CLIENT UPDATE

ASYMMETRIC DISPUTE RESOLUTION CLAUSES: VALIDITY UNDER RUSSIAN LAW AFTER THE SONY ERICSSON JURISPRUDENCE

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On June 19, 2012, the Presidium of the Higher *Arbitrazh* Court of the Russian Federation ("HAC Presidium") issued its well-known Ruling No. 1831/12 in the case of Russian Telephone Company vs. Sony Ericsson Mobile Communications Rus LLC ("Sony Ericsson Ruling") in which it held a so-called asymmetric (optional) dispute resolution clause to be invalid.

This controversial ruling by Russia's top commercial state court has had a significant effect on complex transactions, including financing deals in the first instance. In particular, lenders now often agree not to include asymmetric clauses in their financing agreements with Russian borrowers, although previously those clauses used to be the de facto market standard. Still, there remains significant uncertainty as to the actual legal implications of the Sony Ericsson Ruling. The purpose of this update is to review the actual legal position in light of those uncertainties and offer recommendations as to the optimal course of action in the current situation, pending further guidance from Russia's highest commercial court (see Section 7 of this update for more details).

THE PURPOSE AND TYPES OF ALTERNATIVE DISPUTE RESOLUTION AGREEMENTS

In many cases, the party to a contract that bears the greater risks (e.g., acts as lender under a loan agreement) will wish to ensure that upon entering into the contract it will retain the option of submitting the dispute to a variety of dispute resolution mechanisms and to make the final choice in favor of one or other option after the dispute has already arisen. Depending on the type of dispute, the financial condition of the defendant, and a number of other factors, it may be more preferable to refer the dispute either to a neutral international commercial arbitration or the courts of a neutral country, or to the courts where the defendant and its assets are located. In particular, while disputes on the interpretation of complex terms of financial transactions governed by foreign (e.g., English) law are often more efficiently resolved by international commercial arbitration or the courts of the country whose law has been chosen as the governing law of the contract, in a situation where the debtor is on the brink of bankruptcy and only has liquid assets in one country, it may be preferable to initiate legal proceedings in the courts of the place of domicile of the debtor, which would allow for the most efficient remedies to be available to enforce a judgment and to recover the debt.

The alternative dispute resolution agreements that ensure that an option remains for choosing between certain state courts and international commercial arbitration can either provide equal choice for all parties to an agreement (so-called symmetric clauses), or provide the right of choice for only one party (so-called asymmetric clauses).

APPROACHES IN RUSSIAN COURT AND ARBITRATION PRACTICE TO VARIOUS ALTERNATIVE DISPUTE RESOLUTION AGREEMENTS PRIOR TO THE SONY ERICSSON RULING

Prior to the Sony Ericsson Ruling, Russian courts and arbitration tribunals had firmly established a legal position for validating and enforcing symmetric alternative dispute resolution agreements.

In Ruling No. 11196/11 of the HAC Presidium, dated February 14, 2012, in the case of Surgutfarmatsiya vs. Katren Scientific Production Company, the highest court ruled that "*arbitration agreements providing that each party may at its discretion refer to particular state courts or arbitration do not contravene the law and should be deemed concluded*" (emphasis added. – Auth.).[1] Previously, in its Ruling No. 11861/10, dated January 13, 2011 in the case

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[1] The parties to the contract agreed on a symmetric optional clause that granted the party acting as claimant the right to choose between a particular Russian state court or a particular arbitration court: "*In the event of any disputes hereunder the*

of OJSC Efirnoe vs. Delta Wilmar CIS Ltd, the HAC Presidium confirmed the validity and enforceability of another type of a symmetric optional clause, whereby the jurisdiction of one or other court of international commercial arbitration depends on which party is the claimant and which the respondent in any particular dispute.[2]

The permissibility of various types of symmetric clauses has also been recognized by the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation ("ICAC").[3] In particular, in the ICAC award of August 31, 2011 in Case No. 252/2010, the arbitral tribunal concluded that "*it is customary practice for ICAC to recognize the legality of alternative jurisdictional agreements, including alternative arbitration agreements*".

Generally, up until the Sony Ericsson Ruling, the Russian court and arbitration practice had been developing favorably in respect of asymmetric alternative agreements. In particular, in a series of cases considered by the Moscow District Federal *Arbitrazh* Court, it was deemed permissible for foreign lenders to file claims with Russian state courts based on the right of choice granted under the terms of a contract to only one party (the lender).[4]

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parties shall take all possible measures to resolve them by negotiation. If a resolution cannot be reached the dispute shall be referred at the discretion of the claimant to: the Siberian Arbitration Court (Novosibirsk) or the Arbitrazh Court of Novosibirsk Region. The award of the Siberian Arbitration Court in the matter shall be final". [i.e., state commercial court – Auth.]

2 The parties to the contract agreed on the following optional clause: "*Should the parties be unable to reach agreement, the dispute shall be referred to the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine for consideration in accordance with its Rules by three arbitrators if the claimant is the seller; and to the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation for consideration in accordance with its Rules by three arbitrators if the claimant is the buyer*". The initial claim of the Ukrainian seller was considered by the ICAC at the Ukrainian Chamber of Commerce and Industry. The subsequent claim of the Russian buyer (on a different matter and grounds) was considered by the ICAC at the Russian Chamber of Commerce and Industry. The HAC Presidium found no grounds to set aside the award of the ICAC at the Russian Chamber of Commerce and Industry.

3 *See*, in particular, ICAC awards, dated November 18, 2008, in Case No. 112/2007, November 12, 2004, in Case No. 174/2003, February 28, 2002, in Case No. 2/2001, June 13, 2000, in Case No. 280/1999, January 31, 2000, in Case No. 305/1998, October 29, 1996, in Case No. 441/1996.

4 Ruling of the Moscow District Federal *Arbitrazh* Court, dated December 21, 2009, in Case No. КГ-Ф40.11967-09; December 22, 2009, in Case No. КГ-А40/11983-09; December 23, 2009, in Case No. КГ-А40/13340-09; December 25, 2009, in Case No. КГ-А40/13327-09; December 28, 2009, in Case No. КГ-А40/13190-09; January 12, 2010, in Case No. КГ-А40/14014-09. The contracts provided for dispute resolution under the Rules of the London Court of International Arbitration (LCIA), but concurrently also granted the party providing financing (lender or agent) the right to refer the dispute for consideration to English courts or the competent courts of any other jurisdiction. In the cases cited above, the claims were filed by the creditors with Russian *arbitrazh* (commercial) courts based on the general rules of international jurisdiction (in the country of domicile of the Russian defendants). The Russian courts denied the defendant's motion to dismiss the claims without a consideration because of an arbitration agreement setting forth that the claims were to be heard by the LCIA and noted that "*…the terms of the contract include an optional clause that acts both as an arbitration clause and a prorogatory agreement, by virtue of which the claimant as the party providing financing and given the heightened risks of a lender is granted the right of choice to determine the jurisdiction for resolving a specific dispute, in accordance with which upon a dispute arising out of the contract, not only may the claimant refer such dispute to the LCIA or a competent English court, but it may also initiate legal proceedings in any other competent jurisdiction, of which the Moscow*

Neither did the Russian courts in a number of cases previously consider the inclusion of an asymmetric clause as a ground for denying the recognition and enforcement of foreign arbitral awards or court judgments.[5] Until recently, a similar favorable approach was also taken by the ICAC.[6]

That pre-existing practice had been revised by the Sony Ericsson Ruling.

BACKGROUND TO THE DISPUTE LEADING UP TO THE SONY ERICSSON RULING

The seller (Sony Ericsson Mobile Communications Rus LLC) entered into a general distribution agreement with the buyer (CJSC Russian Telephone Company) for the supply of mobile telephones and accessories. This agreement contained the following asymmetric dispute resolution clause: *"Any dispute arising in connection with this Agreement that cannot be resolved by negotiation shall be finally resolved in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three (3) arbitrators appointed in accordance with these Rules. The seat of arbitration shall be London, and the proceedings shall be held in English. This arbitration clause shall remain in full force and effect and shall survive the termination of this Agreement and shall not restrict the rights of the Parties to recourse to courts of competent jurisdiction for interim or injunctive relief in the event of breach or the threat of breach of the provisions of the sections on `Sony Ericsson Trademarks', `Software Licenses', `Export Controls', `Measures to Fight Counterfeit Goods' or `Confidentiality'. In addition, the arbitration clause shall not limit the right of Sony Ericsson to take action in any court having jurisdiction to recover debt owed for Product supplied"* (emphasis added. – Auth.).

Arbitrazh Court is one in accordance with Art. 35 of the Arbitrazh Procedure Code of the Russian Federation, since the domicile of the defendant is Moscow".

5 *See* Ruling of the Federal *Arbitrazh* Court of the North-West District, dated September 23, 2004, in Case No. A21-2499/03-C1; May 03, 2006, in Case No. A21-5758/2005, and Rulings of the Moscow District Federal *Arbitrazh* Court, dated March 02, 2006 and February 22, 2006 No. КГ-А40/698-06-П.

6 In making its award, dated November 14, 2001, in Case No. 41/2001, the ICAC arbitral tribunal drew attention to the following clause on the procedure for dispute resolution: "*Any disputes or disagreements that may arise out of or in connection with this Contract shall be referred to the Brussels Commercial Tribunal, Belgium, or to Arbitration at the Chamber of Commerce and Industry of the Russian Federation, or to Arbitration at the Chamber of Commerce and Industry of the Republic of Kazakhstan, at the option of the seller*". The arbitral tribunal ruled that ICAC had jurisdiction to hear the dispute submitted for arbitration by the seller and, in particular, came to the following conclusions: "*ICAC notes that an arbitration agreement does not necessarily have the absolute and exclusive effect of excluding a jurisdiction: the principle of free will grants the parties the right to agree on any dispute resolution procedure that suits them, including alternative methods… In the case of the optional clause under consideration the Claimant's filing of a claim with a state court transforms the arbitration agreement into an agreement that cannot be performed. However, if the Claimant were to refer the case to arbitration, the arbitration agreement providing for such alternative remains in existence*".

The buyer filed a claim against the seller with the Moscow *Arbitrazh* Court[7] for replacement of inferior quality mobile telephones with similar mobile telephones of the proper quality. The seller (defendant) filed a motion to dismiss the claim without a consideration on the ground that the parties had to be referred to arbitration, to be conducted under the Rules of Arbitration of the International Chamber of Commerce. The Russian courts of the first three instances (the Moscow *Arbitrazh* Court, the Ninth *Arbitrazh* Appeals Court and the Federal *Arbitrazh* Court of the Moscow District) granted the motion and dismissed the claim without a consideration, citing the fact that the buyer was only entitled to rely on international commercial arbitration and noting for the record the validity and enforceability of the dispute resolution clause.

However, in the Sony Ericsson Ruling, the HAC Presidium set aside all of the court judgments and remanded the case for a new hearing on the merits in the court of first instance (the Moscow *Arbitrazh* Court). In the ruling, the HAC Presidium found, among other things, that the asymmetric dispute resolution clause in question was invalid.

ARGUMENTS USED BY THE HAC PRESIDIUM IN FINDING THE ASYMMETRIC DISPUTE RESOLUTION CLAUSE INVALID

The HAC Presidium placed an emphasis on two arguments which, in the opinion of the highest commercial court, rule out the use of asymmetric clauses in practice.

Firstly, the highest judicial instance noted that one of the fundamental principles of civil law was the principle of equal treatment ("equality") of the parties to civil law relations.[8]

Secondly, the HAC Presidium said that the asymmetric clause had violated the fundamental procedural principle of granting the parties equal opportunities in dispute resolutions to defend their rights and lawful interests. As proof of the existence and applicability of this fundamental procedural principle, the HAC Presidium referred to a

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7 It is important to note that both the seller and the buyer were domiciled in Moscow. Therefore, in accordance with the general rules of jurisdiction of disputes set forth in the *Arbitrazh* Procedure Code of the Russian Federation, this was the state court with jurisdiction over any claims of either the seller or the buyer in the absence of a valid agreement between the parties on the procedure for the resolution of disputes.

8 In accordance with Art. 1.1 of the Civil Code of the Russian Federation "*civil law is founded on a recognition of the equality of participants in the relations which it regulates, the inviolability of property, freedom of contract, the impermissibility of arbitrary interference by anyone whomsoever in private matters, the necessity for unimpeded exercise of civil law rights, and the provision for restoration of violated rights and their protection in courts of law* (emphasis added. – Auth.).

significant number of Russian Constitutional Court and European Court of Human Rights ("ECHR") decisions.[9]

It is worth pointing out that neither the Sony Ericsson Ruling nor Higher *Arbitrazh* Court Ruling No. BAC-1831/12, dated March 28, 2012, which referred this matter to the HAC Presidium, cited the legal argument that has been used in a number of foreign countries to limit the application of certain types of asymmetric dispute resolution clauses. This is the possibility of qualifying an asymmetric agreement as a so-called potestative conditional transaction, the fulfillment of which is entirely in the control of one of the parties to the contract,[10] or as a contract of adhesion containing conditions clearly unconscious and unfair for the adhered party.[11]

In the end the HAC Presidium came to the following conclusions based on the above two arguments: "*While explaining their decision by the fact that there was a valid and enforceable arbitration agreement in place between the parties, the courts did not examine the validity of this agreement as the sum of its provisions, and did not evaluate the inclusion in the dispute resolution agreement of a provision entitling only one party to the contract – Sony Ericsson (the seller) – to refer disputes to state courts. Together with the provisions of the dispute resolution agreement related to the arbitration clause, such prorogatory agreement gives Sony Ericsson an advantage over RTC, since it is the only one granted the right to choose the method of dispute resolution (private arbitration or the state judicial system) and therefore, violates the balance of interests between the parties.*

… Thus, based on general principles of protection of civil rights, a dispute resolution agreement cannot grant but one party to a contract (the seller) the right of recourse to a competent state court and deny such right to the other party (the buyer). If such agreement is concluded it will be deemed invalid as violating the balance of power between the parties. Consequently, the party whose rights are violated by such dispute resolution agreement may also have recourse to a competent state court, realizing its guaranteed right to judicial remedy on equal terms with its counterparty" (emphasis added. – Auth.).

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9 In ECHR practice, this principle is known as the principle of "equality of arms". It must be noted that, in the ECHR cases cited by the HAC Presidium, violations of this principle were associated not with the existence of asymmetric dispute resolution clauses, but with impairment of the procedural rights of one of the parties in the course of legal proceedings that were already underway (inability of a person to attend an oral hearing due to being imprisoned; denial of free legal aid to defendants that had been made available in the country in question under other categories of cases; initiation of civil proceedings by the prosecutor general against an individual in the interests of a legal entity).

10 This argument was used, *inter alia*, by the Court of Cassation of France in its decision of September 26, 2012 in Case No. 983.

11 This argument was used, *inter alia*, by the Supreme Court of Germany in its decision of September 24, 1998 in III ZR 133/97.

IMPLICATIONS OF THE SONY ERICSSON RULING

Upon a detailed analysis, it becomes clear that the conclusions made by the HAC Presidium in the case leave room for different interpretations as to what exactly is the highest commercial court's position and suggested approach to asymmetric dispute resolution agreements. This is because the HAC Presidium put forward certain arguments towards the invalidity of an asymmetric agreement in the given case, but had not provided explicitly for a universal approach to asymmetric dispute resolution agreements under Russian law. More precisely, the HAC Presidium has not provided whether the suggested Russian law position on asymmetric agreements involves any of:

- Transformation of the asymmetric dispute resolution agreement into a symmetric agreement;
- Invalidation of the dispute resolution agreement to the extent of its asymmetric portion, whereas the symmetric part remains in force; or
- Full invalidation of the dispute resolution agreement to both its asymmetric and its symmetric extent.

We will now review each of those potential implications in sequence, to see what support they find in the actual language of the Sony Ericsson Ruling.

Transformation of the Asymmetric Agreement into a Symmetric Agreement

This approach assumes that the arbitration and prorogation clause remain valid, but with both parties given symmetric rights to choose among a number of available dispute resolution procedures. From the practical viewpoint, this option has the benefit of remedying the alleged defect in a jurisdictional agreement while retaining to the maximum extent possible the understandings regarding dispute resolution procedure reached by the parties.

However, the following could raise doubts that the HAC Presidium had this particular legal implication in mind. The Sony Ericsson Ruling makes an explicit mention several times of the invalidity of the dispute resolution agreement. Under Russian law, the invalidity of a transaction or certain of its provisions implies that the legal results that the parties wished to attain cannot be achieved. An invalid transaction may only lead to such legal results as are expressly set forth in the law (e.g., the duty for the parties to return to each other everything received under the transaction).[12]

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12 *See Art.* 167 of the Civil Code of the Russian Federation.

It would appear that the transformation of an asymmetric agreement into a symmetric agreement was not what the HAC Presidium had meant by invalidation of all or part of the asymmetric agreement. Such transformation would in effect imply nothing less than amendment of a contract by the court. Russian civil law envisages such amendment of a contract in the case of contracts of adhesion.[13] However, as previously mentioned, the HAC Presidium did not base the Sony Ericsson Ruling on an argument referencing contracts of adhesion that would have given the court an opportunity to amend the terms of the contract. On the contrary, the HAC Presidium's line of argument is based on breach of the fundamental principles of civil and procedural law and envisages no other legal implications than invalidation ("annihilation") of all or part of the asymmetric clause.

Furthermore, in the case in question it would have been extremely difficult to transform the asymmetric agreement into a symmetric agreement, because the wording agreed by the parties granted the seller the right to refer to a "*court of competent jurisdiction*" not just any dispute, but only "*claims to recover debt owed for Product supplied*". Any attempt to transform this asymmetric clause into a symmetric one would have given rise to the complicated question of what claims the buyer could refer to a "*court of competent jurisdiction*" if the buyer could never have "*claims to recover debt owed for Product supplied*" against the seller.

Invalidation of the Dispute Resolution Agreement to the Extent of Its Asymmetric Portion

In the case in question, only the part of the dispute resolution agreement that referred to disputes being heard in state courts was asymmetric in nature. Both parties, on the other hand, were entitled to refer a dispute to international commercial arbitration.

Russian civil law makes widespread use of the remedy of invalidation of part of a transaction.[14] However, it would appear that in the case being heard, this legal implication was not applied.

Invalidation of the asymmetric part of the agreement would have voided the prorogation clause while maintaining the full force and effect of the symmetric arbitration clause providing for the referral of all disputes to international commercial arbitration in accordance with the Arbitration Rules of the International Chamber of Commerce. In this scenario, having stated that only the arbitration clause remained in full force and effect, the

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13 Arts. 428.1 and 428.2 of the Civil Code of the Russian Federation.

14 In accordance with Art. 180 of the Civil Code of the Russian Federation "*invalidity of part of a transaction shall not entail invalidity of its other parts if it may be assumed that the transaction would have been concluded even without the inclusion of its invalid portion*".

Russian courts would have been obliged to dismiss the claim without a consideration and refer the parties to international commercial arbitration in accordance with Art. II of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") and Art. 148.1(5) of the *Arbitrazh* Procedure Code of the Russian Federation. On that interpretation, all judicial acts adopted in this case necessarily have to be upheld.

However, the HAC Presidium vacated all of the judicial acts that had dismissed the claim without a consideration, and remanded the case for a new hearing on the merits in the court of first instance. Such procedural actions are clearly not consistent with maintaining in full force and effect the arbitration agreement.

Full Invalidation of the Dispute Resolution Agreement to Both Its Asymmetric and Its Symmetric Extent

Despite this legal implication being the least desirable from the practical standpoint, it would appear to be conceptually consistent with the HAC Presidium's line of argument and the procedural actions taken by the highest judicial instance, although there still remains uncertainty whether the top commercial court actually implied this approach. If one accepts that the agreement on dispute resolution between the parties was invalidated in full, then it would appear logical for the HAC Presidium to have remanded the case for a new hearing on the merits in the Moscow *Arbitrazh* Court, which is the competent court under the general rule of jurisdiction at the place where the defendant is domiciled.[15]

From the legal standpoint this legal position, if this is what the HAC Presidium actually envisaged and if the country's court practice follows this most conservative route, gives rise to quite important consequences:

- the Russian courts will not dismiss a claim without a consideration in cases where a party files a claim with a Russian court in circumvention of an asymmetric dispute resolution agreement (this is what happened in the Sony Ericsson case);
- there will be grounds to set aside arbitral awards made in the Russian Federation[16] and deny motions to enforce an award of an international commercial arbitration court

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15 As previously indicated, the defendant's (Sony Ericsson Mobile Communications Rus LLC) domicile was Moscow, Russia.

16 Art. 34.2(1) of the Law of the Russian Federation on International Commercial Arbitration.

with its seat in the Russian Federation where the arbitration tribunal's authority stemmed from an asymmetric dispute resolution agreement;[17]

- there will be grounds to deny motions for the recognition and enforcement of foreign arbitral awards where the arbitration tribunal's authority stemmed from an asymmetric dispute resolution agreement.[18]

It is also important to note that the Sony Ericsson Ruling contains a proviso[19] giving the right to any party in whose case the relevant legal arguments were applied to file for a new trial based on new circumstances in accordance with Art. 311.3(5) of the *Arbitrazh* Procedure Code of the Russian Federation.

DOES THE GOVERNING LAW OF THE DISPUTE RESOLUTION AGREEMENT HAVE ANY IMPACT ON THE LEGAL ARGUMENTS EXPRESSED IN THE SONY ERICSSON RULING?

It must be noted that the HAC Presidium based the Sony Ericsson Ruling on the applicability of Russian law by implication, without giving any grounds for such conclusion. We can only assume that such approach was taken by the HAC Presidium not only because the question was one of the validity of a prorogatory agreement in relation to the jurisdiction of Russian courts, but also because it involved the terms of a contract between two Russian legal entities.[20]

It is obvious that the issue of the validity of the arbitration and prorogatory agreement needs to be considered on the basis of the law applicable to such agreement. The matter of the governing law is of vital importance because in many countries asymmetric clauses are deemed valid and enforceable.[21]

In accordance with Art. V.1(a) of the New York Convention, the validity of an arbitration agreement at the point of recognition and enforcement of an arbitral award is determined "*under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made*". In accordance with the prevailing

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17 Art. 36.1(1) of the Law of the Russian Federation on International Commercial Arbitration.

18 Art. V.1(a) of the New York Convention, Art. 36.1(1) of the Law of the Russian Federation on International Commercial Arbitration.

19 "*Judicial acts of arbitrazh courts in cases where the facts of the case are similar to this one that are handed down on the basis of legal norms interpreted in a different way to the interpretation included in this ruling and that have already taken effect may be reviewed in accordance with Article 311.3(5) of the Arbitrazh Procedure Code of the Russian Federation, if there are no other impediments*".

20 However, none of the judicial instances gave this circumstance any specific, clearly expressed legal significance.

21 Such approach is taken, *inter alia*, in English law – *see*, e.g., the decision of the English courts in NB Three Shipping Ltd. v. Harebell Shipping Ltd. (2004) All ER (D) 152 (Oct) and Debenture Trust Corp plc v. Elektrim Finance BV and others (2005) 1 All ER (Comm.) 476.

interpretation, the courts should also apply such choice-of-law rule in assessing the validity of an arbitration agreement when determining whether a claim filed by a party to a court in circumvention of an arbitration clause (Art. II.3 of the New York Convention) may be considered on its merits.[22] This means that if the parties do not choose the governing law of their arbitration agreement themselves, but specify a foreign country as the seat of arbitration, the validity of the arbitration agreement must, in general, be determined under the law of the country where the arbitration takes place, rather than Russian law.

However, it is important to note that the legal position taken by the HAC Presidium based on violation of the fundamental principles of Russian civil and procedural law creates a serious risk that even if Russian courts apply foreign law to an arbitration (or prorogatory) agreement by virtue of the above conflict-of-law rules, they will believe the issue is one of violation of Russian public policy or Russian overriding mandatory provisions. Thus, making an arbitration or prorogatory agreement subject to foreign law in itself will not remove the legal risk that Russian courts could find the relevant asymmetric clause invalid and unenforceable.

PRACTICAL RECOMMENDATIONS

Because there is a degree of uncertainty in the Sony Ericsson Ruling and given the lack of further reliable guidance from Russia's top judiciary, it would appear premature to consider the Sony Ericsson jurisprudence as reflecting a defined and fully-formed approach by the Russian judicial system to the question of asymmetric dispute resolution agreements. Still, the parties to commercial contracts that include asymmetric dispute resolution clauses need to be aware of the risk that, on the most conservative interpretation, such clauses might be considered invalid. It is no coincidence, therefore, that lenders in trans-border financing deals have already opted in many cases for the most conservative approach, such as removing the asymmetric elements of dispute resolution clauses.

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[22] In accordance with Art. VI.2 of the European Convention on International Commercial Arbitration of 1961 "*In taking a decision concerning the existence or the validity of an arbitration agreement, courts of Contracting States shall consider the validity of such agreement with reference to the capacity of the parties, under the law applicable to them, and with reference to other questions:*

a) under the law to which the parties have subjected their arbitration agreement;

b) failing any indication thereon, under the law of the country in which the award is to be made;

c) failing any indication as to the law to which the parties have subjected the agreement, and where at the time when the question is raised in court the country in which the award is to be made cannot be determined, under the competent law by virtue of the rules of conflict of the court seized of the dispute".

Given the remaining uncertainty, it would also appear problematic to suggest universal recommendations to all parties. However, it is possible even at this point to suggest the following recommendations:

- If negotiating a contract containing an asymmetric dispute resolution agreement, the parties are to bear in mind the potential legal risk that such agreement will be found invalid and unenforceable in full by Russian state courts, though such risk cannot be fully estimated at this point and it may not be ruled out that Russian courts will follow another route. The most conservative approach to mitigating such risk is making the dispute resolution agreement symmetric.
- The parties that have entered into a contract containing an asymmetric dispute resolution agreement may consider amending the contract and reformulating the dispute resolution agreement. On the most conservative approach, the amendments shall involve turning the asymmetric dispute resolution clause into a symmetric one.
- The parties that are already in arbitration or court proceedings under an asymmetric dispute resolution agreement and have a mutual interest in the potential enforcement in Russia of the arbitral award or court judgment can mitigate their risks by making a supplementary agreement with the other party to have the dispute resolved in the relevant arbitration court or state court.[23]
- Finally, the parties that were involved in Russian court cases where an asymmetric dispute resolution clause was interpreted by the court in a way inconsistent with the interpretation in the Sony Ericsson Ruling, it is worth considering the possibility of a review of the judicial acts handed down on the basis of new circumstances in accordance with Art. 311.3(5) of the *Arbitrazh* Procedure Code of the Russian Federation.

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We would be happy to discuss any questions you may have in relation to the above.

November 28, 2012

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[23] Such supplementary agreement may, *inter alia*, depending on the governing law, be made by way of the parties signing terms of reference, or by exchanging a statement of claim and statement of defense in which one party asserts the existence of an agreement, and the other party does not object.