RAA 40

Russian Arbitration Association

Newsletter

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Welcome from Co-Chairs

Dear friends and colleagues,

We are very pleased to present the seventh issue of RAA40 Newsletter which comes out following RAA40's first year under new leadership.

The Newsletter focuses on the main developments in the world's leading institutional rules as well as on costs in arbitration. In the past several years a number of major arbitration institutions significantly revised their arbitration rules in order to improve certain tools available to parties in arbitration and to address the parties' concerns regarding the cost and speed of the arbitral proceedings. The recently revised rules include the arbitration rules of the ICC, LCIA, Swiss Chambers, SCC, SIAC and HKIAC. Egor Chilikov will discuss these changes in detail to provide you with a comprehensive update.

This issue will include an interview with Prof. Richard Kreindler, a partner at Cleary Gottlieb and an experienced arbitrator, who will provide some tips for young practitioners on how to build their profiles to become arbitrators as well as on professional and personal qualities an arbitrator should have. In this issue you will also find interviews with Natalia Petrik, a legal counsel at the SCC, and Nadia Hubbuck, a former counsel at the LCIA and now an associate at Berwin Leighton Paisner, who will provide an insight on the work in major arbitration institutions.

You will also find in the Newsletter our regular columns – key cases decided in Russia and abroad, case notes from our foreign colleagues and a list of arbitration events to attend in early 2018.

It has been a great pleasure to be with you this year. We have had a chance to organize a number of seminars and events in Moscow, including the Women in Arbitration meeting, the conference on Bribery and Corruption Allegations in Arbitration, the roundtable on Multi-Tiered Dispute Resolution Clauses and, of course, our traditional New Year Awards & Drinks.

We have also sought to expand our geographical reach and hosted two seminars outside Moscow, one in St Petersburg (How to Make the Arbitration Quicker) and another one in Kazan (Evidence Collection – Mission is possible). Finally, together with RCAN (Russia and CIS Arbitration Network) and PWC we organized a winter social in London. We take this opportunity to thank all those who supported and attended all these events.

We would like to take this moment to thank RAA40's previous Co-Chairs – Egor Chilikov, Olesya Petrol and Sergey Usoskin – who devoted considerable energy to the activities of RAA40 and have made lasting contribution thereto during their tenure as co-chairs. They set a high and demanding bar for us as the new co-chairs which we aim to meet.

We also use this opportunity to inform you about the change in the composition of RAA40 leadership. Anna Shumilova and Anton Garmoza will step down as RAA40 Co-Chairs effective from 1 January 2018. Anna has been instrumental for RAA40's success both under the prior leadership and during the transition period when the new Co-Chairs stepped in. Anton has been the vital member of our team and an important contributor to RAA40's events this year. We are grateful to Anna and Anton for being with us and wish them our very best in their career pursuits.

We are very much looking forward to bringing all of you together at our events next year. In case you feel like travelling, save the date for the Third Co-Chairs' Circle Global Conference in Rome, Italy, on 18-19 May 2018.

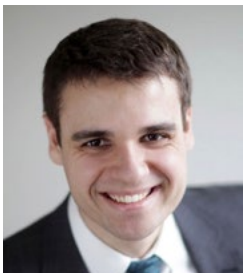
Yours sincerely,
RAA40 Co-Chairs


Denis Almakaev


Anna Shumilova


Olga Tsvetkova (Vishnevskaya)


Marina Akchurina


Anton Garmoza

Courts and Arbitration in Russia

Overview of Key Court Decisions: January 2016 – December 2017

*By **Sergey Usoskin**, Attorney, Double Bridge Law, **Denis Almakaev**, Senior Associate, Hogan Lovells CIS, RAA40 Co-Chair, and **Danil Kuimchide**, Paralegal, Hogan Lovells CIS*

1. Matters Concerning Validity of Contracts of a Bank in Financial Rehabilitation Are Not Arbitrable

(PJSC National Bank Trust v. Phosint Limited, no. A40-117039/2015, Supreme Court, Commercial Division, 16 August 2016 (Supreme Court ref. no. 305-ЭС16-4051))

The Supreme Court found that where the bank undergoing rehabilitation seeks to invalidate a contract with an arbitration clause it may bring such a claim before state courts, since the underlying dispute is not arbitrable. The court found that the rehabilitation, a procedure introduced to prevent the bank's's insolvency, transforms the nature of the claim into a public law one and means that the claim cannot be resolved by arbitration.

Temporary administrators of Bank Trust, appointed by the Russian Central Bank at the initial stage of rehabilitation, sought to invalidate a contract with Phosint. Under this contract Bank Trust agreed to purchase from Phosint promissory notes issued by Bank Trust's affiliates for more than USD 70 mln. They relied both on insolvency-related grounds of invalidity (suspicious transaction and transaction giving preference) and general grounds (abuse of rights). Lower courts referred the claim to arbitration relying on the provision of the contract providing for settlement of all disputes by ICAC (MKAS) at the Russian CCI.

The Supreme Court focused on arbitrability of the claim. It pointed out that rehabilitation is a special mechanism aimed at protecting the interests of bank's depositors and that public authorities provide funding to the bank as part of this mechanism. The court emphasized that the claim brought by the temporary administrators formed an integral part of this mechanism, presumably because it sought to restore the bank's solvency. According to the Supreme Court this renders the whole dispute non-arbitrable. The Supreme Court Presidium refused permission to appeal.

2. A Court Shall Refer Parties to Arbitration Only If the Respondent Requests Such a Referral, Not Just Mentions the Arbitration Clause in Its Pleadings

(A.A. Lagunov v. LLC Leasing Company Razvitie, no. A57-16403/2014, Supreme Court, Commercial Division, 8 February 2016 (Supreme Court ref. no. 306-15-13927))

The Supreme Court held that the state courts may proceed to rule on the merits of a dispute even if the parties agreed to arbitrate in the underlying contract provided the respondent failed to ask the court to refer the parties to arbitration in its first submission on the merits. The court seized of the matter shall not discontinue the case in the absence of such a request.

The dispute arose between a lessee (claimant) and a leasing company (respondent) over certain funds the claimant alleged leasing company owed him. The lease-purchase agreement contained an arbitration clause. However, when the lessee attempted to commence arbitration he was unable to find the arbitral institution. Eventually he commenced proceedings before a commercial court arguing among other things that the arbitration clause is incapable of being performed. In its first pleading, the leasing company made submissions on the merits of the dispute, asked the court to reject the claimant's claims and also observed that the contract contains an arbitration clause.

The first instance and appellate courts issued decisions in favor of the claimant. The cassation instance court overturned earlier decisions and referred parties to arbitration. It held that since the parties had agreed to arbitration, state courts have no jurisdiction unless the respondent positively consents to it.

In overturning the cassation instance court's decision, the Supreme Court relied on two principal arguments. Firstly, a state court has jurisdiction even if the parties have agreed to arbitration. It may refer parties to arbitration only where the respondent relies on the arbitration clause in litigation. Secondly, the respondent must request such referral expressly; a mere reference to the

arbitration clause in a submission would not suffice. The Supreme Court Presidium refused permission to appeal.

The decision contains a useful reminder to the state courts that they may not terminate proceedings on their own initiative if they locate an arbitration clause in the contract (something first instance courts do quite frequently). On the other hand respondents sued in Russia who wish to have the dispute resolved by arbitration must remember to make the relevant submission to the court.

3. Award Creditor Does not Need to Write a Letter Commencing an Action to Enforce an Arbitral Award

(PJSC Sberbank Russia v. LLC Freedom, no. A60-30619/2016, Supreme Court, Commercial Division, 20 March 2017 (Supreme Court ref. no. 309-ЭС16-17446))

In 2016 Russian Commercial Procedure Code was amended to impose an obligation on claimants to send a letter before filing an action against a respondent giving the respondent a certain period of time to settle the claim. The Code expressly provides that this procedure does not apply to certain claims, such as, for instance, application to set aside an arbitral award. However, no similar express provision is provided for applications to enforce arbitral awards.

In the commented decision the Supreme Court confirmed that the letter before action does not need to be sent before commencing proceedings for the enforcement of an arbitral award. The court relied on the purpose of the pre-action protocol – encouraging parties to settle disputes out-of-court where such settlement is possible. The court explained that where the dispute concerns enforcement of an arbitral award such purpose cannot be served as a dispute had already arisen and it had been proved impossible to resolve it and thus it was finally decided by the arbitral tribunal. In such circumstances and to achieve the purpose of time-efficiency of arbitral and enforcement proceedings, the legislator could not have intended to require award creditor to send a letter before commencing an action to enforce an arbitral award.

4. Lender's Unilateral Option to Choose between Arbitration and Litigation Renders the Entire Dispute Settlement Clause Void

(Emerging Markets Structured Products B.V. v. LLC Zhilindustriya & ors, no. A40-125181/2013, the Moscow Circuit Court, 14 March 2016)

The cassation instance court in Moscow ruled that the Russian courts had jurisdiction to hear an over 14.5 bln. rouble claim for the repayment of a loan, since the arbitration clause in the loan agreement had been void. According to the court, the provisions of Russian law invalidating the clause are mandatory and override parties' choice of English law.

The dispute arose under a 2012 loan agreement governed by English law. The claimant (apparently an SPV) provided the loan, which was secured by guarantees from a number of Russian companies. Under the dispute resolution clauses the disputes were to be submitted to LCIA, but the lender had an option to submit them to a court in England, Russia or any other competent jurisdiction. In 2013 the borrower defaulted and the lender commenced proceedings to recover the loan before the Moscow Commercial Court. The respondents (borrower and guarantors) asked the court to refer parties to arbitration.

Despite the fact that the dispute settlement clause expressly permitted the lender to commence proceedings before the Moscow Commercial Court, the courts nevertheless addressed validity of the clause as a whole. They held that by giving only one of the parties the option to choose between arbitration and litigation the clause violated their procedural equality guaranteed by the Constitution and the Convention on Human Rights and Fundamental Freedoms. The courts then dismissed the respondents' argument that English law applicable to the contract and the dispute resolution clause permits such optionality. The courts reasoned that since the relevant practice of Russian courts rests on the provisions of international law, it overrides parties' choice of English law. The Supreme Court refused to reconsider the case.

5. Tribunal's Reliance on an Argument Not Invoked by the Claimant Leads to the Refusal to Enforce the Award

(CJSC Strabag v. CJSC Severstal – Sorting Plant Balakovo, no. A57-22646/2015, the Povolzhie Circuit Court, 9 March 2016)

The cassation instance court in Kazan confirmed lower court's decision that had refused to recognize and enforce a 372 mln. rouble ICAC (MKAS) award against Severstal. It held that the tribunal had rendered the award on the basis of an argument the claimant had not pleaded.

The underlying dispute arose under a contract for the construction of the plant that the general contractor failed to complete. Nevertheless the contractor sued the client for a portion of the general contractor's fee tied to execution of the certificate of acceptance of works. The contractor argued before the arbitral tribunal that the client had had to sign the certificate and accordingly the tribunal should order payment of the fee. The tribunal dismissed this argument, but held that the fee was due, because the provision making payment conditional on execution of the certificate by the client was unenforceable under Russian law.

In refusing to enforce the award the courts held that it contradicts procedural public policy as the tribunal had failed to respect principles of procedural equality and adversarial nature of the proceedings. The courts stressed that the tribunal had relied on a legal ground the claimant had not advanced and in doing so it had failed to respect the respondent's right to equality of arms.

6. 'Russian Torpedo' No More or Still Kicking? Courts Split on Whether Dispute over Validity of the Contract Initiated by a Shareholder of a Party Should be Referred to Arbitration

(Grasilis Holding B.V. v. CJSC Kulon-Istra and LLC Danom, no. A40-176458/2015, the Ninth Appellate Court, 18 March 2016; Svetlana Karaeva on behalf of LLC Otdokhni-77 v. LLC Delta)

In Grasilis the appellate court in Moscow decided the parties should be referred to arbitration as the claimant was bound by the arbitration clause in the contract it had sought to invalidate.

The claimant asked the court to invalidate a long-term lease agreement which a company (in which the claimant had an interest) had entered into. It argued that the terms and conditions of the lease were unfair and the shareholders had not properly approved the lease agreement. The respondent asked the court to refer parties to arbitration relying on the arbitration clause in the lease.

The appellate court agreed with the respondent and dismissed the claim. It relied on the recent Resolution of the Supreme Court's Presidium, where the Supreme Court had explained that shareholders of a company seeking invalidation of the transactions the company entered into act as a representatives of the company, not as independent parties. Hence, as the claimant was only a representative of the lessee the arbitration clause in the lease applied and the court was bound to refer parties to arbitration.

In Karaeva the appellate and cassation instance courts of Moscow decided that a claim brought on behalf of the company by a shareholder seeking to invalidate a contract the company entered into on the basis of the lack of necessary corporate approvals may not be referred to arbitration. The courts decided that the dispute was a corporate one and as such cannot be referred to arbitration on the basis of agreements entered into before Russian law permitted parties to refer corporate-related disputes to arbitration (February 2017).

7. Supreme Court Ruled on Application of Public Policy Exception in Disputes Concerning Contracts Involving Public Funds

(OJSC Special Economic Zones v. OJSC Federal Grid Company of Unified Energy System, no. A40-188599/2014, Supreme Court, Commercial Division, 28 July 2017 (Supreme Court ref. no. 305-ЭС15-20073))

The Supreme Court upheld the lower courts' decisions setting aside an arbitral award on the basis that the underlying dispute was not arbitrable since it arose out of contract involving expenditure of public funds.

The parties entered into a contract for installment of power supply infrastructure within the territory of a 'special economic zone'. The claimant commenced arbitration to invalidate a number of provisions of the contact. The arbitral tribunal denied the claim.

Having lost in the arbitration, the claimant sought to set aside the arbitral award on the grounds that the dispute was not arbitrable from the beginning. In upholding the claimant's application, the Moscow City Commercial Court relied on three principal grounds: (i) although the claimant is an open joint-stock company, they nevertheless acted as a governmental body when entering into the contract; (ii) the contract itself was aimed at improvement of special economic zones, i.e. it was entered into for public purposes; and (iii) the funds for implementation of the contract were assigned from the governmental budget.

The cassation court overturned the earlier decision arguing that the underlying dispute was arbitrable as the contract had been entered into between two private companies. The cassation court noted that the claimant's jurisdictional arguments were inconsistent with the claimant having previously relied on the arbitration clause to commence the arbitration.

The Supreme Court not only sided with the trial court but also extended the scope of disputes which could be held non-arbitrable. The Court ruled that, "as a general rule", disputes "arising out of the contracts which involve expenditure of public funds" cannot be adjudicated by arbitration. In dictum, the Court noted that such disputes could be held arbitrable "in exceptional cases" where the underlying legal relations serve to uphold "a more important public interest". It remains to be seen how this caveat will apply in practice.

8. Moscow City Commercial Court Refused to Grant an Enforcement of an Award Rendered in a "Sham" Arbitration

(PJSC Ukrainian Chemical Production v. Titan Investments LLC, no. A40-4681/17, the Moscow City Commercial Court, 23 June 2017)

The claimant commenced five parallel arbitrations before the Ukrainian International Commercial Arbitration Court ("ICAC") against the same respondent to recover the outstanding debts under a number of contracts. All arbitral awards were rendered by the tribunal in favor of the claimant who then applied to the Moscow City Commercial Court seeking enforcement of the awards.

The Moscow City Commercial Court denied enforcement of the awards on public policy grounds. In four of the five cases it was justified only on the ground that the tribunal had failed to examine whether the underlying contract was approved by the sole shareholder as a major transaction.

What is more interesting is the trial court's finding in one of the cases that the underlying arbitration was a sham. The trial court made a positive finding that the arbitration was brought in order to "legalize an unjustified claim which was based on artificial debts". The court further noted that the arbitral award was likely to be used in the future in order to wind up the defendant and thus "gain unjustified benefit of being the first to bring the insolvency application".

The cassation court affirmed and found that the claimant's claims represented an abuse of the arbitration procedure. Neither of the two courts provided detailed reasons for their findings of sham or abuse of rights. It does not follow from the court rulings that the defendant made those points which suggests that the courts made those findings sua sponte.

This case shows that courts may be ready to deny enforcement where there are sufficient doubts that the arbitration and the underlying transaction are not genuine.

9. Corporate Disputes Were Arbitrable Under the Legislation in Force before 1 September 2016

(Permgrazhdanproekt LLC v. Ms Mosiyash N.P. and Mr Shiray V.D., no. A50-11392/2016, the Ural Circuit Commercial Court, 13 January 2017)

Prior to the reform of Russian arbitration law which finally allowed arbitration of some of the corporate disputes subject to certain conditions, Russian courts tended to hold that this category of disputes is not arbitrable (based, inter alia, on the holding in NLMK v. Maximov).

In the underlying dispute the claimant applied to the court seeking to invalidate the arbitration clause which specifically provided for arbitration of corporate disputes. The contract with an arbitration clause was entered into before new arbitral legislation had entered into force. The arbitration itself took place before the new legislation took effect.

The trial court and court of appeal found in favor of the claimant on the basis that (1) the scope of the arbitration clause was uncertain, (2) corporate disputes were to be settled exclusively by state courts, and (3) arbitration of corporate disputes was only permitted by the new legislation which came into effect on 1 September 2016.

The cassation court upheld the decision of the lower courts on the merits but found that their reasoning regarding arbitrability of corporate disputes under previous legislation was wrong. The court ruled, in dicta, that, even before the reform of Russian lex arbitri, the arbitration legislation and practice allowed arbitration of corporate disputes. In reaching this conclusion the court relied on two reasons. Firstly, previous Russian legislation did not provide for express prohibition against arbitration of corporate disputes. Secondly, exclusive jurisdiction of the Russian commercial courts to handle such disputes meant only that the same should not have been heard by courts of general jurisdiction. This rule did not, however, affect arbitrability of the corporate disputes. The Supreme Court refused permission to appeal.

The holding of this case may be relevant to the parties who entered into the arbitration agreement before the amendments to Russian arbitration legislation took effect. One factor to bear in mind is when the arbitration itself took place.

10. An Arbitral Award Rendered in an Arbitration Seated Outside Russia May Be Treated As a Russian 'Domestic' Award If the Merits Hearing Took Place in Russia

(Common Legal Property LLC v. Techno-Art LLC, no. A40-219464/16, the Moscow Circuit Commercial Court, 19 July 2017)

Two Russian companies agreed to resolve their disputes under the auspices of the 'Russian-Singaporean Arbitration' Centre. Despite the seat of the arbitration being Singapore, the phearing in arbitration took place in Moscow, Russia. The crux of the case was whether the award could be enforced under the New York Convention as a foreign arbitral award.

The trial court found that the award could not be enforced in this way on the basis that the arbitration hearing took place in Russia. Therefore, the court noted, such an award should be considered as a domestic one and enforced in accordance with procedure provided for domestic awards. The court found that the claimant was seeking to unlawfully circumvent the rules applicable to domestic arbitrations when seeking to enforce the award on the basis of New York Convention. Separately, the court also cited abuse of rights pointing out that the claimant was affiliated with a Russian arbitral institution. The cassation court affirmed and the Supreme Court refused permission to appeal.

It is uncertain what the result would have been had the court not made findings of abuse of rights. However, the parties to arbitration with a foreign seat may need to be mindful of this decision when agreeing to hold hearings in Russia.

11. The Claimant's Insolvency Is Not Per Se an Excuse to Ignore the Arbitration Clause

(Energy Company Ural Industrial – Ural Polar LLC v. PSG-International a.s., no. A81-4101/2016, Commercial Court for the Yamalo-Nenetskiy Autonomous Circuit, 23 August 2017)

The Commercial Court for the Yamalo-Nenetskiy Autonomous Circuit ruled that the claimant's adverse financial position (evidenced by its bankruptcy) does not relieve them from their obligation to submit disputes to arbitration.

In the case at hand, the parties agreed for arbitration of any disputes in an ICC arbitration seated in Vienna. The claimant sought to circumvent the arbitration clause and brought proceedings before a state court. The claimant argued that the arbitration clause was unenforceable on the basis that the claimant was subject to the bankruptcy proceedings. More specifically, the claimant argued that they did not have sufficient funds to meet the costs of arbitration. The respondent petitioned the trial court to terminate the proceedings and refer the parties to arbitration.

The court ruled that the claimant's financial position does not per se render the arbitration clause inoperative. The trial court noted that submissions of this sort are subject to "heightened burden of proof" and need to be assessed for abuse of rights. The case turned on its facts. Because evidence was produced to the court showing that the claimant could meet the costs of arbitration, the court declined jurisdiction and referred the parties to arbitration. The Court of Appeal affirmed.

While this may generally be regarded as a pro-arbitration development in the Russian courts' jurisprudence, one should not overlook the dicta. The court did not dismiss altogether the notion that a party's adverse financial position may lead to unenforceability of the arbitration clause if a party proves inability to meet the costs of the arbitration.

12. The Court Found Jurisdiction to Handle Enforcement of the Investment Arbitration Award despite the State Immunity Defence

(PJSC Tatneft v. Ukraine, no. A40-67511/2017, Moscow Circuit Commercial Court, 29 August 2017)

The Moscow Circuit Commercial Court ruled that the Russian courts have jurisdiction to hear applications for recognition and enforcement of arbitral awards against a foreign state where the latter agreed to arbitration.

The claimant sought recognition and enforcement of an arbitral award rendered as a result of the investment treaty arbitration against Ukraine. The first instance court dismissed the application on two grounds. First, it found that Ukraine's agreement to arbitrate disputes with Russian investors under the Russia- Ukraine BIT did not mean that Ukraine agreed to waive sovereign immunity in subsequent enforcement proceedings before Russian courts. Second, the court also ruled that the claimant had failed to prove that the Moscow courts would have 'effective jurisdiction' over the respondent state. On this prong, the court found that the claimant had failed to identify any of the respondent's assets within the jurisdiction of the Moscow courts which would not be immune from enforcement. On this basis, the trial court terminated the proceedings.

The cassation court overturned the trial court's ruling. In relation to the state's immunity, it found that, in agreeing to arbitrate its disputes with Russian investors, Ukraine not only waived its immunity for the purposes of the arbitration proceedings but also for the purposes of subsequent enforcement proceedings before Russian state courts. The cassation court also found that Ukraine consented to jurisdiction of the Russian courts by virtue of a clause contained in the Russia-Ukraine BIT. Moreover, the court held that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards did not provide for immunity as a ground to refuse to enforce the award. Based on these grounds the court decided that the respondent cannot rely on its sovereign immunity. In relation to the Moscow courts' jurisdiction, the cassation court found that the Moscow courts have jurisdiction to consider this case because Ukraine's representatives, namely the embassy, is located in Moscow which is enough for the Moscow courts to entertain jurisdiction over an application to recognize and enforce the arbitral award. The Supreme Court refused permission to appeal.

Courts and Arbitration Abroad
Sweden

*By **Fredrik Ringquist**, Partner, Mannheimer Swartling and **Anna Alriksson**, Associate, Mannheimer Swartling*

The Supreme Court confirms that courts have authority to conduct a full review of an arbitral tribunal's jurisdiction

Decision of the Swedish Supreme Court rendered on 21 April 2016 in case NJA 2016

Background

In 1992, the French company Elf Neftegaz S.A. ("Elf")[1] and the Russian company Interneft AOZT ("Interneft") signed a cooperation agreement regarding the possible exploration and extraction of oil and gas in the Saratov and Volgograd regions of the Russian Federation (the "Regions"). The Regions were co-signatories to the agreement.

In 2009, Interneft and the Regions commenced an UNCITRAL arbitration against Elf in Stockholm in relation to the cooperation agreement. In 2011, Elf filed an action with the Stockholm District Court under section 2[2] of the Swedish Arbitration Act (1999:116) ("SAA"), requesting that the court declare that (i) Elf was not bound by any arbitration agreement with Interneft and the Regions; and (ii) the Arbitral Tribunal lacked jurisdiction to resolve the dispute, or alternatively, that the arbitration clause did not grant the Arbitral Tribunal jurisdiction to resolve the dispute.

In support of its second claim, Elf submitted, among other things, that the cooperation agreement never entered into force, that the Arbitral Tribunal was not properly constituted and that certain other procedural irregularities had occurred in the early stages of the arbitration which prevented it from moving forward.

In response, Interneft and the Regions requested, *inter alia*, that the Stockholm District Court dismiss Elf's second claim on the basis that it fell outside of the scope of section 2 of the SAA since it did not relate to the arbitration agreement itself, but rather to (other) procedural issues in the arbitration.

The Stockholm District Court denied Interneft's and the Regions' request for dismissal but the Svea Court of Appeal overturned the lower court's decision and dismissed Elf's action under section 2 of the SAA. Elf appealed the decision to the Supreme Court.

The Supreme Court's reasoning

The Supreme Court granted Elf's appeal and thus rejected Interneft's and the Regions' request that Elf's action under section 2 of the SAA be dismissed.

In reaching its decision, the Supreme Court first examined the scope of an arbitral tribunal's jurisdictional review under section 2 of the SAA. Section 2 of the SAA provides that "*the arbitrators may rule on their own jurisdiction to decide the dispute*." The Supreme Court noted that this wording indicated that the scope of an arbitral tribunal's review under section 2 of the SAA was broad. Against this background, and also considering that there were no compelling reasons to limit an arbitral tribunal's review to certain jurisdictional issues, the Supreme Court concluded that section 2 of the SAA should be interpreted such that the scope of an arbitral tribunal's review included all issues related to jurisdiction.

The Supreme Court then turned to the specific issue before it, namely the scope of a court's review under section 2 of the SAA. The Supreme Court first noted that section 2 of the SAA stated that an arbitral tribunal's jurisdictional review did not prevent a court from assessing the same issue at the request of a party. Moreover, the Supreme Court found that it made sense to interpret section 2 of the SAA such that the scope of review was the same irrespective of whether it was carried out by an arbitral tribunal or a court. The Supreme Court also stated that procedural economy spoke in favour of ensuring that all jurisdictional issues could be resolved through a court action under section 2 of the SAA, since this would reduce the need to commence challenge proceedings after the issuance of the final award pursuant to section 34 of the

[1] Disclaimer: Mannheimer Swartling was co-counsel for Elf in the Swedish court proceedings. Moreover, Mannheimer Swartling was and continues to be co-counsel for Elf in the underlying arbitration.

[2] Translated into English, section 2 of the SAA reads as follows: *"The arbitrators may rule on their own jurisdiction to decide the dispute. The aforesaid shall not prevent a court from determining such a question at the request of a party. The arbitrators may continue the arbitral proceedings pending the determination by the court."*

SAA. Finally, the Supreme Court noted that it would not make sense if all jurisdictional issues could be reviewed in connection with an appeal of a negative jurisdictional award under section 36 of the SAA, but not pursuant to an action under section 2 of the SAA. Thus, the Supreme Court held that section 2 of the SAA should be understood to mean that a court dealing with an action under this provision could review all aspects of an arbitral tribunal's jurisdiction upon the request of a party, in the same manner as an arbitral tribunal may decide on such matters.

Brief comments

The Supreme Court's decision addresses an issue of principle with respect to the relationship between courts and arbitral tribunals, by clarifying the scope of the court's examination of the arbitral tribunal's jurisdiction. The Supreme Court's decision – that all jurisdictional objections can be referred to examination by a court – means that such issues can be decided by courts in an early stage of the arbitral proceedings, instead of remaining and be subject to challenge proceedings only after an arbitral award has been rendered.

The Svea Court of Appeal rules that arbitral tribunal should not have heard Yukos claims

Judgment of the Svea Court of Appeal rendered on 18 January 2016 in case no T 9128-14

Background

In 2007, four Spanish investment funds (the "Funds") initiated arbitration in Stockholm under the Soviet Union-Spain BIT (the "Treaty"), seeking compensation on the basis that Russian Federation had expropriated their investment in Yukos in breach of the Treaty. In 2012, the Arbitral Tribunal ruled that the Russian Federation had unlawfully expropriated the Funds' investments and ordered it to pay damages to the Funds.

In 2009, the Russian Federation filed an action under section 2 of SAA, requesting that the Stockholm District Court declare that the Arbitral Tribunal lacked jurisdiction to resolve the case brought by the Funds. In 2014, the Stockholm District Court denied the action brought by the Russian Federation. The Russian Federation subsequently filed an appeal against the Stockholm District Court's judgment with the Svea Court of Appeal.

The Svea Court of Appeal's reasoning

The Svea Court of Appeal granted the Russian Federation's appeal and overturned the Stockholm District Court's judgment.

The Svea Court of Appeal began its examination by noting that the case before it primarily concerned the interpretation of two clauses of the Treaty – the investor-state dispute settlement clause (article 10) and the most-favoured-nation (MFN) clause (article 5(2)). The Russian Federation submitted that article 10 of the Treaty did not give the Arbitral Tribunal a right to assess whether the alleged investments had in fact been expropriated, since it only granted jurisdiction over disputes relating to quantum once a breach had been established. The Funds took issue with this interpretation but submitted that article 5(2) of the Treaty in any event vested the Arbitral Tribunal with jurisdiction since it allowed them to rely on more favourable investor-state dispute settlement clauses in other treaties concluded by the Russian Federation. The Russian Federation objected to this contention.

In reaching its decision, the Svea Court of Appeal noted that the Treaty first and foremost should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms in their context and in the light of its object and purpose, pursuant to article 31 of the Vienna Convention on the Law of Treaties. Against this background, the Svea Court of Appeal found that the reference in article 10 of the Treaty to *"amount or method of payment of the compensation due under article 6"* was sufficiently clear to conclude that the provision limited investor-state arbitrations to disputes regarding quantum. Although it would have been more attractive for a foreign investor to have all issues relating to an alleged expropriation resolved through international arbitration, the Svea Court of Appeal was of the view that such an interpretation lacked support in the wording of article 10 of the Treaty. Thus, the Svea Court of Appeal found that this particular provision did not vest it with jurisdiction to assess whether an expropriation had in fact occurred.

Next, the Svea Court of Appeal examined whether the MFN clause in article 5(2) of the Treaty could be used to import a more favourable investor-state dispute settlement clause from another treaty concluded by the Russian Federation. In this context, the Svea Court of Appeal noted that different arbitral tribunals had reached different conclusions regarding this issue. Although the Svea Court of Appeal did not exclude that an MFN clause in principle could be used to import a more favourable investor-state dispute settlement clause from another treaty, it stated that such an interpretation would need to be supported by the specific wording of the MFN clause in question.

The Svea Court of Appeal found that the MFN *"treatment"* mentioned in article 5(2) of the Treaty was limited to *"fair and equitable treatment"* (FET) by virtue of the reference therein to article 5(1) of the Treaty. The Svea Court of Appeal then discussed whether an arbitral tribunal could import a more favourable investor-state dispute settlement clause from another treaty on the basis of an MFN clause with a scope of this kind. In this connection, the Svea Court of Appeal concluded that the FET standard, as a minimum, included a right of access to court and a fair trial. However, the Svea Court of Appeal found that no evidence had been presented supporting that the Funds would lack access to a fair trial before a national court (the Funds had not argued there was no access to court as such). Nor was the Svea Court of Appeal convinced that the FET standard included an unconditional right for investors to refer a dispute to international arbitration. Against this background, the Svea Court of Appeal ruled that the MFN clause in article 5(2) of the Treaty could not be used to import a more favourable investor-state dispute settlement clause from another treaty.

Brief comments

The Svea Court of Appeal's judgment has been appealed to the Supreme Court. It is an open question whether and to what extent the Supreme Court will agree with the treaty interpretation expressed by Svea Court of Appeal. Having said that, the Svea Court of Appeal's judgment underscores the importance of the specific wording of the relevant treaty in determining the scope of dispute resolution clauses and as well as the need to carry out a thorough analysis of potentially applicable treaties before submitting disputes to investment arbitration.

New SCC rules entered into force on 1 January 2017

The Arbitration Institute of the Stockholm Chamber of Commerce ("SCC") has carried out a comprehensive revision of its arbitration rules. The revised rules entered into force on 1 January 2017. The revisions include, among other things, novel features such as a summary procedure which allows arbitral tribunals, at the request of a party, to decide one or more issues of fact or law decide in a summary fashion. The intention has been to provide arbitral tribunals with a case management tool that permits them to deal effectively with allegations deemed unsustainable. The revisions also include procedures to join additional parties and to manage claims arising out of multiple contracts in a single proceeding, as well as on amicus curiae briefs in investor-state arbitrations.

Developments in the World's Leading Institutional Rules

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"*Arbitration is only as good, as its arbitrators.*" This maxim has been repeated since 1980s, the times when *ad hoc* arbitration was going head to head with institutional. Over the decades since then institutional arbitration has progressed significantly. Arbitral institutions nowadays provide a customized infrastructure for arbitrations and even act – as Dr Gerbay recently observed – as "*ancillary participants of the adjudicative process which decisions… may occasionally be outcome-determinative*".[1] Broadly put, one may argue that now (institutional) arbitration is only as good, as its arbitrators and arbitral institution.

In the past several years we have seen arbitral institutions across the Globe amending, modernizing, and significantly re-writing their rules and advancing their practices in pursuance of users' trust and stronger positions on the market. The desire to improve certain arbitral tools and address users' concerns about high costs and lengthy arbitral proceedings were the key drivers of these developments. In that process we have also seen an apparent convergence between the rules of different institutions, but this is not to say that all institutional rules are now the same.

This publication provides a high-level comparative sketch of some (subjectively perceived) recent improvements and innovations made to the rules of ICC, LCIA, Swiss Chambers, SCC, SIAC and HKIAC as in force on 1 March 2017 (referred to here collectively as "the Rules").[2] The author focuses on several selected topics of the amendment campaigns, namely (1) case management techniques, (2) expedited procedures, (3) emergency and interim reliefs, (4) joinders and interventions, (5) multi-contract disputes, (6) consolidations. For the readers' convenience, information on the latter three topics is summed up in a chart at the end of the publication.

1. Case management techniques

The role of institutional rules is to provide a flexible platform for a tribunal to shape arbitration as it considers appropriate in the circumstances of the case. In this respect, institutional rules traditionally vest arbitrators with a vast discretion to conduct the proceedings. On the other hand, this discretion is commonly qualified by (i) the agreement of the parties, (ii) the rules of applicable law, (iii) the requirement to take the complexity and value of the dispute into account and conduct the proceedings in a time- and cost-effective manner, (iv) the requirement to treat parties equally and fairly and provide reasonable opportunities to present their case (the due process rules), and (v) the requirement to secure the enforceability of the award.

With these principles, expressly or implied having been in place for years, users of arbitral services are still far from being completely satisfied, especially about the duration and costs of the proceedings. Queen Mary's International Arbitration Surveys steadily recorded these concerns in 2006, 2010 and 2015.[3] The roots of the problem are certainly multifold. First, even in the world where arbitral actors and users are becoming more and more sophisticated, there may be parties and arbitrators who are less aware of the available menu of the case management techniques. Second, arbitrators may lack motives to take pro-active steps with respect to the conduct of the arbitral proceedings. Third, the key procedural principles often dictate contradictory solutions, providing an incentive to refrain from any definitive steps at all. For example, arbitrators are often concerned that adoption of certain time- and cost-saving procedures may be treated as a violation of due process rules and may subsequently become a ground to vacate the award. The latter fear has been tagged by practitioners as "due process paranoia".

In the past years we have seen arbitral institutions attempting to address the problem from various angles. The Rules under review now highlight that arbitrators should conduct the proceedings in an expeditious and

[1] Rémy Gerbay, *The Functions of Arbitral Institutions*, Kluwer Law International 2016, p. 214.

[2] Author used the following versions of the rules: ICC Rules of 2017, Swiss Chambers' Rules of 2012, SCC Arbitration Rules and Rules for Expedited Arbitration of 2017, LCIA Rules of 2014, SIAC Rules of 2016, HKIAC Rules of 2013.

[3] Available at: http://www.arbitration.qmul.ac.uk/research/index.html.

cost-effective way.[4] They also fix – as a mandatory element of the procedure – that tribunals should have a case management conference (or just consult) with the parties at the early stages of the proceedings to determine appropriate procedures and a timetable.[5] Some of the Rules add to that a non-mandatory menu of case management techniques for consideration of the tribunal and the parties.[6] Other Rules provide for a list of case management powers of the tribunals, like the power to abbreviate or extend any time limits, make inquiries, order production or preservation of documents or other evidence, direct any party or person to give testimony, raise and consider matters not expressly raised by the parties and etc.[7] The purpose of these amendments is, on the one hand, to provide guidance to the parties and the tribunals and, on the other hand, provide greater comfort to arbitrators that they are (indeed) empowered to apply certain techniques.

To name other examples, most of the Rules have introduced and enhanced regulations for expedited arbitrations (this topic is addressed separately below). The SCC Board and ICC Court are now expressly entitled to take into account the extent to which the tribunal has acted in an efficient and expeditious manner when determining the tribunal's fees, thus providing a pecuniary incentive for arbitrators to behave pro-actively when shaping the arbitral procedures.[8] Drafters of the LCIA Rules have qualified the duty of arbitrators to secure that the award is legally enforceable by adding "*at arbitral seat*",[9] hence ruling out "due process paranoia" considerations which may be coming from somewhere other than than the seat of arbitration.

Probably, one of the most noticeable steps has been recently undertaken by the SIAC and SCC, which introduced rules allowing summary consideration and dismissal of certain arguments of the parties.[10] Absent express stipulation in the rules or other applicable regulations, summary considerations/dismissals have always been problematic for arbitrators as they were coming too close to a breach of the duty to give each party a full opportunity to present its case. The new Rules of SIAC and SCC will certainly help to address the problem, though still require a degree of firmness from arbitrators wishing to use this procedure.

2. Expedited arbitrations

All of the Rules under review, except the LCIA Rules, provide for an option to do arbitration by means of an expedited procedure.[11] A comparison may be made against the following positions:

A. *How do expedited rules come into play?* The ICC and Swiss Rules prescribe an automatic application of their expedited procedure where a dispute is either below a defined threshold (USD 2 mln for the ICC and CHF 1 mln for the Swiss Rules) or parties have agreed thereto. The SIAC and HKIAC Rules envisage that an application for expedited procedure may be made by either of the parties if (i) the amount in dispute is below SGD 6 mln for the SIAC and HKD 25 mln for the HKIAC, or (ii) parties have agreed so, or (iii) an exceptional urgency exists. The SIAC Court and HKIAC Council have the discretion to decide if the application is worth granting. The SCC has a separate body of rules for the expedited procedure; these rules apply only if expressly referred to by the parties in the arbitration agreement.

> Broadly put, one may argue that now (institutional) arbitration is only as good, as its arbitrators and arbitral institution.

B. *Swap to ordinary proceedings.* The ICC and SIAC Rules envisage that the ICC Court and a SIAC Tribunal may decide to shift to the ordinary proceedings if the circumstances so dictate. Under the SCC Rules such a swap may be implemented only if the parties consent thereto. The Swiss and HKIAC Rules do not envisage the swap at all.

C. *Number of arbitrators.* The ICC, SCC and SIAC Rules require that the expedited procedure is led by a sole arbitrator (the ICC and SIAC Rules even provide that this provision overrides any contrary provision of the arbitration agreement). The Swiss

[4] See Article 22(1) of the ICC Rules, Article 23(2) of the SCC Rules, Article 14.4(ii) of the LCIA Rules, Rule 19.1 of the SIAC Rules, Article 13.1 of the HKIAC Rules. The Swiss Rules lack similar provisions.

[5] Article 24 of the ICC Rules, Article 15(3) of the Swiss Rules, Article 28 of the SCC Rules, Article 14.1 of the LCIA Rules, Article 19.3 of the SIAC Rules, Article 13.2 of the HKIAC Rules.

[6] Appendix IV to the ICC Rules, Article 19.4 of the SIAC Rules.

[7] See, for example, Article 22.1 of the LCIA Rules, Rule 27 of the SIAC Rules.

[8] See Article 49(3) of the SCC Rules, Article 2(2) of Appendix III to the ICC Rules.

[9] See Article 32.2 of the LCIA Rules.

[10] See Rule 29 of the SIAC Rules and Article 39 of the SCC Rules.

[11] See Rule 5 of the SIAC Rules, the SCC Rules for Expedited Arbitrations, Article 41 of the HKIAC Rules, Article 30 and Appendix VI of the ICC Rules, Article 42 of the Swiss Rules. Notwithstanding the lack of express provisions in the LCIA Rules, LCIA tribunals are arguably vested with enough authority to expedite any arbitration, should they believe that the circumstances so dictate or allow (see powers of LCIA tribunals in Articles 14, 15, 19, 20, 21 and 22 of the LCIA Rules).

and HKIAC Rules also provide for a sole arbitrator, but where an arbitration clause contains a different provision, Swiss' and HKIAC's administrative bodies will only invite the parties to reconsider their agreement, not override it.

D. *Case management techniques.* The Rules call for arbitrators to shape the proceedings as appropriate, taking into account the expedited nature of the arbitration. Furthermore, the Rules provide certain guidance as to appropriate procedures. The Swiss, SCC and HKIAC Rules state that only one round of written submissions (apart from the Request and the Answer) should be, in principle, allowed. The ICC Rules invite tribunals to restrict the production documents and limit the length of the parties' written submissions and witness statements. The Swiss, SIAC and HKIAC Rules motivate to decide cases on the basis of documents only.

E. *Duration.* The Rules provide for abbreviated time limits or for an option to abbreviate them. The ICC, Swiss, SIAC and HKIAC Rules require the award to be issued within 6 months. The SCC has set the time limit at 3 months. As in the ordinary proceedings, extensions of these deadlines are allowed, though the criteria for extensions are often stricter than in ordinary proceedings.

F. *Costs.* The ICC, Swiss and SCC Rules provide for reduced fee scales for expedited arbitrations. The SIAC and HKIAC rules do not expressly do so. But where the HKIAC's per hour fee schedule is selected, users may still expect lesser fees in the light of the condensed procedures. As for the SIAC Rules, users may expect a reduction as the case will be mandatorily considered by a sole arbitrator.

3. Emergency and interim reliefs

All of the Rules under review provide for an option to commence emergency relief proceedings by means of which a party may request an emergency arbitrator to install interim measures before the main arbitral tribunal is constituted.[12] Institutional rules show great convergence as to regulation of the emergency procedures. Generally, only time limits and fees are different, while the rest of the regulations are very much alike. As for time limits, the SCC Rules so far offer the fastest schedule among the Rules under review as they provide for an arbitrator to be appointed within 24 hours from application and the order or award to be rendered within 5 days of referral of the application to the emergency arbitrator. Other Rules mostly reserve 2-3 days for effecting the appointment and allow about 15 days from there to render an order or award.

[12] See Article 29 and Appendix V to the ICC Rules, Article 43 of the Swiss Rules, Appendix II to the SCC Rules, Article 9B of the LCIA Rules, Schedule 1 to the SIAC Rules, Schedule 4 to the HKIAC Rules.

Apart from adoption/improvement of the rules for emergency proceedings, there were other notable developments with regard to the interim reliefs. Generally, most of the Rules have expanded descriptions of interim measures which the tribunals may consider granting. The SCC, LCIA, SIAC and HKIAC Rules now expressly allow tribunals to order claiming or cross-claiming parties to provide a security for respondent's legal and arbitration costs.[13] Where a party has provided a substitute payment of an advance on costs for the other party in order to have the arbitration continued, the SCC, LCIA and SIAC Rules expressly allow tribunals to order immediate recovery of such substitute payment in the form of an order or award.[14]

4. Joinders and interventions

All of the Rules under review expressly deal with joinders of additional parties, but content of the regulations differs greatly.[15] A comparison may be made against the following three positions.

A. *Who can apply?* The most common practice is that original parties to an arbitration attempt to join additional parties. Such practice is endorsed by all of the Rules under analysis. A less common practice is where a third party attempts to intervene into an existing arbitration on its own initiative. Only the Swiss, SIAC and HKIAC Rules permit such interventions.[16]

A. *Criteria for acceptance*. All of the Rules are formulated in a permissive manner (e.g. "*may decide*" or "*shall have power to decide*"), allowing the decision-making bodies to rule at their discretion. With that said, the Rules prescribe to ascertain whether there is *prima facie* jurisdiction of the tribunal with respect to the additional party. Decisions on joinders are without prejudice to the power of the tribunal to subsequently and finally decide on matters of jurisdiction and admissibility.

B. *Coordination of joinders with tribunal's constitution.* Effect of joinders on the constitution of tribunals remains the principal issue which the Rules attempt to address. Generally, the rules aim to ensure that

[13] See Article 38 of the SCC Rules, Article 24 of the HKIAC Rules, Rule 27(j) of the SIAC Rules, Article 25.2 of the LCIA Rules.

[14] See Article 51(5) of the SCC Rules, Rule 27(g) of the SIAC Rules, Article 24.5 of the LCIA Rules.

[15] Relevant provisions are: Articles 6(4)(i) and 7 of the ICC Rules; Article 4(2) of the Swiss Rules; Article 22(viii) of the LCIA Rules; Article 13 of the SCC Rules; Article 27 of the HKIAC Rules; Rule 7 of the SIAC Rules.

[16] Practical significance of these regulations appears to be limited in the light of (procedural and substantive) confidentiality restrictions. For example, Rule 39 of the SIAC Rules and Article 42 of the HKIAC Rules oblige the parties and arbitrators to keep confidential "***all matters***" and "***any information***" relating to arbitration. Consequently, it appears to be a challenge for a potential intervenor to learn of the arbitration, its subject matter and even of the bodies to which the request for joinder may be addressed.

each party, including the adjoined party, either has an opportunity to take part in the constitution of the tribunal, or waives such right, so that arbitral awards may not be subsequently challenged on this basis. The Rules are using various techniques in this respect: introduce time limits, entrust decisions on joinders to institutions' bodies (rather than to arbitral tribunals), vest institutions' bodies with powers to revoke confirmations/appointments of arbitrators already made.

The Swiss and LCIA Rules stipulate that only arbitral tribunals have the power to decide upon the requests for joinder. This effectively means that such requests may be addressed only after the tribunal has been constituted by the original parties to the proceedings. This further means that the only option for the party wishing to join is to accept the tribunal as is and waive its rights to take part in the constitution process; if the joining party does not accept the tribunal as is, then most likely the request for joinder will be dismissed.

> Institutional rules show great convergence as to regulation of the emergency procedures.

The ICC Rules provide that before the tribunal is constituted, the ICC Court may make a provisional decision on a request for joinder. If the request is granted, then the adjoined party will have an opportunity to take part in the constitution of the arbitral tribunal. This is a step forward compared to the Swiss and LCIA Rules. However, for the cases where an arbitrator has already been confirmed or appointed, the ICC Rules stipulate that the joinder can take place only if all parties, including the additional party, agree thereto. This approach is similar to the one of the Swiss and LCIA Rules.

By contrast, the SCC, SIAC and HKIAC Rules provide for more sophisticated and advanced regulations. The SCC Rules entitle the Board of SCC to preliminary decide on a request for joinder, disregarding whether the request has been submitted before or after the constitution of the tribunal. An important element here is that even after the tribunal is fully or partially constituted the Board of SCC may revoke any existing confirmation or appointment and appoint all arbitrators itself. These regulations either allow the new party to take part in the constitution of the tribunal or entitle the Board of SCC to equally deprive all parties of such a right. With that said, the SCC rules inspire parties to make earlier applications for joinder to secure the integrity of the process. The later the request for joinder is submitted, the less incentives the Board of SCC have to exercise its powers to revoke existing confirmations/appointments.

The SIAC and HKIAC Rules are the most coherent and elaborative with respect to joinders. If the request for joinder is made before constitution of the tribunal, then the SIAC Court or HKIAC Council will make a provisional decision on joinder and may then revoke any confirmation or appointment of any arbitrator (consequently, under the SIAC Rules, all parties shall proceed to a *de novo* construction of the tribunal, or, under the HKIAC Rules, the HKIAC Council shall appoint the entire tribunal itself). If the request for joinder is made after the constitution of the tribunal, then the tribunal will decide on the request. If the request is granted in the latter case, then the adjoined party will be assumed to have waived its rights to participate in the constitution of the tribunal (unlike the Swiss, ICC and LCIA Rules, the waiver is expressly stipulated in the Rules and no further stipulation from the adjoined party is required).

5. Multi-contract claims

Only the ICC, SCC, SIAC and HKIAC Rules expressly address the matter.[17]

Generally, the ICC, SCC and HKIAC Rules provide for comparable regulations. Under the ICC and SCC rules, the ICC Court and the Board of SCC are entitled to make preliminary decisions on the consolidation of claims, without prejudice to the power of the tribunal to finally decide on the matters of jurisdiction and admissibility. The HKIAC Rules do not specify which body is entitled to decide on the matter, effectively leaving that decision for the tribunal to make. Criteria for consolidation are, generally, threefold: (i) compatibility of the arbitration agreements, (ii) claims to arise from the same transaction or series of transactions (per the SCC and HKIAC Rules) or any other evidence of the parties' intent to have respective claims be determined together (per the ICC Rules), and (iii) procedural efficiency and expeditiousness (per the SCC Rules) or a common question of law and fact (per the HKIAC Rules).[18] Decision-making bodies are (expressly or impliedly) vested with the discretion to take any other circumstances into account.

The SIAC Rules contain a state-of-the-art provision in this respect, as they link multi-contract matters with that of consolidation. If a claimant files a notice of arbitration containing claims based on more than one contract, then it shall be deemed to have commenced separate arbitral proceedings with respect to each arbitration agreement invoked, and the single notice of arbitration shall be treated as a request for consolidation. If consolidation is not granted, then arbitration of

[17] Relevant provisions are: Article 6(4)(ii) and 9 of ICC Rules, Article 14 of SCC Rules, Rule 6 of SIAC Rules and Article 29 of HKIAC Rules.

[18] The latter criterion is missing from ICC rules.

each claim shall continue via separate arbitral proceedings. Such an approach helps claimants to deal with statute of limitation issues.

The Swiss and LCIA Rules do not contain any express provisions for multi-contract matters. Nevertheless, parties still retain an option to have arbitral tribunal rule on the matter, based on applicable law.

6. Consolidation of arbitrations

All of the Rules under analysis expressly address the matter, but regulations differ significantly.[19] A comparison may be made against the following three positions:

A. *Who decides?* The ICC, Swiss, SCC and HKIAC Rules reserve the matter solely for their administrative bodies (Court, Board, Council). The LCIA and SIAC Rules reserve this matter for their administrative bodies if an application is made before the tribunal is constituted; once the tribunal is constituted, it is tasked to rule on the matter itself.

B. *Criteria for consolidation.* The Rules use permissive language, leaving it to the discretion of the relevant body to decide on consolidation. Moreover, all of the Rules (except the LCIA and SIAC) contain general "capture all" clauses, requiring the decision-making bodies to take regard of "*all circumstances*" when making the decision on consolidation.

   With that said, the Rules stipulate various guiding principles or scenarios, where consolidation may be granted. These scenarios, mainly, attempt to encompass situations, where express or implied consent of the parties with respect to consolidation may be deemed evident. The first scenario is where all parties expressly consent to consolidation. The second scenario is where different arbitrations are launched under the same arbitration agreement (this appears to be viewed in the ICC, SCC, SIAC and HKIAC Rules as sufficient evidence of implied consent for consolidation; the LCIA Rules do not attribute a self-standing value to this criterion and call for additional ones). The third scenario is where arbitration agreements are not the same, but compatible. For that scenario the Rules require additional evidence of consent, such as "*same parties*", "*same transaction or series of transactions*" or "*same legal relationship*".[20] In addition to this, the Rules inspire decision-making bodies to take other circumstances into account, such as the stage of formation of the arbitral tribunals.

C. *Constitution of the tribunal*. Same as with joinders, one of the key challenges for the consolidation procedures is to secure that all parties have a right to take part in the constitution of the tribunal. Where decision on consolidation is referred to the administrative bodies of institutions, the SCC, SIAC and HKIAC Rules entitle respective bodies to revoke any confirmations / appointments of arbitrators (and then either let parties proceed to a *de novo* constitution of the tribunal or appoint the whole tribunal itself). Where a decision on consolidation is referred to the arbitral tribunal, the LCIA and SIAC Rules prescribe that such consolidation may be granted only if in the second arbitration the tribunal is not yet formed or formed of the same arbitrators. The ICC and Swiss Rules are silent in this respect.

[19] Relevant provisions are Article 10 of ICC Rules; Article 4(1) of Swiss Rules; Articles 22.1(ix and x) and 22.6 of LCIA Rules; Article 15 of SCC Rules; Article 28 of HKIAC Rules; Rule 8 of SCIA Rules.

[20] HKIAC rules also require that *"same questions of fact and law"* be present.

Comparative Chart: Joinders, Multi-Party Claims and Consolidations

	ICC Rules 2017	Swiss Rules 2012	SCC Rules 2017
Joinder	**Yes**	**Yes**	**Yes**
Interventions?	No	Yes	No
When to apply?	Before any arbitrator appointed, after that – subject to parties' consent	After the tribunal is formed	Any time, better at earlier stages
Who decides?	Preliminary – ICC Court; finally – tribunal	Tribunal	SCC Board
Tribunal's formation	Not addressed	Not addressed	SCC Board may release all arbitrators and appoint the entire tribunal
Criteria	Prima facie jurisdiction	Prima facie jurisdiction	Prima facie jurisdiction
Multi-contract	**Yes**	**No**	**Yes**
Who decides?	Preliminary – ICC Court, finally – tribunal	–	SCC Board
Criteria	Binding criteria: (a) compatible arb. agreements, and (b) parties' intent to consolidate	–	Have regard to: (a) compatible arb. agreements; (b) same transaction or series of transactions; (c) expeditiousness and effectiveness; (d) any other circumstances
Consolidation	**Yes**	**Yes**	**Yes**
Who decides?	ICC Court	Swiss Chambers' Court	SCC Board
Criteria	Binding criteria: (a) parties' consent; or (b) same arbitration agreement; or (c) (i) compatible arb. agreements, and (ii) same parties, and (iii) same legal relationship Plus regard to other circumstances, like any arbitrator appointed and if they are the same in all arbitrations	Shall take regard of all circumstances, including links between cases and progress already made there	Binding criteria: (a) parties' consent; or (b) same arb. agreement; or (c) (i) compatible arb. agreements, and (ii) same transaction or series of transactions Plus regard to other circumstances, like stage of arbitrations, efficiency and expeditiousness
Tribunal's formation	Not addressed – tribunal in arbitration which commenced first shall remain	The Court may revoke any appointment – the parties shall then follow the general rules of tribunal's formation.	Board may revoke any appointment – the parties shall then follow the general rules of tribunal's formation.

	LCIA Rules 2014	SIAC Rules 2016	HKIAC Rules 2013
Joinder	**Yes**	**Yes**	**Yes**
Interventions?	No	Yes	Yes
When to apply?	After the tribunal is formed	Any time	Any time
Who decides?	Tribunal	Before tribunal formed – SIAC Court; after – tribunal	Before tribunal formed – HKIAC Council; after – tribunal
Tribunal's formation	Not addressed	If SIAC Court decides, it may revoke any appointment; if tribunal decides – parties deemed to waive rights re tribunal's formation	If HKIAC Council decides – HKIAC may revoke any appointment and shall appoint the entire tribunal; if tribunal decides – parties deemed to waive rights re tribunal's formation
Criteria	Prima facie jurisdiction	Prima facie jurisdiction	Prima facie jurisdiction
Multi-contract	**No**	**Yes**	**Yes**
Who decides?	–	Reference to the rules on consolidation	Not specified, effectively – tribunal
Criteria	–	Reference to the rules on consolidation	Binding criteria: (a) each party bound by each arb. agreement; (b) arb. agreements compatible; (c) same transaction or series of transactions; (d) common questions of law or fact
Consolidation	**Yes**	**Yes**	**Yes**
Who decides?	Before tribunal formed – LCIA Court; after – tribunal	Before tribunal formed – SIAC Court; after – tribunal	HKIAC Council
Criteria	If LCIA Court decides then (a) same arb. agreement, and (b) same parties, and (c) no tribunal yet formed in any arbitration If tribunal decides, then either (a) parties consent, or (b) (i) same or compatible arb. agreements, and (ii) same parties, and (iii) no tribunal yet formed in the second arbitration or formed of same arbitrators	If SIAC Court decides then either (a) parties' consent, or (b) same arb. agreement, or (c) (i) compatible arb. agreements, and (ii) either same legal relationship, or principal/ancillary contracts, or same transaction or series of transactions If tribunal decides then same criteria, and plus to (b) and (c) – no tribunal yet formed in the second arbitration or formed of same arbitrators	Binding criteria: (a) parties' consent; or (b) same arb. agreement; or (c) (i) compatible arb. agreements, and (ii) same transaction or series of transactions, and (iii) common questions of fact and law Plus regard to other circumstances, like any arbitrator appointed and if they are the same in all arbitrations
Tribunal's formation	Not addressed	The Court may revoke any appointment and the parties shall then follow the general rules of tribunals' formation	HKIAC Council may revoke any appointments and shall appoint the tribunal itself

Costs in International Arbitration

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1. Introduction

Cost is a significant factor for a party to an arbitration dispute. When a claimant considers commencing arbitration proceedings, it assesses both the merits of the case and the cost implications. Equally, a respondent takes cost of arbitration into account when it considers making a settlement offer, for example. The cost can be very high and is often perceived by the users as the worst characteristic of international arbitration.[1]

The cost of arbitration has been continually discussed by the arbitration community. This is, partly, because national laws and institutional rules provide little guidance as to how decisions on costs shall be made. Interest in the costs of international arbitration has only been boosted by surveys and reports issued by the leading arbitration institutions in the past few years, such as the ICC Commission Report "Decisions on Costs in International Arbitration", issued in 2015 (the "**ICC Report on Decisions on Costs**"),[2] the LCIA's analysis of Costs and Duration Data, also released in 2015 (the "**LCIA Costs and Duration Data**"),[3] the SCC's Report "Costs of arbitration and apportionment of costs under the SCC Rules", issued in 2016 (the "**SCC Report on Costs**")[4] and the SIAC's Costs and Duration Study, issued in 2016.[5]

2. What are costs?

Costs are largely comprised of the three following groups:

- expenses incurred by the parties themselves, including legal costs (attorney fees and expenses), expert fees and expenses, costs related to witness evidence (preparation of witness statements, attendance of a hearing by witnesses, compensation of a witness' loss of income);
- arbitrators' fees and expenses; and
- arbitral institution's administrative fees and expenses.

The latter two are referred to as arbitration costs and often comprise the least significant portion of the total amount of costs incurred by the parties.[6] Depending on the institution, the rules set out whether arbitration costs are calculated either on an ad valorem or on an hourly basis.[7]

The cost can be very high and is often perceived by the users as the worst characteristic of international arbitration.

A question arises as to whether costs related to the work of the party's own staff and management (including in-house counsel) on the dispute can be recovered. Usually, such costs are irrecoverable as they are considered to be operational expenses of the company.[8] However, arbitrators may exercise discretion and award recovery of such costs, if, for example, work

[1] The 2015 International Arbitration Survey conducted by Queen Mary University of London (QMUL) and White & Case LLP (available at: https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015_0.pdf).

[2] Available at: https://cdn.iccwbo.org/content/uploads/sites/3/2015/12/Decisions-on-Costs-in-International-Arbitration.pdf.

[3] Available at: http://www.lcia.org/News/lcia-releases-costs-and-duration-data.aspx.

[4] Available at: http://www.sccinstitute.com/media/93440/costs-of-arbitration_scc-report_2016.pdf

[5] Available at http://www.siac.org.sg/images/stories/press_release/SIAC%20Releases%20Costs%20and%20Duration%20Study_10%20Oct%202016.pdf.

[6] According to the LCIA Costs and Duration Data, arbitrators' fees and institutional costs comprise approximately 20% of the total costs incurred in arbitration proceedings. The SCC Report on Costs concludes that a median of more than 80 percent of the parties' costs is costs for legal representation in disputes decided by three arbitrators, and for the cases with a sole arbitrator this figure is 65 percent of the total parties' costs.

[7] Comparisons of arbitration fees in major arbitral intuitions can be found, for example, in LCIA Costs and Duration Data.

[8] ICC Report on Decisions on Costs, p. 27.

undertaken by the party's employees and management obviated the need for outside counsel or experts and, eventually, saved costs.[9]

Third party funding has not been seen as recoverable costs in international arbitration. But in one of the recent cases, the tribunal awarded to the claimant costs which included third party funding. The tribunal, however, took into account the respondent's bad faith conduct, which forced the claimant to obtain third party funding to pursue its claim in arbitration. This award was upheld by the decision of the High Court of Justice of England and Wales.[10]

3. Tribunal's powers to decide on costs

The basis for the tribunal's power to decide on costs is the parties' arbitration agreement, including the rules of an arbitral institution, and the law of the place of arbitration (*lex arbitri*). If these sources do not expressly authorize the tribunal to issue an award on costs, and provided that such powers are not prohibited, it may be argued that arbitrators have an inherent power to do so and an arbitration agreement impliedly grants them such an authority.

Some arbitration agreements may positively grant the tribunal powers to award costs, other arbitration agreements may explicitly prevent the tribunal from awarding costs. Notably, Section 60 of the English Arbitration Act 1966 prevents parties from reaching an agreement before the dispute has arisen whereby a party shall pay the whole or part of the costs regardless of the outcome of the proceedings.

There are two aspects of the award which determine how much a party will either pay or receive as costs – first, how the costs are allocated and, second, the amount and/or types of costs awarded.

Problems may arise in cases where the tribunal concludes that it does not have jurisdiction to hear the case because the arbitration agreement is, for example, invalid. On the one hand, this means that the respondent won the case on a jurisdictional issue and potentially has the right to be awarded relevant costs. On the other hand, the tribunal technically does not have jurisdiction to decide on costs because an arbitration agreement was held to be invalid. It has been argued that arbitrators shall, nonetheless, have powers to decide on costs as such powers shall be seen as part of the competence-competence principle.[11]

While the UNCITRAL Model Law is silent on the costs of arbitration, some national laws added provisions on this. In Russia, Article 31(2) of the Law "On International Commercial Arbitration"[12] (based on the UNCITRAL Model Law) provides that an award shall specify how costs are allocated and the Federal Law "On arbitration (domestic arbitration) in the Russian Federation"[13] contains one Article (Article 22) that deals with costs in arbitration in greater detail.

The tribunal's decision on costs is made in the form of an award, which means that it is subject to the same rules of annulment, recognition and enforcement as the tribunal's decision on the merits of the dispute. The decision on costs can either be a part of the final award that also deals with the outcome of the dispute on the merits, or it can be a separate award on costs that is issued after the award on the merits of the case (with the latter being issued on the "save as to costs" basis). A decision on costs may also be made in the form of an interim award, however, there is a risk that such an interim award may not be enforceable in Russia.[14]

There are two aspects of the award which determine how much a party will either pay or receive as costs – first, how the costs are allocated and, second, the amount and/or types of costs awarded.

4. The allocation of costs

The allocation of costs is their apportionment between the parties of the dispute, whereas before the tribunal and the arbitral institution the parties are jointly and severally liable for costs.[15]

The arbitration rules use one of the two approaches as the starting point for the arbitrators to decide on the allocation of costs – either the tribunal has discretion to decide[16] or the costs shall be borne by the losing party (also referred to as "costs follow the event").[17]

[9] Article 3 of the Chartered Institute of Arbitrators' Practice Guidelines entitled "Drafting Arbitral Awards, Part III – Costs" (the "CIArb Practice Guidelines on Awards as to Costs").

[10] [2016] EWHC 2361 (Comm).

[11] Gary B. Born, *International Commercial Arbitration (Second Edition), p. 3101*.

[12] Law of the Russian Federation "On International Commercial Arbitration" No. 5338-1 dated 7 July 1993.

[13] Federal Law "On arbitration (domestic arbitration) in the Russian Federation" No. 382-FZ dated 29 December 2015.

[14] Resolution of the Supreme Arbitrazh Court No. 6547/10 dated 5 October 2010 (*AB Living Design v Sokos Hotels*).

[15] See, for example, Article 43(6) of the SCC Rules; Article 28.1 of the LCIA Arbitration Rules.

[16] Article 37 of the VIAC Rules; Article 38(5) of the ICC Rules; Article 33.2 of the HKIAC Rules.

[17] Article 28.4 of the LCIA Rules; Article 42 of the UNCITRAL

Practically, there is little difference between these two approaches, because both are subject to certain qualifications.

Thus, when exercising its discretion in making a decision on costs, the tribunal will take into account such circumstances as it considers relevant, including:

- the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner;[18]
- circumstances of the case.[19]

The costs follow the event principle is a rebuttable presumption and the tribunal may allocate costs having regard to such factors as:

- whether it would be inappropriate to apply the costs follow the event principle;[20]
- parties' conduct in the arbitration, including whether a party was cooperative as to time and cost or not;[21]
- that the apportionment between the parties would be reasonable, taking into account the circumstances of the case;[22]
- relevant circumstances,[23] including unreasonable or *mala fide* conduct of the other party[24] and delays in amending or supplementing claims or replies to the claims.[25]

The costs follow the event principle may come into play even in cases where several claims and counter-claims were made by the parties, with the loser paying the costs of arbitration usually in proportional relationship to the outcome of the dispute. In this case, the tribunal will order one or both parties to bear part of the costs in a proportion that mirrors each party's relative success. However, the tribunal may measure success not on the basis of the quantum of the claims awarded, but on the basis of the issues decided in light of their importance and relevance to the case. In one such case, the tribunal ordered full apportionment of costs, although there was no clear winner or loser, since the tribunal considered that the claimant was "*to be regarded as the winning party*" although it recognized that the claimant did not win in full in its claim for damages.[26]

From a practical perspective, there are two outcomes as to how the costs can be allocated in a particular case:

- a loser pays a winner's costs (which may come in the form of full apportionment or partial apportionment); or
- the arbitration costs are shared equally, with each party bearing its own legal costs.

In one such case, the tribunal ordered full apportionment of costs, although there was no clear winner or loser, since the tribunal considered that the claimant was "to be regarded as the winning party" although it recognized that the claimant did not win in full in its claim for damages.

By way of example, the circumstances which are taken into account by the tribunal when allocating costs may be as follows:

- whether the claims were frivolous and the dispute could have been avoided;
- whether the parties conducted an arbitration in an efficient manner;
- whether a party obstructed proceedings (for example, by advancing spurious arguments);
- whether time had been devoted to claims which were later withdrawn;
- whether an unreasonable conduct of one of the parties led the counterparty to incur additional costs and/or delayed the proceedings;
- settlement offers in the sense of whether a party received more by rejecting a settlement offer and proceeding with the dispute;
- whether one of the parties triggered the dispute by repeatedly acting in bad faith.[27]

At least in SCC, it appears that when the claimant loses the case, tribunals are more inclined to take into

Rules; Article 52(2) of the CIETAC Rules; Articles 43(5) and 44 of the SCC Rules; Paragraphs 8 and 11 of the ICAC Schedule of Arbitration Costs.

[18] Article 38(5) of the ICC Rules;

[19] Article 33.2 of the HKIAC Rules;

[20] Article 28.4 of the LCIA Rules.

[21] Ibid.

[22] Article 42(2) of the UNCITRAL Rules.

[23] Articles 43(5) and 44 of the SCC Rules.

[24] Paragraph 12 of the ICAC Schedule of Arbitration Costs.

[25] Article 28(3) of the ICAC International Commercial Arbitration Rules.

[26] SCC Arbitration 2010/047 referred to in the SCC Report on Costs.

[27] The SCC Report on Costs; Article 2(1) of the CIArb Practice Guidelines on Awards as to Costs.

account other circumstances than just the outcome of the case.[28]

5. The amount of costs awarded

It is the reasonableness of costs that is taken into account by the arbitrators when determining the amount of legal costs to be awarded. In assessing the reasonableness, the tribunal usually considers such factors as:

- whether fees claimed by one of the parties are substantially (more than twice) higher than the fees claimed by the other party;
- the complexity of the dispute or a particular issue in the dispute;
- the duration of the case;
- the amount in dispute;
- the parties' procedural burden;
- whether procedural requests were unfounded or unnecessary (request for production of unnecessary documents; changing counsel at a late stage; withdrawing claims);
- with regards to the experts' fees and expenses, whether the expert evidence was material for the case;
- whether a particular activity for which costs are claimed was necessary;
- whether document requests, legal argument or cross-examination were excessive;
- whether costs were not sufficiently evidenced or justified by a party.[29]

In assessing reasonableness, the same factors may be taken into account as in allocating costs (see above).

The burden of proof that the costs were reasonably incurred rests with the party claiming that it should be awarded those costs.

6. Applicable law

The tribunal's power to make a decision on costs is governed by the procedural law of the arbitration (typically, *lex arbitri*).[30]

It has been argued that the law that governs the substantive standards of costs awards is not necessarily the same as the law governing the tribunal's power to issue an award on costs. Two main views have been expressed in that respect. One is that such rules are the same law that governs the underlying contract/dispute, as it governs the parties' claims and, therefore, shall apply to determine the reimbursement of costs incurred in relation to such claims. The other major view is that awards as to costs should be governed by international standards, as domestic rules are designed with domestic litigation systems in mind. To some extent, such international standards are reflected in the institutional rules.[31]

The Chartered Institute of Arbitrators encourages tribunal to check whether a particular fee arrangement is permissible under the law of the place of arbitration, as well as under the law of the place or places of likely enforcement.

However, award and allocation of costs are procedural issues and should be governed by the law of the place of arbitration and the arbitration agreement, including institutional rules. But in practice, case law and the laws of the countries of origin of the parties and the arbitrators also influence the approach to the allocation of costs in arbitration.[32]

Difficulties may arise when a party is claiming costs that are not allowed in the jurisdiction from which such party comes (for example, contingency fees in Russia). The Chartered Institute of Arbitrators encourages tribunal to check whether a particular fee arrangement is permissible under the law of the place of arbitration, as well as under the law of the place or places of likely enforcement.[33]

7. Party's inability to finance costs in arbitration

Arbitration is expensive and in practice a party may not be able to finance its participation in the arbitration proceedings. One of the possible options for such a party would be to seek third party funding. However, in cases where this is not possible a question will arise as to whether lack of funding may give a party the right to

[28] The SCC Report on Costs.

[29] The SCC Report on Costs; Article 3 of the CIArb Practice Guidelines on Awards as to Costs; Paragraph 85 of the ICC Commission on Arbitration Report "Techniques for controlling time and costs in arbitration" (available at: http://gjpi.org/wp-content/uploads/icc-controlling-time-and-cost.pdf.

[30] Gary B. Born, *International Commercial Arbitration (Second Edition), p. 3099.*

[31] Ibid, *pp. 3099-3100.*

[32] ICC Report on Decisions on Costs, para. 5.

[33] Article 3(1) of the CIArb Practice Guidelines on Awards as to Costs.

avoid an arbitration agreement and engage in the dispute in a state court. In Russia, courts have expressed different views on this and there has been some case law which suggests that such a right should be granted so that a party's access to justice would not be restricted.[34]

However, lack of funds is a party's practical difficulty, just as is an inability to find a suitable outside counsel or an expert for the case. Such practical difficulty shall not be a sufficient ground for qualifying an arbitration agreement as incapable of being performed. Moreover, arbitration, unlike litigation, is contractual by nature and when executing an arbitration agreement a party assumed a risk of not being able to finance its participation in the arbitration proceedings.

8. Security for costs

A claimant's financial difficulties often lead to the respondent filing an application for security for costs.[35] The purpose of security for costs is to ensure that in the circumstances where the claimant's claims fail and the claimant is not able to pay the costs awarded against it, the respondent is able to satisfy its costs claim against such a security.

Institutional rules provide little guidance as to what criteria shall be taken into account by the tribunal when considering an application for security for costs. Arbitrators have discretion in deciding on the application and the outcome will depend on the legal tradition that arbitrators are coming from. The claimant's financial position and his ability to satisfy an adverse costs award are just one of the factors taken into account by the tribunal. Usually, arbitrators also consider such factors as the prospects of the case, whether it is fair to require the claimant to provide security for the respondent's costs, as well as other issues which they consider relevant.

Arbitrators have wide discretion in determining the allocation of liability for costs, as well as in assessing reasonableness of the costs.

9. Conclusion

Arbitrators have wide discretion in determining the allocation of liability for costs, as well as in assessing reasonableness of the costs. Institutional rules and relevant commentaries provide some guidance as to what factors may be taken into account by tribunals in awarding costs, however, the outcome of the decision on costs will to a large extent depend on the circumstances of the case.

[34] See, for example, Resolution of the Eighth Arbitrazh Appellate Court dated 18 September 2013 in case No. A46-2043/2013.

[35] Security for costs is common for certain foreign jurisdictions, but not for Russia. Although general provisions on interim measures contained in the laws and the institutional rules can serve as a basis for granting security for costs, there have been no publicly available instances of granting applications for security for costs in Russia.

Arbitration institutions: an insider's perspective

Interview with Natalia Petrik

Natalia Petrik

ARBITRATION INSTITUTE
OF THE STOCKHOLM CHAMBER OF COMMERCE

SCC legal counsel
Natalia.petrik@chamber.se

Natalia Petrik, legal counsel at the Stockholm Chamber of Commerce Arbitration Institute (SCC) since 2005. Secretary at the SCC Mediation Institute (2006 – 2007), secretary at the Swedish Arbitration Association for Young Lawyers at the SCC Institute (2006 – 2007). 2001 – 2004 associate at Gernandt & Danielsson Advokatbyrå and Vinge Advokatbyrå, litigation and arbitration department, Stockholm.

Natalia Petrik obtained her law degree in 2001 from the Russian Academy of Foreign Trade. She was further educated at the University of Stockholm, becoming a Swedish qualified lawyer. She obtained a Master of Law at the same University in 2006. Natalia holds also a Master of Philology summa cum laude from the Lomonosov State University in Moscow.

What is your professional background? Why have you decided to join the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC")?

Before joining the SCC, I was an associate with a Swedish law firm and worked mostly with CIS-related arbitrations. Although that job was interesting and motivating, it was bound to a limited segment of international disputes. The offer to join the SCC team was an excellent chance to broaden my expertise and to become an arbitration professional. Apart from that, I had interned with the SCC previously and knew how well-organised the Secretariat was.

In what ways is working for an arbitration institution different from working at a law firm (e.g. types of work you do, work-life balance etc.)?

Arbitral institutions are organised in a different way to law firms and the work may differ significantly, depending on their internal structure, caseload and rules of procedure. Compared to my experience at law firms, working at an arbitral institution is more dynamic, intense and independent. Legal counsels work with their own cases independently, assisted by a case administrator. We guide parties and tribunals through the procedure, check arbitral awards and speak at conferences around the world. We handle new submissions, establish deadlines, take dozens of procedural decisions every day. We must be available for urgent matters even outside the office hours. On the other hand, we are free to decide whether we have the time to undertake a specific project, for instance speaking at a conference, giving a lecture or writing an article. I enjoy our involvement in public communication and the fact that international and national professional organisations seek our legal expertise when drafting guidelines and national laws. You never get bored with this job.

In your view, what are institutions looking for when they recruit their legal team?

It largely depends on the caseload and on institution's organisation. Most of the candidates to our vacancies are associates from law firms with experience in arbitration. As we work in different languages, we value strong language skills. Public speaking experience is a big plus too.

What would be three pieces of advice you would give to counsel (in terms of communicating with the institution or tribunal, preparing their submissions etc) based on your experience?

We provide a lot of procedural support to tribunals, but are less involved in advising counsel. However, if I acted as a counsel, I would probably focus on being clear and precise about the facts and the claims I put forward. Most of the disputes are decided on facts. Abundant legal argumentation is not a substitute for insufficient documentary evidence.

In arbitrations outside my home jurisdiction, I would take my time and check the procedural requirements of the law of the seat. This is the only way to ensure quality of your submissions. You may discover, for instance, that in arbitrations seated in Sweden tribunals may not award "any such relief it deems appropriate", something that foreign attorneys often request in their submissions. Even big law firms make that mistake.

If I were concerned about anything in the proceedings or the way the tribunal handles the case, I would make the institution aware about it. SCC appreciates any feedback, both negative and positive. We take it seriously and use it for developing user-friendly rules and routines.

How often do you see Russian/CIS-based arbitrators or counsel in arbitrations under the SCC Rules administered by your team? Do counsel come from local offices of global firms or local firms?

At the moment, we have 22 pending cases with Russian parties. Only in four or five of them the Russian party have appointed a Russian arbitrator. In overwhelming majority of cases, the Russian parties have appointed foreign arbitrators. Russian counsel appear more often in 30 – 40% of those cases. Approximately, a half of them are from local offices of global firms and half are expatriates working with global firms abroad.

What would be your advice to young Russian arbitration practitioners who aspire to become arbitrators?

I consider arbitral appointments as a recognition of professional excellence of a lawyer. Whom will you most often see as an arbitrator in international institutions? In general, it is the attorneys working with law firms and advising clients on a daily basis. On average, a first-time appointee in an SCC arbitration would be a practitioner with 9 – 10 years of experience from a larger law firm. Most likely, we have seen such a practitioner acting as counsel in the SCC cases and in other professional context, speaking at conferences or participating in educational programs.

Does the SCC have an internship program? What are the tasks interns perform and what is your view the advantages of doing an internship at the SCC?

Yes, we do. We offer two internships per year, each is three months long. As a rule, we have at least one Russian-speaking intern per year. Their tasks may vary a lot, but most of them are focused on legal work, such as making summaries of cases, conducting legal research, making translations of court decisions and news as well as analysing the SCC practice and caseload. We are still good friends with many of our interns and keep in touch with them through the SCC alumni network. Many of them continue working in international arbitration and are the SCC ambassadors around the world.

Costs are a major issue for parties these days. Any advice how parties can reduce arbitration-related costs?

Administrative and arbitrators' fees in ad valorem systems are predictable and low compared to the overall costs of arbitration. However, even those costs can be further reduced through co-operative behaviour of parties' counsel. Cases proceed more smoothly and faster where counsel focus on the merits of the claims instead of fighting on the fields of procedure. Another costs driver is the volume of memorials and the number of exhibits. Complaints about costs often fade in comparison to hundreds and thousands of pages of documents and submissions the tribunals face even in ordinary commercial arbitrations, let alone investment cases. Keep this in mind when structuring your case.

Arbitration institutions: an insider's perspective

Interview with Nadia Hubbuck

Nadia Hubbuck

BERWIN LEIGHTON PAISNER

Former Counsel at LCIA, currently Associate at Berwin Leighton Paisner

Nadia focuses her practice on international arbitration, but her practice also encompasses domestic and multi-jurisdictional litigation, other forms of alternative dispute resolution and pre-action advice.

Nadia has represented a broad range of clients including large corporales, high net-worth individuals, and financial institutions from across the globe in a wide variety of contractual and commercial disputes, including shareholders' disputes. She also has experience in large cross-border litigations and corporate matters.

Nadia is a Solicitor of the Senior Courts of England and Wales and also admitted to practice in Russia.

Prior to joining Berwin Leighton Paisner LLP, Nadia worked as Counsel at the Secretariat of the London Court of International Arbitration (LCIA) in London with a particular focus on matters involving parties from Russia and the CIS region.

In this capacity, she oversaw hundreds of international arbitrations in a wide range of industry sectors including commodities, retail, finance, mining & energy, IT & telecoms, and construction & engineering.

In addition, she led designing and implementing the LCIA's compliance policy in respect of financial sanctions imposed by the European Union and the United Kingdom on a number of countries.

Before that, she was in private practice with a magic circle firm, where she concentrated on the resolution of competition-related disputes, having started her career as an in-house lawyer with a major Russian company.

Education

- Post-Graduate Diploma in International Arbitration (Distinction), Queen Mary University of London;
- LPC, College of Law (Distinction);
- GDL, Nottingham Law School (Commendation); and
- LLM, University of Manchester/Moscow School of Social and Economic Sciences (Merit).

What is your professional background? Why have you decided to join the institution?

I am a dual qualified lawyer in Russia and in England & Wales. I practiced as an in-house corporate lawyer prior to moving to the United Kingdom, where I qualified as a Solicitor of the Senior Courts of England and Wales. Having worked for a major international law firm, I decided to join the LCIA to gain experience in international arbitration from an arbitral institution perspective, which I thought would give me an opportunity to gain an invaluable insight into how arbitral appointments are made and decisions are taken by the LCIA Court in respect of the application of the LCIA Rules.

In what ways is working for an arbitration institution different from working at a law firm (e.g. types of work you do, work-life balance etc.)?

There is a perception in legal circles that working for an arbitral institution provides for a less stressful environment and for a better work-life balance. Whilst I will not argue against the latter, the former is far from true, given that each Counsel at the LCIA has from 80 to 100 cases to look after. Therefore, unlike at a law firm where you work on two to four major cases, at the LCIA you have to be prepared to juggle a lot more, as well as have to be able to deal with new incoming matters such as applications for the expedited formation of an arbitral tribunal.

The most essential function of the role of a Counsel is facilitating the constitution of arbitral tribunals and subsequently ensuring that a case is being handled efficiently by the appointed tribunal.

In performing this function, I would liaise directly with the President or a Vice President of the LCIA Court to obtain his or her guidance regarding the selection of arbitral candidates and any associated issues, such as disclosures made by arbitral candidates and any objections to their appointment made by the parties, arising out of the candidates' disclosures. Once the President or a particular Vice President has assisted with the appointment of a tribunal, Counsel would generally try to continue liaising with that individual as regards any other queries or issues that may arise during the life of that particular case, for instance, challenges or determination of arbitration costs.

In the case where the parties have nominated arbitrators and the nominees have selected the third and presiding arbitrator, the arbitral appointment process is usually quite straightforward, subject to the LCIA Court's approval of the nominees and the need to address any disclosures, as mentioned above. I would like to note that, in comparison to other arbitral institutions, which have formal meetings to discuss arbitral appointments, the LCIA's process is fluid and efficient as decisions by a President or Vice President are relayed to Counsel on a daily basis by electronic correspondence.

In your view, what are institutions looking for when they recruit their legal team?

I cannot speak about other arbitral institutions but, as far as I am aware, the LCIA looks for international arbitration law experience, fluency in the English language, knowledge of other languages and generally for an international outlook in the candidates for a role of Counsel.

How is the LCIA different from other institutions? Any non-obvious advantages of arbitrating disputes under the LCIA Rules?

In addition to very efficient and "light-touch" approach to administration of caseload by the Secretariat, the 2014 LCIA Rules ensure that the cost are controlled and that the process is not unduly delayed. The efficiency theme permeates the 2014 Rules, which contain concrete tools for the LCIA to monitor the process and to provide efficient case-management, encouraging arbitral tribunals to engage with parties about the process at an early stage and to set aside time for drafting the award before the hearing has taken place. Further, the LCIA asks arbitrators to provide detailed availability information to the LCIA when they are accepting appointments, in order to monitor and assess their availability.

What would be three pieces of advice you would give to counsel (in terms of communicating with the institution or tribunal, preparing their submissions etc) based on your experience?

With respect to any pieces of advice I would wish to give to practitioners, the following is a three-point short list:

- If you are preparing an application for an expedited appointment of a tribunal or for appointment of an emergency arbitrator, pursuant to Articles 9A-C of the 2014 LCIA Rules, call the Secretariat ahead of time to give a heads-up so that a Counsel and the LCIA Court can be lined up and be ready to deal with the application efficiently and without delay.
- Generally, do not hesitate to call the Secretariat in advance of submitting a Request for Arbitration, if you anticipate any tricky procedural issues being raised;
- Provide full contact details of all parties to the arbitration in the Request for Arbitration, including email addresses, which will enable the Secretariat to contact all the relevant parties from the commencement of arbitration and to avoid any unnecessary delays.

Lastly, I would recommend all users to read the LCIA Guidance Notes which have been published on the LCIA website, as well as the LCIA Rules, which are available in the Russian language.

How often do you see Russian/CIS-based arbitrators or counsel in arbitrations under the LCIA Rules administered by your team? Do counsel come from local offices of global firms or local firms?

Approximately a third of the LCIA's cases currently involve either a Russian and/or CIS-related party and/or a party ultimately controlled by a Russian/CIS entity. This number has been stable over the last five years. In the Russia/CIS-related cases there seems to be a preference for English law as the governing law of underlying agreements and London as a seat. As a result, parties tend to instruct English lawyers to represent them in LCIA arbitrations and to nominate English QC or former senior English judges as arbitrators. However, by the end of my tenure at the LCIA I had noticed that more Russian law firms started to appear as legal

representatives and more nominations of Russian arbitrators were made.

What would be your advice to young Russian arbitration practitioners who aspire to become arbitrators?

My advice would be to gain a variety of international arbitration experience in international law firms, arbitral institutions and more importantly, as a secretary to an arbitral tribunal, which would enable a young arbitration practitioner to see how arbitral tribunals approach deliberations and drafting of arbitral awards.

Does the LCIA have an internship programme? What are the tasks interns perform and what are you your view the advantages of doing an internship at the LCIA?

The LCIA runs an internship program for young arbitration lawyers, which is advertised on the website and for which the LCIA receives hundreds of applications every year. An intern conducts research for the Director General on the LCIA caseload and also assist the Secretariat with various ad hoc tasks related to the LCIA caseload. I would encourage any young lawyer interested in gaining insight into how the LCIA works to consider applying for the internship.

Costs are a major issue for parties these days. Any advice how parties can reduce arbitration-related costs (administrative and arbitrators' fees)?

My main advice to the parties looking to ensure that their arbitration costs are kept under control is to ensure that, before approaching a tribunal with any request to make a ruling on a procedural issue, they would try to reach agreement on the issue in hand before troubling the tribunal with their request.

Can you share the most funny or awkward situation you faced (e.g. a request from a party etc)?

There have been a number of various funny situations, however, the one which spring to mind is a very particular criteria for an arbitrator a claimant asked the LCIA to take into account when selecting an arbitrator, namely, that a potential candidate should not be a "megalomaniac." As readers would appreciate, finding an arbitrator satisfying this particular criteria has not proved to be problematic.

Interview with Richard Kreindler

Richard Kreindler

CLEARY GOTTLIEB

Cleary Gottlieb Steen & Hamilton LLP
Partner

Brief CV

Richard Kreindler has acted as counsel for European, U.S. and other multinational companies in numerous commercial, post-M&A, construction and infrastructure arbitrations before and under the rules of the leading U.S., European and other institutional and ad hoc arbitration regimes. His experience as arbitrator includes approximately 50 arbitrations, as chairman, sole arbitrator and party arbitrator. He also has extensive experience as counsel and as an expert witness in the public international law arena, including multilateral and bilateral investment treaty-based arbitrations. He also serves as mediator in international disputes.

He has advised on cross-border enforcement of foreign arbitral awards and vacatur/set aside proceedings respecting domestic and international arbitral awards. He also routinely advises on multijurisdictional aspects of U.S., German, European, Asian and Middle Eastern civil litigations, including cross-border taking of evidence and recognition and enforcement of judgments. Richard has also represented private and sovereign entities in numerous commercial, construction and natural resource damage claims under public international law before the Iran-United States Claims Tribunal and the United Nations Compensation Commission. He provides regular advice to leading international companies on compliance and anti-corruption programs and policies, including in the context of government investigations of foreign corrupt practices; at the request of Nokia Corporation, he served in 2007 as Chief Compliance Officer of Nokia Siemens Networks (NSN).

Richard Kreindler's detailed CV can be found at:
https://www.clearygottlieb.com/professionals/richard-kreindler

Education and Degrees

- Universität Münster, Doctorate in Law, 2005
- Columbia Law School, J.D., 1985
- Ludwig-Maximilians-Universität München, Magister, 1982
- Harvard University, A.B., 1980

Please describe your current practice.

My current practice is about 75% as counsel and about 25% as arbitrator. That goes up and down over the years, but that is more or less the ratio and it is also quite intentional because my main passion is primarily still as counsel. Of course, when working in a large law firm you have issues of conflicts and other business considerations, and so it is difficult and, frankly, not desirable to have greater than about 25% of my time as arbitrator. Having said that, I feel very strongly, and this would also apply to young people, that it is very good to be working as arbitrator from time to time (and you should start as early as possible), even if your main interest is being counsel, because the experience and the skills that you gain as arbitrator improve your corresponding skills as counsel, and vice versa.

In terms of the practice itself, I would say that three quarters of it is generally is commercial, maybe one quarter of it is public international law and related areas. About one half of my practice typically has some relationship to Germany and the other half has no particular relationship to Germany and is quite eclectic, and some of that relates to Eastern and Central Europe and indeed occasionally Russia.

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

I do act as counsel, as arbitrator and I am also a professor. I like that combination. We all know that in some jurisdictions and some countries that kind of combination is considered to be more desirable than others. I would say in the common law countries the academic aspect is perhaps not as highly esteemed or practiced as it is in countries like Germany or Switzerland. And while my greatest passion, I would say, among the three is still as counsel, the one certainly relates to the other. I think the experience as counsel, as I mentioned, helps you as arbitrator and vice versa. The experience engaging in an oral advocacy also assists you in being an effective university professor, particularly if you are teaching (as I do) in the areas of arbitration where many professors, who are excellent as professors, may not have real practical experience as counsel, and perhaps were never arbitrator. With the arbitrator and counsel background, you are able to tell your students about actual experiences, so called "war stories", it makes the theory less abstract and more entertaining, and it can inspire young people to seriously consider a career in arbitration.

Which role, in your view, is the most difficult one and why?

In terms of handling pressure, thinking and reacting on your feet, then perhaps counsel is the most difficult. In terms of responsibility for decision making with a far-reaching impact, then perhaps the arbitrator role is most difficult, essentially the same as the responsibility of a state judge. In terms of being a professor, that is difficult too because being a professor is a mixture of substance, on the one hand, but also maintaining the attention of the students, on the other hand; being an effective professor who makes a difference, whether on a lecture or in a seminar, is arguably the hardest of the three.

How did your interest in arbitration (and in profession in general) come about?

It is actually fairly straightforward: from a young age, I was always interested in debating and oral advocacy, on the one hand, and international aspects of life, on the other hand. Arbitration seemed to be an excellent opportunity to marry international, so not just domestic, with oral advocacy. And, of course, I started at a time when international arbitration was not nearly as popular or well-known or prevalent and not nearly as sophisticated as a practice area in a large or small firms, as it is today. But it is actually what I identified early on as what I wanted to do as a profession.

What was your first appointment as an arbitrator? How did you receive it?

I do not exactly remember, but I think I received my first appointment at about the age of 30. I was working in Paris at the time. I believe that I was appointed by the ICC as a chair of a case and the way that I think that the ICC came to consider me (this is perhaps a lesson also for today for younger people) is that I was already involved as a lecturer in practical seminars that the ICC organized in Paris where various young people would act as counsel and as arbitrators in role-play situations such as mock hearings; I was quite active there and the ICC Secretariat came to know me. I was also registered with my biography in the ICC national committee, which was also very important. As you know, the ICC has a national committee structure, so while the ICC itself officially does not have a list of arbitrators, the national committees usually have registries of names of local nationals and when the ICC needs an arbitrator for a particular case, it contacts a national committee for a particular nationality. The national committee in turn consults its registry or list, matches names with the profile indicated by the inquiry from the ICC, and then ultimately decides who to contact and propose. So, I was on the list and I was contacted.

And the same principle applies today by the way to the ICC Russian national committee or any other ICC national committee. One absolutely wants to be registered with a proper complete CV with your respective national committee. And not only the ICC but other institutions as well. It is important for institutions that interest you to know of your existence, to be familiar with you, to consider you for possible appointments.

What would be your advice for young arbitration practitioners who wish to become arbitrators? Is there any particular strategy a young arbitration practitioner should employ to increase the chances of being appointed as an arbitrator?

I think my previous response partially answers this question. Again, involvement with the active and leading institutions, involvement with their educational programs, certainly involvement with their "under 40" activities. We did not have "under 40" activities when I was under 40, so it was much more difficult for young persons, especially in certain countries and cultures, to raise their profiles with the institutions. Today, it is much easier, because of the "under 40" activities, which leads to two things – one is that the institutions

become aware of young people and the other is that young people who are under 40 become aware of each other. And those under 40 people will be 50 at one point and so one starts early to create relationships in a more relaxed and less pressured environment of contemporaries, which will hopefully continue for the next 20 or more years. It is an excellent development and I highly recommend involvement in under 40 activities.

Do you think postgraduate degrees or special courses in arbitration (such as CIArb, ICC Arbitration Academy) help in furthering the arbitrator's career and if so in what ways?

Yes, I think they are a good idea, they provide focused training, they are often crash courses of just a week or maybe one day every month. They are an excellent opportunity not only to learn, but also to meet both teachers who are themselves established arbitration practitioners and again the other students who are probably in the same age group. Some are in-house counsel, some are external counsel and 10 years later these people will be in prominent positions and you will have created professional and perhaps personal relationships with them. So while one need not attend 12 different courses, one should perhaps choose one or two, perhaps one at home and one abroad, and pursue that, and, of course, it is a great credential on the CV. And when I say CV I mean not only for getting a job as a lawyer in a law firm, but your CV is also something that is considered when you are being considered for arbitrator or for engagements by clients as counsel, so if you are being considered for arbitrator or counsel and you have attended and passed a CIArb course, for example, that makes an impression and that is a credential.

Do you have any advice whether it is better to have a CIArb course or ICC Arbitration Academy course?

I think if your main focus is London then probably the CIArb course may be better, as it well known in London, and it is something that the domestic English arbitration environment would be more familiar with. ICC is surely better known worldwide, so if you are in Russia or you are in Latin America, the ICC course here will be better known than a CIArb course. The CIArb, whose residential diploma course I taught at for many years in Oxford and Singapore, is I think still very well suited to common law countries and is excellently run.

What about participation in professional arbitration conferences? Are they helpful in promoting yourself as an arbitrator?

Conferences are helpful, but I would say they are most helpful if you speak, not if you just attend. Obviously, there are conferences one wants to attend, but the idea is to create a profile. I would say that simply attending conferences is only partially helpful in promoting yourself in terms of meeting other people, but it is the onus of having to present as speaker on a subject and make a compelling substantive contribution that really makes a difference and in today's day and age with the internet, which we did not have when I started out, every time you speak, every time you write, there is a multiplier effect. When you speak at a conference or you write an article, it is accessible and it is picked up by blogs, and it is picked up by GAR or the equivalent of GAR in many countries. If your speech or article is considered to have made a real contribution to the field, then that can be very effective even on a global scale.

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

That is a really good question. My answer is not very original – impartiality, fairness, but also the ability and the time and the appetite to focus on the actual facts and the actual law. As we know in many arbitrations, whether small or large, sometimes the facts and the law get lost in the procedure, they get lost in the theater and in the perhaps hostile environment. It is important for the arbitrator to drill down on what the actual facts are, what the law is and at the end of the day what he/she needs is to be able to write an enforceable and convincing decision. And if there is a defaulting party, that requires incredible discipline and impartiality on the side of the arbitrator to maintain the burden of proof of the appearing party. As we know just because a party does not show up, this does not mean that the other party simply wins. I would say, again, that fairness and always giving the other side an opportunity, essentially equal opportunity, to respond are important qualities.

If you are a chair, it is important to always give the other arbitrators an opportunity to weigh in, and not only obviously in the internal deliberations, but also in the hearing itself, and to give the parties the impression that the chair is collaborative and inclusive of the other two arbitrators, turning to your right, turning to your left: "Do you have any comments?" "Do you have any questions?". Even if it is not likely that there will be comments and questions, the parties see that the chair is being inclusive as opposed to being first among equals. And that is very important, at least that is the way I try to do it.

Is there any special set of personal qualities a good arbitrator should have?

One important personal quality for an arbitrator is patience. On the one hand, you want an arbitrator who is quick and responsive in terms of responding to things on paper, but you also want patience. And you want in the hearing a particular arbitrator to take a break and deliberate internally, when he or she feels the need to do so and not always to rule immediately from the bench. That, of course, relates to equal treatment and to process.

It is also important to always remember that in some arbitrations one of the counsel is doing the arbitration for the five hundredth time and one of the counsel is doing it for the very first time. Everyone is doing it for the very first time at some point, and that does not mean that the counsel who is less experienced does not have a better case. So, again, work with the facts and the law, do not look just at the skills of the counsel and how the counsel packages the case.

In your view what can an arbitration community do to broaden the pool of arbitrators with young practitioners?

I think we are already doing it – "under 40" activities. I think that is fabulous, and it is not only "under 40", it is also the main events, like the ones the ICCA organizes, that are also now including young people: there are more women, more young people on the main panels, there is more geographical diversity; this I think is key and it did not quite exist 10 years ago. And that means that a young person not only wants to get involved in an "under 40", which is fairly straightforward, but also have the courage to get involved in the "over 40", because that is probably in many ways even more satisfying.

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

The first is obviously conflicts but assuming there are no conflicts, do I myself feel that I have the suitability to be an arbitrator, whether party arbitrator or chair, in this matter, based on what I know about the matter, which is obviously incomplete because I do not know that much about the matter at the outset. I can ask more, but I have to be careful about what I ask.

The great example is that very often in international arbitrations we know that an arbitrator who does not speak the language, does not know the law, does not know the culture, does not know the industry is for some reason chosen or asked to be a party arbitrator or asked to be a chair, usually in an arbitration that is in English, but where perhaps the law and the otherwise relevant languages are not in his or her comfort zone. In this situation, you have to ask yourself whether you are suitable, and often the answer is "yes". I have had arbitrations in Korea, in Korean language with translation, where all the arbitrators were not Korean and it worked. Obviously, it worked because of translation, but also because with the translation you can come to good decisions in a legal culture that you did not know and you are probably being chosen precisely because you are not from that culture, which may also make sense.

And then second – do I have the time and the availability? And there I think one has to be very honest with oneself and if the answer to that is "yes", I do think I have the time and the availability, do I want to take it on, in terms of it being something new or something attractive.

It could still be the case that one would not accept the new appointment because, first of all, you might have a policy of taking on only four or five a year, as in my situation. Second of all, if the seat of arbitration is very far away and things will indeed take place at that seat, you have to be realistic with yourself as to whether that makes sense. And third of all, you might just not have the profile and expertise to feel that you are the right choice.

Is it common for parties to request a pre-appointment interview with you? Do you find it helpful and if so which questions you find most helpful to discuss at the interview?

In my experience – yes. It usually takes place on the telephone. It could be half an hour, it could be an hour. It could be one, two or even three telephone interviews. Usually, the more telephone interviews there are, that means that the party is interested, and they have further questions.

Do I find such interviews helpful? As arbitrator candidate, I find it somewhat helpful, but frankly I do not regard these interviews as my opportunity to ask to much about the case, although I might ask some of the things that would help me to assess my own suitability. I really find it to be more of a one-way street, where the party or its counsel are trying to find out whether I am the right person for this arbitration – in terms of availability, experience, work on prior similar matters, whether other counsel or arbitrators are known to the candidate, has the candidate worked with them. This is also how I approach it when I am conducting the interview as counsel.

The other questions that are typically asked, like what is your approach to burden of proof, what is your approach to strict interpretation of contract, are usually not very helpful, at least not when asked of me. My answers are usually quite general, as it all depends on the particular case and facts. I would never say that I have a particular strict policy or philosophy on anything other than ethics, and other than that I know what burden of proof means and I know that you have to figure out which law applies to it and what the result is, but I would never make a blanket statement and ultimately the persons who are asking that question understand that they cannot accept any more specificity as an answer.

From your perspective as an arbitrator what are the best qualities of a counsel who represent a party in arbitration?

Know the file, do not overstate your case, whether it is in writing or orally, do not engage in inflated or over-aggressive language, use your written and oral pro-

ceedings as counsel to carefully feed, spoon-feed to tribunal, through the advocacy, through the witnesses, though the examination, what your case is. Also address your weaknesses, every case has weaknesses or potential weaknesses, focus on them and show the tribunal why in your view the weaknesses are not critical as opposed to simply ignoring your weaknesses. And try to narrow the case rather than to expand the case. Do not tell the tribunal why the case is complicated, but instead tell the tribunal why the case is not complicated.

Are there practices which counsel appearing before you should avoid?

Not really. There are so many different personalities, there are so many different styles and many counsel are really litigators, who are applying litigation technics to arbitration. Many counsels, as I mentioned, are doing this for the first time in arbitration. Many other counsel are highly experienced. I would say I am very flexible, as long as they do all the other things I just mentioned a minute ago. What I do not particularly encourage is overaggressive language and personal attacks, and it does not mean I will hold that against the counsel, but it does mean that such conduct does not really help, and one can be more effective with a soft voice than you might imagine.

You understand some Russian and actively participate in arbitrations involving Russian parties as counsel. How did your interest in Russia come about? Would you agree to act as an arbitrator in arbitrations handled in Russian?

My interest in Russia came originally because of my interest in Russian language, which I used to speak with some facility but that was a long time ago. I have always been interested in languages from a young age and learned other languages – French, Latin, Greek, German, Croatian. But I decided, I think wisely, that Russian was probably one of the most difficult languages to learn, but it also one of the most sophisticated. I was in university in the US at that time and decided to take Russian, but not with any real goal of doing anything with it and this was, of course, during Soviet times as well. I did want to learn Russian and I took it very seriously and as a result I got a Master's degree in Munich in Politics and Russian studies. So, I continued with it then, but then I went to law school and more or less gave it up. But it was still there, always in the back of my mind, and, of course, also all the ensuing developments in the Soviet Union and in Russia made it all the more interesting. And while I never held myself out as an expert on Russia, which I am not, or Russian language expert, I have retained enough that I maintain the interest.

In terms of Russian arbitration, I have handled arbitrations involving Russian or CIS, Ukrainian parties. In a couple of cases, a part of the arbitrations was in Russian with translation, but also many of the documents were submitted in Russian either without translation, as agreed by the parties, or with translation, but where there were important disagreements about whether the translation was correct, so that the actual wording of the Russian or the Ukrainian text was important to the outcome of the case and I was able to play a role and draw on my Russian skills.

I would not agree to act as an arbitrator in arbitrations handled only in Russian, but I would agree and have agreed to act as an arbitrator in arbitrations where witnesses or experts testify in Russian or in Ukrainian, obviously with translation, but where I am also able to follow, I would say, 75% of the testimony without the translation (while having the translation, but also listening to the actual original language) and this can be a good thing for both parties.

From your perspective, is there anything special about Russian parties or counsel in arbitration?

This was the question I have actually had the most difficulty with, and, sure, the answer is – yes. As it is with any other nationality, but I cannot quite put my finger on what might be special about Russian parties or counsel in arbitration. If I had to give an answer, I would say that my experience up to now has been that both Russian parties and counsel are often more informal, more approachable, more emotional, more spontaneous, less formalistic than perhaps some others. Sometimes I fell I get more of a sense of the personality of the case and of the parties where Russian parties and Russian counsel are involved. And I mean that in a positive sense, because I think getting a sense of what the commercial elements are is important and helpful.

Russia has recently undergone a major reform of arbitration laws to make Russia a more attractive seat for arbitration. What are your views regarding this reform?

I think that by and large, what has happened with the arbitration laws in Russia, is a great development. I think it could make a difference to the acceptability of international arbitration with a seat in Russia. I think that there are various reasons why acceptability has not always been high up till now and perhaps the current political climate is also not conducive to that.

On the other hand, we know that there have been many litigations and arbitrations involving Russian parties, since the break of the Soviet Union, taking place particularly in London, sometimes in Stockholm and elsewhere, but particularly in London for various reasons. With Brexit, it is unclear whether the popularity of the English courts or English arbitration will decline. Some people say "no", it will go up, but I am not so sure about that. If it goes down, will that make people

more open to looking at the suitability of Russian courts and particularly arbitration with a Russian seat? I think it is possible and I think the reform could help. What I also think most important is that the reform needs to be communicated, explained and made attractive outside of Russia. That has happened to a certain extent, but I do not have the impression that the communication, whether in conferences or in articles or otherwise, has been as active and as persuasive as it could have been.

In every reform there are two elements, one is the actual fact of the reform, and the other is ongoing reporting on case law pursuant to the reform, case law that impacts the suitability of arbitration in Russia, or also enforceability of both domestic and foreign arbitral awards in Russia. It is an ongoing process and I think that domestic and foreign law firms with a presence in Russia have an opportunity here to do an even better job of communicating, primarily in English, outside of Russia, as to where it is going on. I think that over time that can assist, but it is not going to happen overnight.

When you are not arbitrating or working, how do you spend your spare time?

The answer to that is – family and more family. That is it.

Interview with Anton Alifanov

LL.M. in International Arbitration at Stockholm University

Anton Alifanov

Anton Alifanov graduated from State University of Trade & Economics, Law School (2008, with honors). He started practicing in 2006 as an assistant to attorney at a Russian law firm, then moved to in-house position for one year. After graduation Anton joined Hellevig, Klein & Usov in Moscow, where focused on commercial, tax and employment disputes. In late 2012 he moved to the Moscow office of Castren & Snellman, where he works on litigation and arbitration projects, and advisory in dispute resolution. Anton completed LL.M in international commercial arbitration at Stockholm University (2015/2016) and interned at SCC Arbitration Institute (2016). He is a member of the Moscow Bar (2014)

Why did you decide to obtain an LL.M.? Were you focusing from the beginning on masters' degrees in arbitration? Why not do an extended professional training course (ICC Academy, CIArb training programs) instead?

I should say that my first encounter with dispute resolution was actually in arbitration: back in 2006 I attended a hearing at MKAS (ICAC) with the attorney I worked with. And at that time it impressed me a lot. Though we had a one-semester course in commercial arbitration at law school, it mainly focused on Russian Law on International Commercial Arbitration, as well as recognition and enforcement or arbitral awards. When I was with HKU law firm, I finally had a chance to work on several projects in arbitration involving our clients, and one of them made me really enthusiastic about the thing. This was *Sokotel v. Living Design* case that encompassed not only SCC arbitration, but also parallel proceedings before Russian state courts, showing how diverse and multifold arbitration is.

However, while working on the assignments I started to realize that at some point I will need to acquire comprehensive and more in-depth knowledge of arbitration. During the past few years I attended numerous trainings, seminars, and conferences. At one of the training courses in Stockholm in 2014 I talked to several ICAL alumni, and decided to do the LL.M program at Stockholm University. The reasons to do a masters program were that it is comprehensive as compared to special trainings, the result of studies is a recognized LL.M degree, it gives an opportunity to study and live abroad (an experience I did not have), and provides excellent networking and opportunities for professional development. Luckily partners at Castren & Snellman approved my request to take a sabbatical leave for almost one year to pursue the course.

Why Stockholm University? What other programs have you considered and why you chose Stockholm in the end of the day?

In my case several factors were involved. Firstly, Stockholm can fairly be considered as attractive for 'Russian' disputes, and indeed has a very long history dealing with parties from Russia & CIS. Then, my professional background of having worked primarily with Nordic clients for the past 9 years. Thirdly, the costs & logistics issue: tuition fees are relatively modest there, plus several scholarships are available; Stockholm is not that far, so I was able to drive or fly back home to visit my parents and friends. And finally, me and my wife (as we relocated together) truly love Stockholm and Sweden, and have friends living there. So, frankly speaking there was no choice at all :-)

However, when considering what could potentially be other programs to apply to, these were Queen Mary in London and MIDS in Geneva. highly rated in the arbitration world, besides, I have received very good feedbacks about these courses from my friends who attended them. But tuition fees, as well as threshold for receiving scholarships for these programs are sub-

stantially higher, as compared to Stockholm. As to US masters programs the costs & logistics issue is a real deal breaker, though the program offered by Jan Paulsson in Miami is, I assume, worth attending.

What's your advice to those preparing applications for the Stockholm University program or LL.M.s more generally? When should one start and what are the most important documents?

First thing to do I would definitely recommend to ask oneself – do I really need it? Do I really need master's degree, and do I want to study arbitration at all? Because I can say that there were several people in my program who were completely unaware of what arbitration is and why had they decided to study it. This neither adds any value for such students, nor motivates the rest of the group in the educational process. Another important thing – an LL.M degree does not guarantee you a job, neither in Russia, nor abroad.

If you are sure about the decision, then the plan is the following:

- Check the application dates – application process normally opens in late December for the academic year commencing in fall of the next year;
- Scholarships – there could be several scholarships available: provided by Swedish Institute Visby (see at www.UniversityAdmissions.se), by Stockholm University (information could be available on its website, or by email/phone), special scholarships announced by the University (e.g. I received a scholarship from Swedish Arbitration Association). Visby scholarship is the most desirable (see at https://eng.si.se), as it covers not only tuition fee, but also relocation and housing costs, plus contains a fixed monthly payment for meals etc.;
- Presenting yourself – apart from CV and personal documents (passport, diploma) there should be also (i) motivation letter justifying your interest in and eligibility for the program, and a recommendation latter (ii) from your supervisor at work (e.g. from partner at a law firm), or (iii) from your academic advisor (if you are relatively recent graduate);
- Knowledge of English – you should have a valid international certificate (e.g. IELTS) which meets the minimum score requirement.

All the aforesaid is submitted to the program electronically, plus translated diploma and transcript are sent via post, usually not later than the end of January (first round), and end of March (second round). Usually in May the university announces admission decisions, and later in June – decisions on scholarship applications. Classes start in the end of August – beginning of September, preceded by orientation week for all international students arriving in Stockholm.

Can you give an overview of the program (what courses were offered and which ones you chose, how was the program structured and what activities were offered apart from lectures)?

One should note that ICAL program does not offer a menu of courses to choose unlike e.g. Queen Mary or MIDS programs. So, basically, you are offered a set course consisting of:

First (fall) semester:

- general course on international commercial arbitration – lectures, reading assignments, class seminars, writing assignments (drafting memoranda, submissions);
- mock arbitration – several rounds of submission followed by oral hearing;
- exam on general course;

Second (spring) semester:

- advanced arbitration course – lectures, reading assignments, class seminars, writing assignments (drafting memoranda, submissions);
- special course to prepare the thesis;
- thesis drafting & public defense.

There is also a long break between the semesters from European Christmas till mid-January, which is a good opportunity to visit your relatives back home. Interestingly, the program administrators schedule the January classes so that they start right after the Russian holidays end.

Apart from the scheduled activities we had several classes on a short notice – with prominent arbitration practitioners and scholars, who were in Stockholm on business, or speaking at a conference, and kindly agreed to give us a lecture. And this is a big advantage of studying in Stockholm, as it's one of the preferred arbitration venues and therefore magnets arbitration specialists from around the globe.

How much time per week you spent on the program in terms of classes, doing the reading and assignments etc?

I would say the classes occupied less than 1/3 of total time. In fall semester we had around 3 hours of classes four days a week. The rest of the time was occupied mainly by reading assignments, then – mock arbitration and drafting of various memoranda. In the spring semester the situation has changed: class activity dropped down to 15-20 per cent, while the rest of the time was preoccupied with drafting our master's theses.

Who was you favorite professor/lecturer?

We had a great variety of experienced arbitration scholars and practitioners, but I would specifically single out two of them: Robin Oldenstam of Mannheimer

Swartling (Gothenburg/Stockholm), and Jose Rosell, who at that time was a partner with Hughes, Hubbard & Reed in Paris, and is currently an independent arbitrator based in Copenhagen. These eminent arbitration lawyers combine both academic skills and practical experience, are truly star-performing lecturers and pleasant persons to network with.

Who were you classmates? Where did they come from, were they experienced practitioners or recent graduates?

Ohh, we had a very diverse group – 27 people from 20(!) different jurisdictions: Mexico, Brazil, Canada, Mauritius, Singapore, China, Dubai, Austria, Belgium, Bulgaria, Romania, Germany, Greece, Macedonia, France, Latvia, Lithuania, Azerbaijan, Belarus and mother Russia. So, all major legal systems and legal traditions were represented, the only continent we missed was Australia. Ladies were the majority in our group, a sign that arbitration is going to move away from being an occupation for 'grey-haired men'. As to the experience, the majority were between 22-25 years old, with either no prior experience in legal profession or with a couple of internships; 10 people were between 25-30 years, with few years of experience at law firms or in-house; and finally five students, including me, were 30+ with substantial background in law practice.

What is the Stockholm arbitration scene? Are there any conferences, seminars or events you can attend and you recommend during the year?

Quite a lot – usually there were 2-4 arbitration events every month. Some of them are major conferences: biannual Swedish Arbitration Days (last held 7-9 September 2016), GAR Live Stockholm, Energy Charter Treaty Forum, etc. Others are morning or evening seminars organized by SCC together with leading Swedish law firms and devoted to specific topics. Law firms also contribute to the ICAL program greatly by sharing their experience and views on problematic aspects in arbitration at internal seminars, usually followed by reception and networking.

Is there any alumni network for the graduates of the Stockholm University arbitration program?

Indeed there is an ICAL Alumni Association (can be found at http://www.icalaa.org/) which unites program graduates for more than 10 years from all over the world. It is a nice opportunity to share valuable information, search for an internship or a job, post vacancies, or just get together for fun and pleasure. Membership is currently free of charge.

Looking back is there anything you would have done different (choosing other classes, engaging in some extracurricular activities etc)?

Well, I would like to join the ICC mock arbitration instead of the SCC mock (since I've done SCC arbitration in real life). I would also try to complete my Swedish language studies which I was made to drop due to tough schedule of the arbitration program. And I would definitely take sailing courses which I was unable to attend because of thesis deadlines in May-June.

Would you say studying arbitration or doing masters in law generally in Sweden is different in any way from doing the same somewhere else (e.g. England or the US)?

As I told, I do not personally have experience of studying in UK or US, so my opinion here is more of an assumption. Educational process in Sweden, of course, is very much dependent on local culture, with its main feature being friendly approach. E.g., there are no set

standards for writing assignments: you can choose any existing standard (Oxford, Blue book, etc.) or even invent your own. Students get numerous attempts to pass exams, a rule that some students abuse. So, the right words to describe doing master course in Sweden are friendly and flexible.

You have done an internship at SCC. Please tell us about it

This internship is a three-month unpaid engagement regularly offered by the Stockholm Chamber of Commerce (SCC) every spring and fall. I was lucky to be chosen, as in fact SCC receives quite an astonishing number of applications for this position.

Needless to say that to be an intern when you're 30 and have 10 years of professional experience is a bit of a contradiction. But getting an inside view on how an arbitral institution operates, how the cases are handled, and how the disputing parties and arbitral tribunal cooperate with each other is really worth it. And I must admit that it made me change my mind on some of the technical aspects of building a case.

Main responsibilities of an intern comprise assistance to legal counsel in preparation of case summaries for the SCC Board meetings, i.e. studying submissions of parties to check the arbitration clause, provisions and submissions on appointment of arbitrators, choice of seat, language, and of applicable law, request for relief, possible challenges, costs issues, etc. Among other responsibilities are researching various legal matters, working on caseload statistics, drafting articles and news, translating news for the website, assisting in conferences and other events, etc. I have been also lucky to get involved in couple of the SCC Emergency arbitrations, use of which have boosted in 2016.

The nice bonus from this internship is the possibility to attend events organized by or in cooperation with SCC free-of-charge, as well as to be present at SCC Board meetings for discussion of cases. To sum up, it is a valuable experience and a decent record in your CV.

It should be noted that knowledge of Russian language and Russian law is an advantage when applying for the internship; the other desirable languages are Chinese and Spanish. I know that some of my male colleagues are skeptical about joining the complete femine environment they have at SCC – I must say that I did not experience any problem with this)

In your view what have you gained by completing the program?

Main thing I gained through this LL.M program can be called 'broadening the horizons': in this global world of international trade and cross-border disputes one cannot serve the client properly relying on only 'Russian' approach, or 'Swedish', or 'English' approaches. This program introduces you to the diverse world of international arbitration, and you have the possibility to learn how different jurisdictions understand and use arbitration. Things you learn are very practical, as several times advising my clients I applied what I had learned just a day before in class. I also have received a formal degree which I hope will help me in pursuing my future career in arbitration. And finally now I can say I had at least a glimpse of how studying and living abroad feel like, which I believe is a value itself.

What is your experience of living in Stockholm?

As I have already mentioned, Sweden, and Stockholm specifically, is in my heart. It offers a very friendly atmosphere for living, working and going out altogether. Nice architecture and lovely views of the city transforms an ordinary walk into sightseeing tour. Nature is so close to you here: you live and study near the sea, surrounded by woods, you meet deer, rabbits and foxes simply on your way from grocery to home! Transportation in Stockholm is also incomparable to Moscow: driving 16-20 km from suburb to city center takes 15-18 mins, same way using public transport – 30-45 mins. People feel relaxed there.

I really admire the way the Swedes arrange their life – thinking more of common than of personal, having their family always in the first place, living in harmony with nature. There are, of course, some negative sides, e.g. current situation with immigration, very strict and inconvenient banking regulations, restrictions resulting from not being part of the local social security system. However, I prefer having few wise rules which people obey, than having plenty of cumbersome regulations ignored by everyone. Someone may take my approach as too naïve, but all the aforesaid things I truly miss here at home, though still trying to apply in my local community. The other things that could be a challenge for a foreigner in Sweden are lack of communication (as locals are very temperate), also gloomy and dark winter months, and high cost of living in general. But studies and interaction within the class helps a lot to overcome these hardships.

More than that, should you have some free time and spare money you can easily catch a Ryanair, NorwegianAir or other low-cost flight within EU for EUR 15-50 for round-trip per person. I found this option to be a nice bonus of staying in Stockholm.

How expensive is Sweden? What would be your advise to a Russian student moving to Sweden to do a masters?

In short: give me a call before you decide to do so

On a serious note: it is not a big drama at all, but one should take into account a few things. Yes, Sweden is an expensive country, especially for a Russian student,

considering decrease of rouble's value. In such case the answer is simple – try to save money. Restaurants are relatively expensive, with business lunches starting from EUR 18-20, so it's wiser to buy and cook at home. There are plenty of groceries available: from less expensive Hemkop, Liddl and Willy's to more 'prestigious' Coop and ICA. Besides, there is a student canteen on the university campus called Lantis which offers lunch for approximately EUR 9. There is an alcohol monopoly in Sweden: alcohol can be bought only in a retail chain called 'Systembolaget', which closes earlier on Saturday and is closed on Sunday. So, plan ahead!

Transportation is very convenient: almost every place is connected by either bus, railway ('pendeltag') or metro ('tunnelbana'). Ordinary ticket price for one-time ride was SEK 36, but students enjoy special reduced rates using transport card (SL Card). There are many discounts offered for students: transportation, foods, museums, etc. You therefore need to become a member to some of the Swedish student unions and you can choose one during orientation week in August before the studies begin.

But the main disaster is finding an accommodation – and not only because rent prices in Stockholm are very high. The locals are also cautious to lease their property to a person from outside the EU, with no rent and credit history in Sweden. A huge disadvantage is that the university does not offer accommodation to foreign students, other than those who received scholarships from the university. However, it is still possible to find housing in the city by sharing: e.g. you cooperate with your classmates and rent a three-bedroom apartment for SEK 15 000 – 18 000 (EUR 1570 – 1885) per month. It is also easier to find accommodation in suburbs: south and west are cheaper than north and east. Stockholm transit system is relatively convenient – you can always use bus, train or metro, so living some 30-50 km from university is not a big problem. Among the places to search for housing I would recommend website www.blocket.se and Swedish student portals (links are available at www.thelocal.se website). The main rule is to start your search far in advance of your arrival to Stockholm, and you will succeed.

What's your favorite Swedish dish/beverage?

Hmm, the things that come to my mind are mainly pastry, as Sweden is mostly famous for it. Traditional 'Princess' tart is definitely worth trying, same as kannelbulle (cinnamon bun) – an everyday companion for a cup of coffee. The latter is actually my favorite beverage, but note that Swedes drink the so-called 'bryggkaffe' (brewed coffee) which is alike American filter coffee. In the evening or over weekend I would go for a glass of rose, traditional in Sweden.

Any restaurants/bars or clubs you would recommend?

Stockholm is full of nice places to dine and club! For instance, 'Sturehof', 'Strandvagen 1', 'Nosh & Chow', 'Napoleon Bistro', 'MeatballsForThePeoples' offer very good lunches. For coffee the best places in the inner city are 'Sturekatten' and 'Vetekatten'. For going out at night most places are located in Sodermalm (south Stockholm), however, Boqueria club, Slakthuset, Ice-Bar and Soap Bar in the city center are also popular. I would also recommend visiting a lovely open-air Hembygdsgårds café, located north of Stockholm on Vaxholm island, which offers fantastic foods and views over the sea.

Do you need to speak or know some Swedish to get around? What are the five words in Swedish you would suggest to learn before coming to Sweden?

Ha-ha-ha!! In terms of language Sweden is very English-friendly: it is spoken by everyone in almost any place of the country. There is therefore no special need to know Swedish to survive, despite the fact that all street signs, announcements in bus, trains and metro, price tags in shops, all radio and TV are in Swedish. You can always ask for help, and you will likely receive it.

But that is a very good tip – to be prepared and to know some Swedish. I would say the very important word masters students encounter when arriving in Stockholm is 'Personnummer'. This is a Swedish identity number every citizen/resident has, and without which person cannot enjoy the local social security, medical care, bank services, cell phone contract and even discount programs in shopping malls. Unfortunately, masters students are not entitled to a personnummer as they stay in Sweden less than a year. The other main words describing local habits are 'Mingle', a traditional Swedish social networking to have a pleasant chat over some drinks and snacks; and 'Fika' which means light meal served, usually coffee, snacks or other refreshments. And the words 'Ja' and "Nej' for 'Yes' and 'No', respectively, are of course a must to know; same for 'Tack så mycket' ('thank you very much') and 'Varsågod' ('Please/You're welcome'). University offers a non-mandatory course in Swedish that any masters student may attend for free.

So, think, decide and try your luck!

Arbitration Blogs to Follow

Blogs about Russian Arbitration Reform to Follow

If you are interested in following the Russian arbitration reform, please visit a topical chapter on the RAA's web site with the latest news and analytical reports about the reform at http://arbitrations.ru/press-centr/arbitration_reform/

Arbitration Events to Attend

16 January 2018	**RAA Arbitration Bazaar** Organizer: Russian Arbitration Association Location: Moscow, Russia, Le Restorant, 2 Zvenigorodskaya street, 13/1, 2nd floor www.arbitrations.ru
30-31 January 2018	**C5's 7th Annual Conference on International Disputes and Asset Recovery Involving Russian and CIS Parties** Organizer: C5 Location: London, UK www.c5-online.com
2-4 March 2018	**9th Moscow Pre-Moot to the 25th Willem C. Vis International Commercial Arbitration Moot** Organizer: Lomonosov Moscow State University Location: Moscow, Russia www.vismoot.ru
23-29 March 2018	**25th Willem C. Vis International Commercial Arbitration Moot** Organizer: Association for the Organization and Promotion of the Willem C. Vis International Commercial Arbitration Moot Location: Vienna, Austria vismoot.pace.edu
26 March 2018	**Russian Arbitration Reform: time to gather stones?** Location: Vienna, Austria
26 March 2018	**Fourteenth Annual Leading Arbitrators' Symposium** Location: Vienna, Austria, Grand Hotel Wien
26 March 2018	**VIth Russian Drinks** Location: Vienna, Austria. Restaurant "Ribs of Vienna" Weihburggasse, 22, Wien.
30 March 2018	**Russian Arbitration Day 2018** Organizer: Arbitration Centre of the Institute of Modern Arbitration, LF Academy Location: Moscow, Russia rad.lfacademy.ru
9 April 2018	**2nd ICC European Conference on International Arbitration** Organizer: ICC Location: Paris, France www.iccwbo.org
26 April 2018	**5th Annual RAA Conference and Members' Meeting** Organizer: Russian Arbitration Association Location: Moscow, Russia www.arbitrations.ru **Program:** 1. Arbitration Reform: Time to Gather Stones? a. Round table on Domestic Arbitration; b. Round table on International Arbitration; 2. The Prague Rules on the Taking of Evidence: Is it Alternative to IBA Rules? 3. Blah-blah-blayka 4. Annual RAA Members Meeting 5. Evening Reception
10-20 May 2018	**III RAA Online Arbitration Moot: online rounds** Organizer: RAA, RAA25 and HSE Location: online; moot.arbitrations.ru
11-13 May 2018	**LCIA European Users' Council Symposium** Organizer: LCIA Location: Tylney Hall, UK www.lcia.org
15-19 May 2018	**8th Saint Petersburg International Legal Forum** Organizer: Ministry of Justice of the Russian Federation Location: Saint Petersburg, Russia www.spblegalforum.ru
18-19 May 2018	**3rd Global Conference of the Co-Chairs' Circle** Organizer: Co-Chairs' Circle Location: Rome, Italy www.co-chairs-circle.com

VI TH RUSSIAN DRINKS

FOR THOSE WHO SURVIVED PREVIOUS DRINKS AND FOR NEWCOMERS!

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Come and share your experience after 3 days of preliminary rounds!

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RAA 25

Baker McKenzie.

Restaurant "Ribs of Vienna"
Weihburggasse, 22, Wien

8 p.m.
26th March 2018

PRE-MOOT
VIS MOSCOW

9th Moscow Premoot

9th Moscow Premoot to the 25th Willem C. Vis International Commercial Arbitration Moot

2-4 March 2018

Lomonosov Moscow State University cordially invites the teams and arbitrators around the globe to the 9th edition of Moscow Premoot.

Pleadings judged by arbitration experts on **3 and 4 March** will be preceded by **Vis Moot Workshop and Conference** on **2 March** at the unique cultural venue.

- World renowned arbitration guests invited
- Our professional programme is accompanied by exciting social and cultural events
- Russian visa support provided, accommodation/logistics advice at request.

Registration for teams and arbitrators is open before **1 February 2018** at www.vismoot.ru, questions to moscowpremoot@gmail.com.

Do skoroy vstrechi!

1 March (Thursday)

Cultural Programme for Early Arrivals: Moscow Theaters Tour

2 March (Friday)

10:00 - 12:30
Tour to Lomonosov MSU, incl. to the top of the Main Building

13:30 - 17:00
Vis Moot Workshop and Conference followed by Welcome Reception and Evening City Walk

3 March (Saturday)

11:00 - 18:30
Rounds I, II and III

18:30 onwards
Drinks in Moscow Historic Center

4 March (Sunday)

11:00 - 18:30
Rounds IV, V and VI

19:30 – 21:00
Awards Ceremony and Banquet at the Faculty of Law

21:00 onwards
Nightlife

III RAA Online Arbitration Moot: registration is open

Russian Arbitration Association, RAA25 and the Faculty of Law at the National Research University Higher School of Economics (HSE, Moscow) invite all Russian-speaking law students and arbitrators to participate in the III RAA Online Arbitration Moot.

The Online Moot will be held in two stages:

- **10 – 20 May 2018** – Online rounds are hold through video-conferencing and the RAA Online Arbitration System.
- **24 – 26 August 2018** – Oral hearings and Conference are take place in HSE, Moscow.

Registration for teams and arbitrators is open before **15 March 2018**. The registration, the Mock case, the Rules and all deadlines will be available at moot.arbitrations.ru. The working language is Russian. The participation is free of charge.

If you have any questions, please, send them to raa25@arbitrations.ru

RAA40 Events in 2017

Women in Arbitration, 6 March 2017

In 2017 RAA40's activities began with the annual social **Women in Arbitration** held jointly with Olesya Petrol on 6 March 2017.

Being organized for the third time, this event was aimed at bringing together women practicing in dispute resolution to celebrate International Women's Day 2017 and to discuss various aspects of women's careers in the field. Speakers included Julia Zagonek (White & Case), Anna Grishchenkova (KIAP), Marina Akchurina (Cleary Gottlieb). This year's event was also marked by a special guest, Vladimir Khvalei (Baker & McKenzie, Moscow), who provided an outside perspective. The speakers shared their experience regarding challenges that female practitioners may face while building their profile in international arbitration, as well as possible ways to overcome them. They expressed an opinion that most stem from stereotypes, which can be rebutted easily, while others still require finding a solution.

This inspiring event was held at wine club and private art gallery L'Appartement 83 accompanied by exceptional wine and perfect appetizers, and was kindly sponsored by White & Case and KIAP.

How to expedite arbitration proceedings: perspectives of arbitrator, counsel and client, 17 May 2017

In 2017 RAA40 also extended its activities beyond Moscow and organized seminars in Saint Petersburg and Kazan on the occasion of two major legal conferences, St. Petersburg International Legal Forum and Kazan Legal. The seminars attracted over a hundred people.

On 17 May 2017 the **Saint Petersburg** office of Egorov Puginsky Afanasiev & Partners hosted a RAA40, ICDR Y&I and ICC YAF joint seminar on a topic of interest **"How to expedite arbitration proceedings: perspectives of arbitrator, counsel and client"**.

The panel consisted of Dr. Solveiga Paleviciene (Glimstedt), Grigory Lazarev (Kind & Spalding) and RAA40 Co-Chair Anna Shumilova (Joseph Hage Aaronson LLP). The discussion touched upon expedited procedures recently offered by the ICC and other arbitration rules as a response to the call for a more timely efficient con-

duct of proceedings. It was further considered what roles arbitrators and parties play in ensuring quick dispute settlement and how different interests can be dealt with. The speakers then discussed at what cost comes expediency and in which cases such procedures would be most suitable.

EPAM partner Ilia Nikiforov moderating the event also asked the participants to address other technics that could help to achieve time and cost efficient arbitration proceedings without losing the quality of the arbitral award.

Evidence collection: Mission is possible, 26 September 2017

For its event in **Kazan**, which took place on 26 September 2017, RAA40 chose a challenging subject "**Evidence collection: Mission is possible**". The event was organized in partnership with KPMG.

An experienced panel addressed difficulties and practical matters relating to management of evidence in international arbitration and litigation cases. Maria Gritsenko (Bryan Cave) shared her insights of best practices in document disclosure and other specifics of common law when it comes to gathering of evidence for English cases. Polina Permyakova (Delphi) outlined main issues that parties may face in Swedish proceedings. The speakers then turned to a role of witnesses in international disputes and ways to enhance their effectiveness. Evgeny Raschevsky from Egorov Puginsky Afanasiev & Partners focused on collection and presenting of evidence from fact witnesses and described main issues related to witness testimonies. That was followed by Sergey Alekhin (Willkie Farr & Gallagher) and Egor Misiura (KPMG) debate about expert witnesses, their responsibilities and scope of interactions with the party, its counsel and the tribunal.

RAA40 Co-Chair Olga Tsvetkova (EPAM) moderated the discussion.

Bribery and Corruption: Addressing the Wrong in Arbitration, 28 September 2017

Notwithstanding RAA40's new trend of taking arbitration-related events outside Moscow, on 28 September 2017 we organized a seminar on the topical issue of proving corruption in international arbitration at the Moscow offices of Hogan Lovells.

The event titled "**Bribery and Corruption: Addressing the Wrong in Arbitration**" brought together a panel of distinguished speakers from Switzerland (Sebastiano Nessi, Schellenberg Wittmer), Russia (Alexei Dudko, Hogan Lovells and Kontantin Ryabinin, Mannheimer Swartling), Ukraine (Olena Perepelynska, Integrites) and England (Nathan Searle, Hogan Lovells) allowing to cover most of the key European jurisdiction. The debate focused on the burden of proof and (even more importantly) standard of proof in establishing corruption allegations. In addition, the panel addressed the same issue from the perspective of investment arbitration and was offered to consider whether it is fair that only investors should be punished for bribery in circumstances where, as one arbitration practitioner has put it, '*tango takes two*'.

The discussion was moderated by RAA40 Co-Chairs, Denis Almakaev (Hogan Lovells) and Anton Garmoza (International Centre for Legal Protection) and was followed by drinks, courtesy of the host.

Winter Reception in London, November 9, 2017

On November 9, 2017, RCAN and RAA40 organized a **Winter Reception in London**. PWC hosted and sponsored the event.

The Winter Reception was the first RAA40 event abroad and was a great success. The event attracted more than one hundred guests, including young arbitration practitioners, practitioners in related areas such forensic experts and translation services, solicitors and barristers based in London as well as in-house counsel. The event provided a rare opportunity for Russian speaking lawyers and arbitration practitioners to meet and share their thoughts and ideas with each other and their senior colleagues.

We hope this is a good start for RAA40 events abroad.

A Multi-tier ADR clause: Is it efficient for your international transaction?, 7 December 2017

On 7 December 2017 RAA40 and ICDR Y&I led a roundtable "**A Multi-tier ADR clause: Is it efficient for your international transaction?**" on the occasion of the IX ABA Moscow Dispute Resolution Conference.

The event attracted many practitioners interested in alternative dispute resolution available prior or instead of commencing arbitration. Distinguished practitioners from Moscow (Leonid Akimov, PJSC Rosseti and Maxim Kulkov, Kulkov, Kolotilov & Partners), London (Ed Crosse, Simmons & Simmons), Stockholm (Åsa Waller, Mannheimer Swartling) and New York (Miroslava Schierholz, ICDR) took part in the discussion. Different background of the speakers allowed for giving both client and counsel views on advantages and downsides of multi-tier clauses, impact of cultural background on the reasons for the parties' choice of mediation and prospects of its development in Russia. The audience was particularly interested in positive experience of Rosseti with the successful use of mediation proceedings for the resolution of disputes in electric power industry.

The event was kindly hosted by the Russian Union of Industrialists and Entrepreneurs (RSPP) and sponsored by Mannheimer Swartling. A Russian/English simultaneous translation was available, courtesy of Nektorov, Saveliev & Partners.

LCIA YIAG and RAA40 Winter Social, 20 December 2017

On 20 December 2017, RAA40 and LCIA YIAG held a traditional **Christmas and New Year Social** in Moscow followed by **RAA40 Awards**. The event was sponsored by White & Case and Egorov Puginsky Afanasiev & Partners.

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

At Christmas and New Year Social we announced the results of the annual online voting on Top 10 Young Arbitration Practitioners. To be eligible for the award the following conditions had to be satisfied: the lawyer must (i) not yet be a partner, professor, doctor of law (LLD, PhDs are eligible), and (ii) practice in the sphere of Russia-related international arbitrations in Russia or abroad. RAA40 Co-Chairs were not eligible.

The 2017 winners are (in alphabetical order):

- **Sergey Alekhin** (Willkie Farr & Gallagher, Paris)
- **Yury Babichev** (Goltsblat BLP, Moscow)
- **Egor Chilikov** (Private Law Pratice, Moscow)
- **Arter Dudko** (White & Case, London)
- **Anna Kozmenko** (Schellenberg Wittmer, Zurich)
- **Yury Mahonin** (Dechert, Moscow)
- **Andrey Panov** (Norton Rose Fulbright, Moscow)
- **Olesya Petrol** (Private practice, Moscow)
- **Julia Popelysheva** (Clifford Chance, Moscow)
- **Evgeniya Rubinina** (Freshfields Bruckhaus Deringer, London)

Our sincere congratulations to all the winners!

Acknowledgements

RAA40 Co-Chairs would like to express their special gratitude to:

Egorov Puginsky Afanasiev & Partners for supporting RAA40 seminars in St Petersburg (*How to Make the Arbitration Quicker*) and in Kazan (*Evidence Collection – Mission Impossible*) as well the New Year Awards & Drinks

White & Case LLP (and Julia Zagonek personally) for supporting Women in Arbitration meeting and the New Year Awards & Drinks

KIAP (and Anna Grishenkova personally) for supporting Women in Arbitration meeting held on the eve of the International Women's Day

Hogan Lovells (and Alexei Dudko personally) for hosting the conference on "*Bribery and Corruption: Addressing the Wrong in Arbitration*"

Mannheimer Swartling, Russian Union of Industrialist and Entrepreneurs and Nektorov Saveliev & Partners for supporting ICDR and RAA40 seminar "A Multi-Tier ADR Clause: Is It Efficient for Your International Transaction?"

RCAN and PwC for organizing and hosting the Winter Reception in London

These events would not have been possible without your support. We firmly believe that the events you sponsored helped promoting arbitration among young practitioners and gave them valuable opportunities for professional

Newsletter #7

RAA 40

Russian Arbitration Association