
THE
INTERNATIONAL
ARBITRATION
REVIEW

EDITOR
JAMES H CARTER

LAW BUSINESS RESEARCH

THE INTERNATIONAL
ARBITRATION REVIEW

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For further information please email
Adam.Sargent@lbresearch.com

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Editor
JAMES H CARTER

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PUBLISHER
Gideon Robertson

BUSINESS DEVELOPMENT MANAGER
Adam Sargent

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EDITOR'S PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another. The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more lawyer hours of reading than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. But there is a niche to be filled for analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world is consumed with debate over whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter
Dewey & LeBoeuf LLP
New York
July 2011

Chapter 34

RUSSIA

*Mikhail Ivanov and Inna Manassyan**

I INTRODUCTION

The practice of resolving disputes through arbitration is undergoing rapid development in Russia. The arbitration courts in Russia do not form a part of the Russian Federation judicial system, and thus represent an alternative form of dispute resolution. However, arbitration courts and state courts, despite all the differences, are in general equally recognised as instruments of civil rights protection, performing one and the same function of justice.

There are two types of commercial arbitration in the Russian Federation: international commercial arbitration and domestic commercial arbitration. Separate laws have been developed with respect to these types of commercial arbitration.

International commercial arbitration is governed by the Russian Federation Law No. 5338-1 ‘on International Commercial Arbitration’ dated 7 July 1993 (‘the ICA Law’), which is based on the Model Law on International Commercial Arbitration, adopted in 1985 by the United Nations Commission on International Trade Law (‘UNCITRAL’).

The main criterion qualifying arbitration proceedings as international is the presence of a ‘foreign element’ in the dispute, which means that either the parties to the dispute must be located in different countries or, if both parties to the dispute are Russian companies, at least one of them should have a foreign shareholder.

The ICA Law applies to international commercial arbitration if the seat of arbitration is in the Russian Federation. If the seat of international commercial arbitration is abroad, the ICA Law applies to such arbitration in specific cases provided by the ICA Law, such as in the enforcement and challenge of arbitral awards, the obligation of a state court to consider a claim that is subject to an arbitration agreement until one of the parties invokes such agreement, and taking interim measures in support of arbitration.

* Mikhail Ivanov is the managing partner of Salans LLP’s St Petersburg office and Inna Manassyan is an associate at Salans LLP’s Paris office.

Pursuant to an agreement of the parties, the following may be referred to international commercial arbitration:

- a* disputes resulting from contractual and other civil law relationships that arise in the course of foreign trade and other forms of international economic relations, provided that the place of business of at least one of the parties is situated outside of the Russian Federation; and
- b* disputes arising between enterprises with foreign investments or international associations and organisations established in the Russian Federation, disputes between the participants of such entities, and disputes between such entities and other subjects of Russian Federation law.

According to the ICA Law, if an international treaty of the Russian Federation establishes rules other than those that are contained in Russian legislation relating to arbitration, the rules of the international treaty shall be applied.

The procedure for the establishment of domestic (national) arbitration courts and their activities are regulated by the Federal Law No. 102-FZ 'on Arbitration Courts in the Russian Federation' dated 24 July 2002 ('the Law on Arbitration Courts'). Pursuant to Clause 1, Article 1 of the Law on Arbitration Courts, if the parties so agree, any dispute arising from civil law matters may be submitted to domestic arbitration courts, unless otherwise set forth in federal law.

The Law on Arbitration Courts applies to domestic disputes provided that there is no foreign element (as previously referred to), which makes the dispute subject to international commercial arbitration. The Law on Arbitration Courts specifically provides that it does not apply to international commercial arbitration. A domestic arbitration court is also entitled to consider a dispute between a Russian entity and a foreign company, but in this case the rules of the ICA Law apply. We can thus see that the jurisdiction of domestic arbitration courts is of a general nature, while the jurisdiction of international arbitration courts is specific and limited to cases with a foreign element.

Apart from the ICA Law and the Law on Arbitration Courts, each permanent arbitration institution has its own procedural rules, which also apply when the parties submit a dispute to that permanent arbitration institution.

In the context of enforcement and challenge of arbitral awards within the Russian Federation, one must also mention the Arbitrazh¹ Procedural Code of the Russian Federation ('APC'), which was adopted on 14 June 2002.

In speaking about the distinctions between international and domestic arbitration, the following should be noted: the ICA Law and the Law on Arbitration Courts set different time frames for judicial review of decisions (rulings, decrees) of an arbitration court on its competence to examine the case.

1 The term *arbitrazh* relates to state commercial courts, which form an integral part of the national judicial system. These courts consider disputes connected with commercial (economic) activities, including disputes that arise from relationships between commercial entities and governmental authorities (such as antimonopoly, taxation, registration authorities and the like).

i International commercial arbitration

Pursuant to Part 3, Article 16 of the ICA Law, an arbitration court is entitled to choose to examine the question of whether it has jurisdiction:

- a* before considering the case on its merits, as a ‘preliminary issue’, or
- b* at the same time as it makes its final award on the case.

This gives the court the opportunity to take each case into consideration individually, to weigh up the dangers of spending significant time and expense on unnecessary arbitration proceedings (if the decision on jurisdiction is left until the court makes an award on the case on its merits).

If a separate decision that the international arbitration court has jurisdiction is made as ‘on a preliminary issue’, this decision can be disputed in a state court within one month of the party’s receipt of such decision.

According to the ICA Law, upon examination of the justification of the arbitration tribunal’s decision regarding its jurisdiction, the decision of the state court is not subject to appeal to higher instance courts. At the same time, while the ICA Law does not provide for the possibility of appealing a decision of the state court, the APC (which was adopted after the ICA Law) does set forth such a possibility. Russian state *arbitrazh* courts resolve this conflict of laws in favour of the APC.

While the case is being examined in the state court, the arbitration court may continue with the proceedings and make an arbitral award. If a decision that an arbitration court has jurisdiction is taken at the same time as an award on the case’s merits, such decision can be disputed in state court only within the framework of procedures for annulment of (final) arbitration awards, or this issue can be raised in procedures for enforcement of (final) arbitration awards.

A decision of an arbitration court rendered as a ‘preliminary issue’ on the lack of its jurisdiction cannot be disputed in a state court. Regardless of the fact that such a decision is not necessarily a final decision on the issue of which court – state or arbitration – has jurisdiction, an arbitration court cannot be forced to examine a dispute.

ii Domestic arbitration

According to the Law on Arbitration Courts, an arbitration court will examine a petition from any party that objects to its jurisdiction and decide on it without postponing the issue, handing down an award on the case’s merits. If an arbitration court rules that it lacks jurisdiction, then it cannot consider the case on its merits. The Law on Arbitration Courts does not establish the possibility of appealing before a state court the decision of an arbitration court regarding its competence. In this connection, the rules of the APC providing for the possibility of appeal before state *arbitrazh* courts of preliminary decisions of arbitration courts on their jurisdiction are not applicable to domestic arbitration courts.

Regarding the types of arbitration courts, it should be noted that modern Russian law defines two types of arbitration courts (arbitration): permanent arbitration courts (designed for institutional arbitration) and *ad hoc* arbitration (or arbitration tribunals established for the resolution of a particular dispute).

Permanent arbitration courts are stable arbitration institutions with a permanent location and with their own regulations (for example, regulations determining the procedure for arbitration proceedings and regulations for conciliation procedures), which regularly examine cases, and do not terminate their activities when examination of a particular case is complete. An *ad hoc* arbitration tribunal is created for the resolution of a single dispute, and after the dispute's resolution, is disbanded. There is no defined location; the proceedings are held at a location determined by agreement of the parties or by the *ad hoc* arbitration tribunal itself. The procedure for this type of arbitration proceeding, as a general rule, is determined by rules selected by the parties, with any deviations that the parties may agree upon.

According to the ICA Law, 'arbitration' means any arbitration, whether conducted by a tribunal set up specifically for a given case or administered by a permanent arbitral institution.

The major international commercial arbitration institution in the Russian Federation is the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation in Moscow ('the ICAC'). The ICAC is an independent and permanent arbitration institution operating in accordance with the ICA Law, the Statute on the ICAC annexed to the ICA Law, and the ICAC Rules.

A large number of arbitration institutions have been established in Russia. Other well-established institutions (apart from the ICAC) are the Arbitration Court of the Moscow Chamber of Commerce and Industry, the Arbitration Court of the St Petersburg Chamber of Commerce and Industry and the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation in Moscow.

With respect to statistics relating to arbitration in the ICAC,² in 2010 the ICAC received 299 claims from companies from 30 countries. Russian companies were participants in 281 of the disputes. The ICAC also received 18 disputes in which both parties were foreign companies. With respect to the variety of contracts from which the disputes arose in 2010, as in previous years, disputes connected with foreign trade sale-purchase (supply) agreements were the most common, with 150 such disputes submitted (accounting for 50.2 per cent of the total).

II THE YEAR IN REVIEW

i Developments affecting international arbitration

In 2010, there were no changes to the legislation on international commercial arbitration in Russia. On 23 June 2010, the Chamber of Commerce and Industry adopted amendments to the ICAC Rules, allowing, *inter alia*, the parties to participate in hearings by video conference. To further modernise the arbitration courts' practice, on 27 August 2010, the Chamber of Commerce and Industry endorsed the Rules on Impartiality and Independence of Arbitrators that are similar (although not identical) to the IBA Guidelines on Conflicts of Interest in International Arbitration. Similarly to the IBA's Guidelines, the Rules on Impartiality and Independence are of advisory nature. These

2 According to the ICAC website: www.tpprf-mkac.ru/ru/whatis/-2010-.

Rules were tailored to apply in the ICAC proceedings, as well as to provide guidelines on conflicts of interest rules for the Russian state courts when seized with challenges to arbitrators.

Before moving on to examples of judicial practice that relate to the activities of international commercial arbitration courts, it should be noted that in general, such practice is connected with control on the part of state courts over awards made in international commercial arbitration (in particular, when a party requests that a (state) *arbitrazh* court set aside an arbitration award, or that an award made in international arbitration be recognised and executed). As a reminder, state courts do not examine the case on its merits, and, as a general rule, do not oversee the reasoning of arbitral awards.

The ICA Law provides for an exhaustive list of grounds on which an arbitral award may be set aside, basically reproducing the language of Article 5 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ('the New York Convention'). The majority of grounds are based on procedural breaches that have occurred within the course of the arbitral proceedings and have to be proved by a party. An arbitral award may be set aside by the state *arbitrazh* court if:

- a* the party making the application for setting aside furnishes proof that:
- a party to the arbitration agreement was incapacitated, or the said agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereof, under the law of the Russian Federation;
 - a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case;
 - the award was made regarding a dispute not contemplated by or not falling within the terms of submission to arbitration, or contains decisions on matters beyond the scope of submission to arbitration, provided that if the decisions on matters submitted to arbitration can be separated from those on matters not so submitted, only that part of the award that contains decisions on matters not submitted to arbitration may be set aside; or
 - the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the ICA Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with the ICA Law;
- or
- b* the court finds that:
- the subject matter of the dispute is not capable of settlement by arbitration under the law of the Russian Federation; or
 - the award is in conflict with the public policy of the Russian Federation.

The grounds for refusing recognition or enforcement of an arbitral award are almost the same as for the annulment of the award. Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

- a* at the request of the party against whom it is invoked, if that party furnishes proof to the competent court where recognition or enforcement is sought that:
- a party to the arbitration agreement was incapacitated in some manner or the said agreement is not valid under the law to which the parties have subjected it

or, failing any indication thereof, under the law of the country where the award was made;

- the party against whom the award was made was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case;
- the award was made regarding a dispute not contemplated by or not falling within the terms of submission to arbitration, or it contains decisions on matters beyond the scope of submission to arbitration, provided that if the decisions on matters submitted to arbitration can be separated from those on matters not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which or under the law of which that award was made; or

b if the court finds that:

- the subject matter of the dispute is not capable of settlement by arbitration under the law of the Russian Federation; or
- the recognition or enforcement of the award would be contrary to the public policy of the Russian Federation.

It should be noted that if a party is seeking recognition and enforcement of an arbitral award issued in a foreign arbitration, the grounds for refusing recognition or enforcement of an arbitral award are to be determined according to the New York Convention, provided that the award has been made in the territory of one of the contracting states.

ii Arbitration developments in local courts

Validity of the arbitration clause

In the past, foreign arbitral awards were systematically denied recognition and enforcement by the state courts of the Russian Federation on the grounds that an arbitration agreement was invalid when not countersigned by the parties. However, this formalistic approach may change given the recent judgment of the Presidium of the Supreme Arbitrazh Court in *ESF Euroservices BV v. Hyundai Merchant Marine*,³ rendered in a dispute between two Dutch companies.

In this case, lower Russian courts denied recognition and enforcement of an arbitral award on the following grounds: (1) an arbitration court based in Russia lacks jurisdiction to resolve disputes between two foreign legal entities; (2) a bill of lading cannot confirm that an arbitration agreement was concluded absent the parties' signatures; and (3) one of the arbitrators had a conflict of interests with regard to the claimant. The Supreme Arbitrazh Court ruled to enforce the arbitral award, stating that

3 (2010) Arbitration Court at the Transportation Central Agency for the city of Moscow.

the parties' performance under the bill of lading confirmed their consent to arbitrate. Following the Presidium's judgment, Russian courts may be more inclined to admit the validity of an arbitration agreement, whether signed or not, on the basis of the parties' conduct. This case is also notable because of the Presidium's unequivocal statement that domestic arbitration courts may consider disputes between foreign companies – an issue that raised controversy in the past.

Challenges to arbitrators

The Presidium of the Russian Supreme Arbitrazh Court in *ESF Euroservices BV v. Hyundai Merchant Marine* also rejected the lower courts' conclusion that an arbitrator had an interest in the outcome of the case, because he chaired a bar association to which certain counsel for the claimant belonged, and the said bar association subleased premises from the law firm representing the claimant. The Presidium held that no evidence was provided in such a case of the arbitrator's interest in the outcome of the case. It further stated that attorneys were not prevented by law from acting as arbitrators, as long as they are not bound by attorney–client relations with any party participating in the proceedings, and absent any other interest in the case. It can therefore be concluded that the Supreme Arbitrazh Court tends to interpret restrictively the grounds for a challenge of an arbitrator.

Scope of the arbitration agreement and arbitrability issues

A recent case, *Frener & Reifer Russia v. Enka Insaat ve Sanayi AS*,⁴ reviewed by the Supreme Arbitrazh Court in 2011, dealt with the question of whether the arbitration clause in a construction contract covers disputes between a customer and a contractor regarding the exercise by the customer of its rights under the guarantees issued by third parties (banks) to secure the contractor's obligations under the contract.

In the case in question, the contract contained an ICAC arbitration clause. The bank guarantees, on the other hand, provided for the jurisdiction of state courts in London (UK). When Enka demanded payment from the banks under the guarantees securing the contractor's obligations, the contractor commenced an ICAC arbitration requesting an arbitration court to oblige Enka to withdraw its demands to the banks. Enka objected to the jurisdiction of an ICAC arbitration court over this claim. The tribunal accepted its jurisdiction and considered the case on the merits, including issues related to the execution and withdrawal of the bank guarantees.

Enka challenged the ICAC award before a state court in Moscow. The award was set aside. The Supreme Arbitrazh Court refused to consider a supervisory appeal filed by the contractor and confirmed that the ICAC did not have jurisdiction to settle such a dispute, because the award affected the rights and obligations of the banks that were not parties to the arbitration agreement and that did not participate in the ICAC arbitration.

Another recent precedent-setter is the decision of the Constitutional Court of the Russian Federation in *LLC Commercial Bank of Economic Development Bank Kazan*

4 (2010) ICAC.

v. LLC BulgarRegionSnab,⁵ which finally resolved a long-disputed question of whether arbitration courts may rule on issues involving transfer of title to real estate.⁶

The question brought before the Constitutional Court by the Supreme Arbitrazh Court concerned the right of the arbitration courts to make an award on issues that are directly regulated by the state and belong to the public domain. In the case in question, the Constitutional Court was asked to decide whether arbitration courts could make an award on the forfeiture of mortgaged real estate. Traditionally, Russian state courts held that arbitration courts were not state judicial bodies and, therefore, could not resolve real estate disputes involving a public law element. In this case, arguably, the ‘public law element’ related to the statutory provisions prescribing to amend the Unified State Register of Rights to Real Property following the transfer of title to such property.

The Constitutional Court held that such state registration of real estate title did not form part of the dispute’s subject matter and did not change the nature of the parties’ legal relationship. Therefore, the requirement of state registration of real estate title could not preclude the arbitration courts from resolving disputes involving real estate.

In parallel with this forward-looking position, the Constitutional Court expressly distinguished between state and arbitration courts, implying that the latter lack the power of the state judiciary to make directly applicable decisions concerning forfeiture of mortgaged property. The Constitutional Court particularly stressed that in such cases the transfer of title to real estate was not founded on an arbitral award *per se*, which only served as a basis for obtaining an enforcement order. In the Court’s opinion, pursuant to the forfeiture procedures regulated by law, the transfer of title takes place on the basis of an agreement, executed further to a public auction or a public sale. Although the Constitutional Court did not directly address the constitutional issues raised in the query of the Supreme Arbitrazh Court, that is, whether the arbitration courts hold certain judicial powers equivalent to those of the Russian state courts, this decision may have far-reaching consequences for the arbitration practice from the perspective of Russian courts. Although the decision addressed the issue as related to the Russian ‘domestic’ arbitration rather than international arbitration, the Constitutional Court’s findings are likely to also have implications for international arbitration concerning real estate located in Russia.

Infringement of public policy

There is a widespread perception that allegations of violation of Russian public policy are almost invariably found in pleadings submitted by parties opposing enforcement of awards in Russia and are, as a rule, supported by Russian courts. Varying findings of Russian courts on this issue are partly attributable to the fact that the term ‘public policy’ is not defined in Russian law and is left to the discretion of the courts. At the same time, recent years have seen Russian courts work out a more uniform conception of what is to be understood by the term ‘infringement of public policy’.

5 (2011) the Permanent Court of Arbitration Pravo.

6 Decision of the RF Constitutional Court dated 26 May 2011.

Judicial practice in 2010 confirmed the approach to this issue that had been previously applied. Thus, in *Odfell v. Severnoye Mashinostroitelnoe Predpriyatie*,⁷ the Federal Arbitrazh Court for North-West District concluded that an award of an international arbitration court may infringe Russian public policy if its enforcement results in actions that:

- a* either directly violate the law or are detrimental to the sovereignty or security of the state;
- b* affect the interests of large social groups;
- c* are incompatible with the principles on which the country's economic, political or legal systems are built;
- d* affect the constitutional rights and freedoms of individuals; or
- e* contradict the main principles of civil law, such as equality of the parties, inviolability of property and freedom of contract.

Yet another criterion referred to in the ruling is the adequacy and fairness of the liability imposed on the breaching party. The respondent alleged that the amount of damages awarded by the arbitration court was unfairly high and, thus, the award violated public policy. This argument was not upheld by the cassation court. The court stated in its reasoning that the arbitration court decided the amount of damages on the basis of applicable Swedish law. The court further held that the award was made in accordance with the relevant procedural and substantive law. The cassation court considered that the respondent's allegations were aimed at revising the case on the merits and, therefore, could not be considered by the state courts. It should be noted that the decision referred to above did not intend to suggest some kind of all-embracing definition of the public policy or set forth some final limitations on the application of the public policy argument.

In a more controversial decision rendered in *Open Society Institute Management Services v. CJSC Sector-1*,⁸ the Presidium of the Supreme Arbitrazh Court set aside an arbitral award in a case where one of the co-arbitrators passed away after the final hearing took place. The remaining two members of the arbitration court issued an award that was later challenged and set aside by Russian courts. The ICAC Presidium decided to proceed with the rendering of the award by the remaining members of the arbitration court by reference to the applicable ICAC Rules, which provide that subsequent to the closing of the proceedings, the Court may decide that the remaining arbitrators shall proceed with the arbitration. However, the Presidium of the Supreme Arbitrazh Court held that the issuance of the award by the remaining two arbitrators breached the principle of equality of the parties and therefore was contrary to the public policy of the Russian Federation. The Presidium considered that an award might be issued by the remaining arbitrators only if evidence is provided that the absentee took part in final deliberations and was able to communicate his or her views to the other arbitrators. Otherwise, in the Presidium's

7 (2010) Stockholm Chamber of Commerce. Currently the case is appealed to the Russian Supreme Arbitrazh Court.

8 (2010) ICAC.

opinion, the appointing party would be deprived of its right ‘to influence the process of rendering an award’.

The Federal Arbitrazh Court of the West-Siberian District rendered yet another controversial decision in *Yukos Capital SARL v. OJSC VNK Tomskneft*,⁹ whereby it denied enforcement of an ICC award on violation of due process and public policy grounds. First, the cassation court stated that the Russian respondent did not receive part of the correspondence relating to the arbitration, because Tomskneft’s executive powers were transferred to another company of the Yukos Group, and therefore correspondence concerning the arbitration proceedings served to the previous executive organ of Tomskneft – Yukos EP, could not be regarded as a due notice. Second, the cassation court found that both the claimant and the respondent belonged to the Yukos Group and were ultimately controlled by the same company. Hence, the loan agreements, concluded between the claimant and the respondent as part of the transfer pricing scheme applied by the Yukos Group of companies, were considered by the cassation court as a sham transaction. On these grounds, enforcement of the ICC arbitral award was held by the cassation court to be contrary to the public policy of the Russian Federation. The present case, which is rather exceptional in its broad interpretation of the concept of public policy and due process, was not examined by the Supreme Arbitrazh Court.

Interim measures

In *Edimax Limited v. Shalva Chigirinsky*,¹⁰ the Presidium of the Supreme Arbitrazh Court confirmed that a Russian *arbitrazh* court is competent to adopt interim measures in cases being examined on the merits in international commercial arbitration abroad. In that particular instance, arbitration proceedings took place before the LCIA. The provision allowing a Russian *arbitrazh* court to adopt interim measures in support of commercial arbitration first appeared in the Arbitrazh Procedural Code of the Russian Federation adopted on 24 July 2002; however, until recently, this rule was rarely used in practice. Another important issue was positively resolved by this decision of the Presidium. Considering whether *arbitrazh* courts may attach assets of individuals – not legal entities – the Presidium of the Supreme Arbitrazh Court found that the dispute in question arose out of the guarantee issued by Mr Chigirinsky to secure the share sale and purchase contracts. The Supreme Arbitrazh Court came to the conclusion that an *arbitrazh* court may attach property of an individual if the subject matter of the dispute stems from the parties’ business relations.

In another landmark case, *Living Consulting Group AB v. LLC Sokotel*,¹¹ the Presidium of the Supreme Arbitrazh Court refused to recognise and enforce an SCC separate award on costs on the basis that such award lacked finality. This award was issued by the SCC against a party for payment of its share of the advance on costs of the arbitration. The Supreme Arbitrazh Court expressly stated that only final awards resolving the dispute on the merits are enforceable under the New York Convention

9 (2010) ICC.

10 (2010) LCIA.

11 (2010) SCC.

and, therefore, interim awards could not be enforced in Russia under the New York Convention.

Limitation period to enforce an arbitral award

In its judgement of 9 March 2011, the Presidium of the Supreme Arbitrazh Court overturned the decisions of the appellate and cassation courts in the case of *Lugana Handelsgesellschaft mbH v. Ryazanski zavod metallokeramicheskikh priborov*,¹² which held that the limitation period to enforce the arbitral awards in question had expired. The lower courts referred to the three-year limitation period for the enforcement of a foreign arbitral award applied from the date of the award's entry into force. Taking into consideration that the DIS awards were rendered in 2005, the courts considered that the limitation periods expired in 2008 and, therefore, the awards could not be enforced in 2010. However, the appellate and cassation courts failed to consider that the relevant decision to enforce those awards was taken by the Supreme Arbitrazh Court only in 2010. According to Article 321 of APC, an enforcement order must be executed within three years from the date of its issuance. Therefore, the Presidium of the Supreme Arbitrazh Court held that first, the cumulative limitation period to enforce a foreign arbitral award is of six years: three years to request enforcement of an award before an *arbitrazh* court and three years to execute an enforcement order. Second, the Presidium of the Supreme Arbitrazh Court held that the limitation period to enforce an award must apply from the date when such an award was 'legalised' by Russian courts, that is, when the relevant Russian court issues a decision to recognise and enforce such an award. Therefore, in the case in question, the limitation period applied from the date on which the Supreme Arbitrazh Court rendered its decision in 2010. To note, the said decision of the Supreme Arbitrazh Court rendered in 2010 is also remarkable for stating that arbitral awards imposing interest on damages and costs are not unenforceable on public policy grounds. Russian courts traditionally considered 'interest on damages' as unfairly burdensome and, therefore, contrary to Russian public policy. Apparently, we may now expect some positive shifts in the court practice in this respect.

iii Investor–state disputes

Russia has entered into a number of bilateral investment treaties ('BITs'), which, in general, are similar in content and provide for the fair and equitable treatment of investments in signatory countries and prohibit nationalisation or expropriation (or measures having the effect of nationalisation or expropriation) without compensation. Those BITs typically provide for arbitration under the UNCITRAL Arbitration Rules, or before the Arbitration Institute of the Stockholm Chamber of Commerce. The Russian Federation signed the ICSID Convention on 16 June 1992 but has not ratified it. None of the investment treaty arbitrations to which the Russian Federation is a party, therefore, have taken place before the ICSID.

The principal investment treaty cases involving the Russian Federation pertain to a series of arbitrations related to the *Yukos* 'saga'. In one of the cases, an award has

12 (2011) DIS.

been already rendered. The case was brought against Russia by RosinvestCo Uk Ltd, for expropriation of 7 million shares in Yukos Oil Company OJSC. Arbitration was conducted under the UK-Russia Investment Promotion and Protection Agreement.¹³ In September 2010, the arbitral tribunal, composed of Lord Steyn, Franklin Berman and Karl-Heinz Bockstiegel as presiding arbitrator, rendered a final award concluding that Russia did in fact unlawfully expropriate Yukos assets. However, Rosinvest was awarded only \$3.5 million, plus simple interest at latest inter-bank lending ('LIBOR') rate – against a claimed \$232.7 million, \$11 million of incurred legal fees and \$2.4 million in other expenses. The tribunal held that the awarded amount represented market value for the Yukos shares on January 2007, when the company's hardships with Russian tax charges had already been known on the investment market. Russia began proceedings at the Svea Court of Appeal in Sweden to set aside the award.

Another investment treaty case involving the Russian Federation is a series of three arbitrations conducted under the auspices of the Permanent Court of Arbitration in The Hague under the Energy Charter Treaty, following the dismantling of the Yukos group by the Russian Federation;¹⁴ the UNCITRAL Arbitration Rules apply. These arbitrations are believed to be the largest arbitrations ever, reportedly involving in the range of \$100 billion in damages sought by investors.

III OUTLOOK AND CONCLUSIONS

Contrary to common perception, the Russian Federation appears to be gradually moving towards a greater support of arbitration taking place abroad. A good example of this is set by a recent development providing for the possibility of Russian courts adopting interim measures in support of international arbitration outside of Russia, as well as by an arbitration-friendly position generally taken by the Supreme Arbitrazh Court of the Russian Federation, which encourages lower courts to abandon a formalistic approach to such issues as, for example, validity of the arbitration agreement or public policy considerations. Most recent 2010–2011 cases, discussed *supra*, set a rather positive trend for the continuous development of international arbitration in Russia.

13 (2010), SCC, case No. V 079/2005.

14 *Hulley Enterprises Limited (Cyprus) v. the Russian Federation*; *Veteran Petroleum Limited (Cyprus) v. the Russian Federation*; and *Yukos Universal Limited (Isle of Man) v. the Russian Federation*.

Appendix 1

ABOUT THE AUTHORS

MIKHAIL IVANOV

Salans LLP

Mikhail Ivanov is the managing partner of Salans LLP's St Petersburg office and head of Salans' Russian litigation/arbitration practice. Mr Ivanov advises clients on a wide range of legal matters involving investment in the Russian Federation, specialising in the resolution of disputes between foreign investors and major Russian companies, in particular before the Russian commercial and general courts. He also participates in international commercial arbitration, in particular at the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation in Moscow. He graduated from Moscow State Institute of International Relations, International Law Department, in 1984.

INNA MANASSYAN

Salans LLP

Inna Manassyan is an associate currently based in Salans LLP's Paris office. Ms Manassyan has also been working as an associate in Salans' Moscow office as of 2006. Ms Manassyan's practice focuses on international arbitration and litigation. Her experience includes representation of clients before the Russian commercial and general courts, as well as Russian arbitration courts. She has also contributed to the firm's international arbitration practice, working on a number of large-scale disputes before the world's major arbitral forums. Ms Manassyan received her law degree from Moscow State University (*summa cum laude*, 2002) and an LLM from Stockholm University in 2010.

SALANS LLP

36 Moika Embankment
St Petersburg 191186
Russia
Tel: +7 812 325 8444
Fax: +7 812 325 8454
mivanov@salans.com
www.salans.com