3rd Annual RAA Conference**
	Organiser: Russian Arbitration Association Location: Moscow, Russia www.arbitrations.ru
18-21 May 2016	**6th St. Petersburg International Legal Forum**
	Organiser: the Ministry of Justice of the Russian Federation Location: St. Petersburg, Russia www.spblegalforum.ru

27-28 May 2016

2nd Global Conference of the Co-Chairs' Circle

Organiser: the Young Arbitration Club Finland
Location: Helsinki, Finland
www.co-chairs-circle.com

7th Moscow Pre-moot to the 23rd Annual Willem C. Vis International Commercial Arbitration Moot

The Faculty of Law of **Lomonosov Moscow State University** cordially invites the Willem C. Vis teams and arbitrators to attend the 7th Moscow Pre-moot, which will take place on **26-28 February 2016** at the new modern premises of the Faculty of Law.

Moscow Pre-moot represents training sessions to the world's leading moot competition on private law and arbitration – **Willem C. Vis International Commercial Arbitration Moot** held annually in Vienna. It consists of a series of simulated arbitration proceedings arising from the dispute between the parties to the international sale of goods. This year the moot proceedings are governed by VIAC Rules.

It is our honor to announce that **Secretary General of VIAC Dr.iur Manfred Heider** will attend Moscow Pre-moot this year.

The following teams have already registered for Moscow Pre-moot:

- International University "MITSO" (Belarus);
- University of Neuchatel (Switzerland);
- Westminster International University in Tashkent (Uzbekistan);
- University of Passau (Germany);
- Belarusian State University (Belarus);
- Lomonosov Moscow State University (MSU) (Russia);
- MGIMO-University (Russia);
- Utrecht University (Netherlands);
- Charles University in Prague (Czech Republic);
- Russian State University of Justice (Russia);
- Karl-Franzens University Graz (Austria);
- Peoples' Friendship University of Russia (Russia);
- National Research University Higher School of Economics (Russia);
- University of São Paulo (Brasil);
- Kutafin Moscow State Law University (Russia);

To bring the participants a little bit closer to a success in Vienna, on **26 February 2016** we organize the **Vis Moot Workshop** where renowned Vienna arbitrators will give the tips to participants. The Workshop on practical skills will be followed by the Conference devoted to some issues raised by Willem C Vis organizers this year.

To make the 7th Moscow Premoot a more exciting event we arranged a **cultural and social programme:** guided tours around VDNKH and historic center of Moscow, ice skating at the Red Square, a tour to Lomonosov University and surroundings (including a photo shoot), journey via Moscow tube and drinks under the roof of one of Moscow-City skyscrapers, welcome reception at the restaurant with modern Russian cuisine and awards banquet at the panoramic restaurant.

If your team is interested in participating in the 7th Moscow Pre-moot or if you are interested to act as an arbitrator **please register** at www.vismoot.ru **before 15 February 2016**. Should you have any questions about the coming event, please contact Olesya Petrol or Kirill Udovichenko at moscowpremoot@gmail.com.

Participation is free of charge.

Updates on www.vismoot.ru and www.facebook.com/groups/206722156053400/

Programme

PRE-MOOT
VIS MOSCOW

26 February (Friday)

12:00 – 14:30	Promenade around VDNKH: Soviet Architecture for Early Arrivals
15:30 – 19:00	Vis Moot Workshop and Conference
19:00 – 21:00	Welcoming Reception and Dinner at Vatrushka Cafe
From 21:00	Historic Center Walking Tour & Ice Skating at Red Square

27 February (Saturday)

10:00 – 18:30	Rounds I, II and III
From 18:30	Journey via Moscow Tube followed by Drinks in the Moscow-City

28 February (Sunday)

9:00 – 11:00	Tour to MSU and Surroundings & Photo Shoot
11:00 – 18:30	Rounds IV, V and VI
19:30 – 21:00	Awards Ceremony and Banquet at Tramplin Restaurant
From 21:00	Nightlife: Moscow Never Sleeps

* Programme is preliminary

RAA Online Moot – Starting from 11 January 2016

By Alexandra Shamardina, Peoples' Friendship University of Russia, Member of the Organizing Committee of the RAA Online Moot

RAA First Annual Student Moot Court Competition On Online Arbitration (the Online Moot) starts its work the following year, 2016. The Online Moot is to be held annually in Moscow. The Online Moot is organized by the Russian Arbitration Association, RAA25 and the Higher School of Economics Faculty of Law. The Online Moot's overall aim is to promote online arbitration as one of alternative dispute resolution mechanisms, encouraging the resolution of business disputes by arbitration.

The Online Moot is dedicated to resolution of the problem based on the RAA Online Arbitration Rules which came into force on 1 October 2015. The competition will be held on the basis of the RAA System, which will provide non-Moscow students an opportunity to participate remotely via videoconference. The Online Moot rules are available on the Online Moot website.

Closing date for Submission of Registration Form is **9 March 2016**.

The Online Moot problem is to be released **on 11 January 2016** on the Online Moot website.

We are also pleased to announce the conference on online arbitration and the problem to take place in the Online Moot's eve. The conference will be supported by experts in international private law – partners of leading law firms, arbitrators and scholars.

Preliminary hearings are scheduled on **20 – 30 April 2016**.

Oral hearings taking place at the premises of the Higher School of Economics Faculty of Law are scheduled **20 – 22 August 2016.**

The participants are granted an opportunity to gain experience in international commercial arbitration and widen their horizons – the best speaker will be offered a summer internship in one of the top law firms of Russia.

The detailed schedule and further information are available on the Online Moot website.

We invite students and arbitrators to participate in the First RAA Online Moot!

RAA40 Events

LCIA YIAG - RAA40 2015 Moscow Workshop

By Mikhail Kalinin, Student, Lomonosov Moscow State University

On 20 May 2015, the Moscow office of Norton Rose Fulbright hosted and sponsored an interactive workshop in the traditional LCIA "Tylney Hall"-style open forum discussion of topics the audience proposed before the workshop. YIAG and RAA40 co-organized the event.

After Andrey Panov, Norton Rose Fulbright Senior Associate and the YIAG regional representative in Russia and CIS, opened the workshop, Dr Jacomijn van Haersolte-van Hof delivered keynote address describing her last year as the LCIA Director General.

Dr Haersolte-van Hof commented on the process of drafting of the recently introduced 2014 LCIA Arbitration Rules and, particularly, the newly introduced emergency arbitration provisions of the Rules. Even though emergency arbitration is yet to be universally accepted by national legislation, practice and scholars, the possibility to obtain interim or conservatory measures from experienced international arbitrators and the potential of worldwide enforceability of such measures are among the most essential advantages of the emergency arbitration procedures.

Another important amendment to the LCIA Rules is the possibility of electronic filing, i.e. a new LCIA Online Filing system that allows to file Requests for Arbitration and Responses through the LCIA website, as well as to submit any other documentation and to pay the filing fees online. Finally, Dr Haersolte-van Hof addressed the topics of diversity, competition between the arbitral institutions and the different approaches to the issue of legal (tribunal) secretaries that arbitral tribunals sometimes use in LCIA-administered disputes.

Finally, Dr Haersolte-van Hof commented on certain issues arising out of the sanctions imposed on Russian individuals and companies and assured the audience that the sanctions, even though problematic, have not frustrated the work. LCIA may still provide services to sanctioned parties if it obtains respective license and the relevant regulator normally issues such licenses At the Q&A session, Jacomijn stated that the LCIA is keeping the conservative position as to the matter of publishing awards to keep the disputes confidential and pointed to the statistics published in the Registrar's reports.

Artem Doudko (White & Case LLC, London), Andrey Panov (Norton Rose Fulbright, Moscow and YIAG Regional Representative for Russia and CIS), Anna-Maria Tamminen (Hannes Snellman, Helsinki and YIAG Co-Chair) and Sergey Usoskin (Ivanyan and Partners, Moscow) led the "Tylney Hall"-style open forum discussion.

The participants discussed the need to include provisions on consolidation of multi-party and multi-contract provisions into the institutional rules and the appropriate criteria and timing for consolidation. A question of

possibility to consolidate claims of different investors under different BITs into a single set of proceedings came up during the discussion, particularly in the context of 'stealth' consolidation, where claimants commence a single set of proceedings under multiple BITs.

Then, the discussion turned to the questions on the very recent ECJ Gazprom v. Lithuania judgement. Attendees discussed the advantages and downsides of anti-suit injunctions and interim measures, as well as chances of their enforceability in Russia. Some observed that the judgement has limited effect as the ECJ limited itself to permitting national courts to recognize anti-suit injunctions issued by arbitral tribunals, leaving it to the national courts to decide whether to enforce them.

The participants further discussed the problematic correlation of arbitration privacy and enforcement proceedings before the state courts. In this respect, Russian Arbitrazh Procedure Court provisions permitting a party to request the hearing to be closed to the public were highlighted. The discussion then moved on to the much-debated issue of the so-called "asymmetrical" or "optional" clauses. These clauses giving one of the parties a unilateral option to choose the forum have been treated as unfair and invalid in several jurisdictions. The participants then discussed an interesting practical example of attempts to avoid the problems arising from such unilateral clauses by drafting them in a "smarter way". The main idea behind the attempts was to draft a standard arbitration or forum selection clause combined with a waiver of rights to object by one of the parties in cases where the other party decided to submit its claims elsewhere.

Finally, the participants discussed the new mandatory, but controversial, requirements concerning the arbitral institution set by the new draft law on arbitration in Russia.

An informal drinks session closed the event.

Managing an International Arbitration: Client's and Counsel's Perspective

Sergey Usoskin, RAA40 Co-Chair, Attorney, Double Bridge Law

On 19 November 2015 RAA40 organized an open debate on the practical issues that arise in an international arbitration and the best practices of dealing with them. The panel and more than 40 attendees discussed attorney-client relations, evidence management, interaction with the opposing counsel and arbitrators as well as the logistics of an ideal hearing.

Four experienced arbitration practitioners introduced the issues and led the debate: Marina Akchurina (Cleary Gottlieb Steen & Hamilton), Maxim Kulkov (Kulkov, Kolotilov & Partners), Izabella Sarkisyan (Baker Botts) and William Spiegelberger (UC Rusal). One of RAA40's Co-Chair Sergey Usoskin (Double Bridge Law) moderated the discussion.

The discussion started with questions concerning client-counsel interaction and allocation of roles and responsibilities between them. The participants stressed the inevitable tension between the client's in-house counsel who needs to proactively manage costs and external counsel that may be more inclined to deal with all issues in an exhaustive manner. In this respect it may be important for the client to speak with one voice and prevent situations where the external counsel appeals to the business managers to override in-house counsel. On the other hand, the external counsel needs to escalate important issues within the client organization if the external counsel believes that it does not receive the necessary cooperation. Several views emerged in this respect. Everyone agreed that at the very least the external counsel should ensure that it requests the necessary assistance in writing and reiterates the request and the consequences several times.

However, some participants thought that this would still not be enough, the external counsel should continue to insist on receiving the cooperation.

The debate next turned to the overly active clients, who demand to commence arbitration 'tomorrow'. The panelists highlighted the need to establish at the outset the commercial reason behind the demand, e.g. whether the filing is necessary as a show of power before an important round of negotiations or to report to the company's board at their next meeting. Perhaps the same result can be obtained by measures other than commencement of arbitration, such as by a letter before claim or by obtaining interim measures. If the notice of arbitration needs to be filed quickly counsel should rationally assess the results that may be achieved during the available time. For instance, counsel may choose to draft a short notice setting out only a very general description of the dispute and then develop the case in later submissions with the benefit of appropriate time for their preparation.

The debate on evidence-related issues focused on proactive management and resilience. Turning first to an unwilling witness, who tells at the time of the first contact that she is unwilling to give evidence, everyone agreed that external counsel should not give up at this point. At the very least such a witness may provide some important information or documents counsel may use as evidence. More importantly, the initial refusal may result from some misconceptions the witness has with respect to the process and the counsel may be able to dispel them (e.g. by explaining that the expenses of the witness and time spend will be compensated). The debate next turned to experts who may possess first-rate knowledge of the subject, but not the required expertise in producing clear and easily readable expert reports. Everyone agreed that in this case ghostwriting the report for the expert is not a solution. Rather, from the very outset precedents of well-written expert reports should be provided to the expert and best practices and conventions of writing reports for the respective forum clearly explained and discussed with her. It may also prove useful to ask the expert to produce at an early stage a part of the report (e.g. an answer to one of the questions) and discuss the any concerns and comments regarding the format and presentation of this part to allow the expert to take into account these comments in working on the other parts of the report.

Next, the debate turned to the sleeping arbitrators and extremely aggressive opposing counsel. The participants stressed that an arbitrator who does not ask questions does not necessarily sleep, rather his unwillingness to intervene with questions may be a reflection of the legal tradition the arbitrator comes from. However, where the arbitrator is sleeping the solutions are usually very practical. Coughing or causing as much noise as possible when shuffling files (or perhaps dropping one of them) may be one of the solutions. Playing with the hearing rooms air conditioning (decreasing the temperature or ensuring the room is properly ventilated) may be another. Going for more often coffee breaks may be yet another option. Aggressive opposing counsel presents a more delicate issue. On the one hand, if the counsel is too aggressive he does a disservice to the client, because the arbitrators would likely be offended or not impressed by the aggressiveness. On the other hand, certain degree of aggressiveness is to be expected in cross-examination. Still if the opposing counsel crosses the limits of appropriate, the only proper response for the counsel is to intervene and request the tribunal to order the opposing counsel to contain himself.

RAA40 takes this opportunity to express its gratitude to the Moscow office of Baker & McKenzie and Mr Vladimir Khvalei (Partner, Baker&McKenzie) for hosting the seminar.

RAA40 New Year Awards & Drinks

On 9 December 2015 a very excited group of Russia- and foreign-based arbitration practitioners met at Bon App café in Moscow for an early celebration of New Year and holidays and announcement of the recipients of the 2015 RAA40 Top 10 Young Arbitration Practitioners Award. This is the second time RAA40 organized the event.

Unlike traditional seminars and conferences the purpose of the RAA Awards & Drinks is to provide an opportunity for extensive networking and allow both young and established practitioners to meet in an informal setting.

Since the setting was, as expected, informal we do not have much to report apart from announcing the recipients of the awards. To be eligible for the award, the lawyer must have been (1) under 40; (2) not yet a partner or a professor, (3) practicing in the sphere of Russia-related arbitrations whether in Russia or abroad. RAA40 Co-Chairs were not eligible. The recipients were chosen by the RAA40 membership though an online poll with more than 250 persons voting.

The 2015 winners are (in alphabetical order):

Pavel Boulatov (White & Case),
Dmitry Davydenko (Muranov Chernyakov & Partners),
Artem Dudko (White & Case),
Ekaterina Kobrin (Baker & McKenzie),
Anna Kozmenko (Schellenberg Wittmer),
Yury Makhonin (Dechert),
Andrey Panov (Norton Rose Fulbright),
Julia Popelysheva (Clifford Chance),
Olga Vishnevskaya (Egorov Puginsky Afanasiev & Partners),
Roman Zykov (RAA).

We take this opportunity to once again express our gratitude to the sponsors for their very generous support that made the event possible. They were Egorov Puginsky Afanasiev & Partners and White & Case.

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.

Acknowledgements

Co-chairs of RAA40 wish to express their gratitude to:

White & Case for providing financial support to RAA40 New Year Drinks & Awards held on 9 December 2015.

Egorov, Puginsky, Afanasiev & Partners for providing financial support to RAA40 New Year Drinks & Awards held on 9 December 2015.

Baker & McKenzie for hosting the seminar on managing an international arbitration on 19 November 2015.

Alexander Chuprunov, a 4th year student of Lomonosov Moscow State University, Faculty of Law, for translating the interview of Prof. Alexander Komarov from Russian into English.

For Notes

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Newsletter #6

RAA 40

Russian Arbitration Association