Recent Decisions of the Supreme Commercial Court of the Russian Federation Regarding International Arbitration

By Ekaterina Butler

I. Introduction

This article describes the rulings in four cases decided by the Supreme Commercial Court of the Russian Federation (RF) that would be of relevance to any party involved in commercial arbitration in Russia, including foreign parties involved in cross-border dispute resolution. The full text of the court decisions can be found at http://ras.arbitr.ru/.

II. Amendments to Arbitration Clause After Assignment of the Main Contract

In *LLC Intervtorresource v. LLC Glovis Rus*,[1] the Supreme Commercial Court of the RF held that amendments made to an arbitration clause in a contract by the original parties to the contract after the contract was assigned to a third party assignee were not binding on the assignee and the contract debtor.

In this case, the court had to decide the issue of the validity of an arbitration clause amended after the assignment of the main contract. A buyer and a purchaser entered into a purchase-and-sale contract that included an arbitration clause providing for arbitration, with the seat in Hamburg, Germany, under the rules of the Chamber of Commerce, and with German law as the substantive law of the contract. The seller assigned the benefit of the purchase-and-sale contract to a third-party assignee. The obligations under the purchase-and-sale contract were to be borne by the seller, as assignor. After the assignment of the contract, the original parties to it, i.e., the original seller and purchaser, entered into an additional agreement in which they amended the arbitration clause by electing to use the arbitration rules of the International Committee for Settlement of Non-Governmental Disputes (ICSNGD). When the purchaser (i.e., the contract debtor) defaulted, the assignee went to arbitration. The arbitration tribunal formed under the ICSNGD rules made an award in favor of the assignee. The debtor failed to satisfy the award, and the assignee brought an enforcement proceeding before the court of first instance of St Petersburg, Russia, which decision the assignee subsequently appealed to the appellate court. Both the court of first instance and the appellate court rejected the enforcement application.

On further appeal, the supreme commercial court also rejected the enforcement application. Applying Russian law to the assignment agreement, the high court concluded that the new arbitration clause had no effect on the debtor-buyer of the original sale-purchase contract, since the new arbitration clause was entered into between the seller and the assignee after the assignment had been effected. Thus, the debtor did not become a party to the new arbitration clause. The high court ruled that, as a matter of Russian law, unless agreed otherwise, the right of legal recourse as provided for in the original agreement is transferred to the assignee upon assignment of the agreement. Hence the original arbitration clause was validly assigned to the assignee and remained binding on the debtor. Given the autonomous nature of an arbitration agreement, any amendment thereto must be agreed between the debtor and the assignee. In the absence of such agreement, any amendment is not binding on the debtor.

III. Validity of an Arbitration Clause in an Unsigned Bill of Lading

In *ESF Euroservices B.V. v. Hyundai Merchant Marine*,[2] the Supreme Commercial Court of the RF held that an arbitration clause incorporated in a bill of lading was valid, despite the fact that the bill of lading remained unsigned, where the parties did not contest the validity of the bill of lading or the actual delivery of the goods covered by the bill of lading.

The claimant, ESF Euroservices, was the carrier, and the respondent, Hyundai Merchant Marine, was the consignor under a bill of lading for the transportation of containers with ethyl acrylate. The consignor had supplied the carrier with containers that were defective and caused a loss of pressure. As a result of this loss of pressure and due to the fact that ethyl acrylate, which was being shipped in the containers, is a highly explosive gas, additional safety measures needed to be taken while unloading the cargo at the port of delivery in St Petersburg. The carrier incurred additional costs when taking these safety measures, and claimed compensation from the consignor. The carrier filed a claim with the court of arbitration at the Central Transportation Agency in Moscow pursuant to the arbitration clause in the bill of lading. The arbitration tribunal decided for the carrier. The consignor appealed the arbitration award to the Moscow commercial court of first instance on the grounds, inter alia, that no valid arbitration agreement existed between the parties, since the bill of lading had not been signed. The court of first instance cancelled the arbitration award, and the appellate court confirmed the decision of the court of first instance. On appeal, the supreme commercial court disagreed with the appellate court and confirmed the arbitration award. The high court ruled that, although the bill of lading had not been signed by both parties, it was valid. Under Russian law, the arbitration agreement should be made in writing and signed. The arbitration agreement is deemed to be in writing if it is contained in

a document signed by the parties or is concluded by way of an exchange of letters, messages by teletype, telegraph or through use of any other kinds of communication purporting to fix the terms of the agreement, or by way of an exchange of a notice of claim and reply in which one party submits that there is a valid arbitration agreement and the other party does not contest this. A reference in a contract to the arbitration clause constitutes a valid arbitration agreement, provided that the contract itself is made in writing and the arbitration clause is incorporated by reference in the contract. Here, the high court ruled, although the bill of lading was not signed by both parties, given that the parties did not contest the validity of the bill of lading or the actual delivery of the goods under the bill of lading, the arbitration clause was valid.

IV. Awarding Interest on Damages

In *Lugana Handelsgesellschaft mbH v. OJSC Ryazan Metal Ceramics Instrumentation Plant*,[3] the Supreme Commercial Court of the RF found that awarding interest on damages was not contrary to Russian public policy, provided the amounts awarded are not excessive.

An arbitral tribunal in an arbitration conducted under the rules of the German Institution of Arbitration (DIS) made an award, whereby the respondent, OJSC Ryazan Metal Ceramics Instrumentation Plant, was ordered, inter alia, to pay the claimant, Lugana Handelsgesellschaft mbH, damages and interest thereon at the rate of eight percent above the base rate. The claimant was also awarded arbitration and legal costs and interest thereon at the rate of five percent above the base rate.

When the respondent failed to satisfy the arbitral award, the claimant filed an application with the commercial court of first instance of Ryazan Region for recognition and enforcement of the arbitral award. The commercial court of first instance rendered an enforcement order with respect to all the claims, except for the interest on the damages and the arbitration and legal costs. The award of interest was rejected as contrary to the public policy of the RF and not provided for by Russian legislation. The appellate court reversed and remanded the matter to the court of first instance. On remand, the commercial court of first instance rejected the application for recognition and enforcement in its entirety, and that rejection was subsequently confirmed by the appellate court.

The claimant then appealed to the Supreme Commercial Court of the RF, which reversed and ordered recognition and enforcement of the arbitral award in its entirety. In particular, the high court confirmed the award of interest. The high court stated that Paragraph 1 of Article 1 of the Civil Code of the RF sets out the principles of equal treatment and redress of grievances, including compensation for overdue payment of the awarded damages. Noting that the amounts ordered were not excessive and applying legal principles it had formulated in a prior case,[4] the high court stated that contractual penalties are part of the legal order of the RF and that interest on any recovery is not contrary to the public policy of the RF.

V. Arbitral Awards Not Rendered on the Merits Not to Be Recognized

In *Living Consulting Group AB v. LLC Sokotel*,[5] the Supreme Commercial Court of the RF held that Russian courts will not recognize or enforce arbitral awards not rendered on the merits.

Pursuant to an arbitration clause, the claimant, Living Consulting Group AB, commenced arbitration under the arbitration rules of the Arbitration Institute of Stockholm Chamber of Commerce (the "SCC Rules") to recover amounts due under a contract for the supply and installation of interior design elements. When the respondent, LLC Sokotel, failed to pay its fifty-percent share of the advance for costs, the claimant paid the total amount of the advance in compliance with Article 45 of the SCC Rules. The Claimant then filed an application with the arbitral tribunal for an order against the respondent to recover the fifty-percent share of the advance it had paid on behalf of the respondent.

The arbitral tribunal issued a "separate award" against the respondent, as requested by the claimant. When the respondent failed to satisfy the award, the claimant applied to the commercial court of first instance in St. Petersburg, Russia, for recognition and enforcement of the separate award rendered by the arbitral tribunal under the SCC Rules. The court of first instance and the appellate court both rendered judgments for the claimant. The respondent appealed to the Supreme Commercial Court of the RF, which reversed and refused to recognize and enforce the award, as not having been rendered on the merits. The high court ruled that the award in question was not final, nor was it rendered on the merits pursuant to Article 43 of the SCC Rules. Hence, the award was not enforceable under either the New York Convention or applicable Russian law, in particular the Arbitration Procedure Code of the RF. The high court noted that it will not enforce any interim decisions by arbitral tribunals that are of a procedural nature, such as decisions on advances for costs, jurisdiction or security for costs.

Endnotes

1. Case N° 15887/09, 20 April 2010 (Russ. Sup. Com. Ct.).
2. Case N° 16727/09, 30 March 2010 (Russ. Sup. Com. Ct.).
3. Case, N° 13211/09, 2 Feb. 2010 (Russ. Sup. Com. Ct.).
4. *Joy-Lad Distribs. Int'l Inc v. OJSC Moscow Oil Refinery* Case N° 5243/06, 19 Sept. 2006 (Russ. Sup. Com. Ct.).
5. Case No. 6547/10, 5 Oct. 2010 (Russ. Sup. Com. Ct.).

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