

E-LETTER

CONTENTS

[Recent YIAG Events](#)

[Reports from YIAG members](#)

[Bolivia](#)

[Peru](#)

[Brazil](#)

[Romania](#)

[England](#)

[Russia](#)

[Germany](#)

[Singapore](#)

[India](#)

[Sweden](#)

[Iran](#)

[Ukraine](#)

[Ireland](#)

[USA](#)

[Malaysia](#)

[YIAG Forthcoming Events](#)

[Other Arbitration Events](#)

WELCOME

Dear Members

We hope you will enjoy this Winter edition of our YIAG e-newsletter, which captures our events and activities since July 2011. As always, we wish first to welcome the **553** new YIAG members who have joined our membership since our last e-newsletter.

YIAG activities in the next few months include our symposium in Stockholm co-hosted by the IBA Arbitration Committee Young Lawyers and The SCC association Young Arbitrators Stockholm (YAS) and two symposia at Tylney Hall (May & September); we look forward to seeing you there!

Stockholm – 8 March 2012

Tylney Hall – 11 May 2012

Tylney Hall – 14 September 2012

In the meantime, we wish you all a very pleasant year ahead.

Amir, Andy, Kate and Marie

YIAG co-Chairs



REPORTS FROM YIAG MEMBERS

As in the past, we have received numerous excellent contributions from YIAG members. We will continue to do our best to include as many as we can in each e-Letter, taking into account the geographical balance and required mix between recent case law and new or amended arbitration legislation. Please send your contributions - consisting of notes of between 4 and 6 paragraphs relating to recent interesting developments in the field of international arbitration in your jurisdiction - to your regional representative or YIAG co-Chair.

[Please note that the reports in this section are not intended to be comprehensive and should not be used as a primary source of legal research. The views expressed in the notes published in the YIAG E-letter are those of the individual authors and are not expressed on behalf of YIAG or the LCIA.]

RUSSIA



Anna Shumilova & Olga Vishnevskaya - Egorov Puginsky Afanasiev & Partners, Moscow

Landmark decisions of the Supreme Arbitrazh Court turn the Russian court system towards arbitration

The Russian courts are traditionally criticized for their conservative and formal approach to arbitration. The ice that is the courts' infamous contempt towards arbitration, however, has been broken by the recent practice of the Supreme Arbitrazh Court of the Russian Federation (SAC).

The recent rulings demonstrate a stable tendency in favour of arbitration, which has been supported by the higher courts of Russia. In May 2011 the Constitutional Court of the Russian Federation (CC) issued a remarkable Ruling No 10-P¹, in which it broadly interpreted a number of legislative provisions regulating the competence of domestic arbitral tribunals. (The question was brought before the CC by the SAC within the cases on enforcement of an arbitral award over a real estate dispute). The SAC perceived the CC's position in the cases under consideration. It upheld the lower courts' decisions granting enforcement of the arbitral award and referred to the CC's position that the public nature of the dispute, which causes its non-arbitrability, is to be determined solely by the parties involved and the nature of the legal relationship, and may not be determined by the category of property *per se* (case No A65-9867/2009, Ruling No 634/10 dated 24 September 2011; case No A65-9868/2009, Ruling No 503/10 dated 27 September 2011).

The SAC followed this pro-arbitration tendency in further cases concerning both domestic and international arbitration. Recently, notable decisions were delivered by the SAC, in which it resolved a set of important issues frequently arising in such cases.

1. Prohibition to reconsider the case on its merits

The Russian commercial (arbitrazh) courts of the two lower instances reassessed the factual evidence of the case and impeded the enforcement of the arbitral award rendered by the International Commercial Arbitration Court under the Chamber of Commerce and Industry of the Russian Federation (ICAC) (aka MKAS). Based on the allegation that the evidence produced in the arbitration proceedings was fraudulent, the courts found the decision of the arbitral tribunal unlawful and refused to enforce it.

However, the SAC stated that reassessment of the facts already examined by the tribunal could not prevent the enforcement of an arbitral award, since it is not a ground for refusal of enforcement under Article 239 of the Arbitrazh Procedure Code of the Russian Federation (case No A14-2053/2010-65/29; Ruling No 2608/11 dated 26 July 2011). Thus, the SAC reconfirmed that the arbitrazh courts are not allowed to reconsider the merits of the cases while dealing with enforcement of the award – the basic provision, which was sometimes ignored by the courts.

¹ The Ruling was discussed in the YIAG 2011 summer e-letter.

2. Protection of foreign counterparties

The Russian courts were also criticized for favoring Russian parties in cases on recognition and enforcement of arbitral awards and their challenges, especially when one of the parties appeared to be a company of significant importance to Russian business. In the recent decisions, however, the SAC emphatically demonstrated the reverse of this trend ruling in favor of foreign counterparties in their disputes with the major Russian plants.

On 13 September 2011 the Presidium of the SAC affirmed the SCC arbitral award ordering the Russian big shipbuilding yard, *Baltiysky Zavod*, to pay a Swedish company, *Stena RoRo AB*, a penalty in the amount of 20 million euro for failure to comply with shipbuilding contracts concluded in 2005 (case No A56-60007/2008; Ruling No 9899/09). The Presidium also dismissed the claim of Baltiysky Zavod Russian shareholders for invalidation of the contracts at stake (case No A56-6656/2010; Ruling No 1795/11). The SAC intervened in this long-lasting dispute after the lower courts rejected Stena's application for the recognition and enforcement of the arbitral award due to a public policy violation and after they recognized the contracts as invalid.

In another recent remarkable case the SAC ruled over a dispute between the largest shipbuilding complex in Russia, *JSCo "PO "Sevmash"*, and a Norwegian company, *"Odfjell SE"*. The SAC upheld the lower courts' decisions satisfying the Odfjell's application for recognition and enforcement of the SCC arbitral award, under which Sevmash was ordered to reimburse Odfjell's damages (over 43 million US dollars) caused by Sevmash's failure to perform shipbuilding contracts concluded in 2004 (case No A05-10560/2010; Ruling No BAC-4369/11 dated 26 May 2011).

3. Right to legal representation in arbitration proceedings

The SAC has also sealed a loophole, which allowed to resist the enforcement of an arbitral award in cases where representatives of the parties in arbitration proceedings were not specifically authorized to appear before the arbitral tribunal (case No A72-14613/2009; Ruling 12311/10 dated 12 April 2011).

The court of first instance found that the representative of one of the parties to arbitration proceedings was not authorized to represent its interest therein, since the power of attorney issued in his name allowed him to appear only in the courts of general jurisdiction and arbitrazh courts. However, the SAC reasoned that the authority to appear before courts (even without a specific indication to arbitration proceedings) was sufficient to consider the representative to be duly authorized. Thus, the SAC assumed a progressive position on the issue of legal representation in arbitration proceedings, which remains unregulated under Russian law.

Albeit the Russian court practice, especially of the lower arbitrazh courts, could still be hardly regarded as uniform, the above mentioned cases by all means enhance the arbitrazh courts to develop a balanced and predictable approach making arbitration in Russia more attractive for both Russian and foreign players.

One should also expect positive developments in the Russian arbitration legislation. The State Duma, the lower chamber of the Russian Parliament, is considering amendments to the Federal Law "On International Commercial Arbitration" No 5338-I of 1993, which are based on the amendments to the Model Law on International Commercial Arbitration of 1985 adopted by UNCITRAL in 2006. The proposed amendments would liberalize the requirements as to the form of arbitration agreements (including its execution in electronic form) and would broaden the arbitral tribunals' authority regarding the interim measures (including the preliminary ones). The bill also deals with a number of other important amendments intended to bring Russian law in compliance with international standards.