CLIENT UPDATE

PRESIDIUM OF THE HIGHER *ARBITRAZH* COURT SUMMARIZES LITIGATION PRACTICE INVOLVING FOREIGN PERSONS

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TO OUR CLIENTS AND FRIENDS:

On July 26, 2013 the Higher *Arbitrazh* Court of the Russian Federation (the "HAC") posted Information Letter No. 158 dated July 9, 2013 on its website, adopting and recommending that lower courts apply the Digest of Case Law on Certain Matters Related to the Consideration by *Arbitrazh* Courts of Proceedings Involving Foreign Persons (the "Digest").

The Digest covers a wide range of topics arising in court cases involving foreign parties, including whether or not Russian state courts ("*arbitrazh* courts") have jurisdiction to hear cases involving foreign parties, and whether or not foreign law may be applied.

We note the following important legal positions expressed in the Digest:

Jurisdiction

- The Digest has formulated a number of legal positions in respect of prorogation clauses (*i.e.*, agreements by the parties on the choice of national court competent to decide on existing or potential future disputes between the parties). The HAC considers a prorogation clause to be autonomous by nature (like an arbitration clause). Because of the autonomous nature of a prorogation clause, if the principal agreement (such as a loan agreement that includes the prorogation clause) is deemed invalid, this does not automatically render the prorogation clause invalid. The HAC also confirms that a prorogation clause remains valid if an agreement is novated, i.e., the new obligor and obligee continue to be bound by the prorogation agreement between the original obligor and obligee.
- The HAC upholds prorogation clauses that do not refer to a specific national court (*e.g.*, an agreement that any future disputes will be heard by a Russian court), as well as prorogation clauses which provide that any disputes must be heard in a court of the party that will be acting as the claimant (or defendant).
- The HAC recognizes prorogation agreements where disputes are to be heard by a foreign court. Pursuant to the HAC's legal position, in the event of such a prorogation clause the *arbitrazh* courts must dismiss any claims without prejudice ("without a hearing"), provided that the opposing party files a timely objection to the court's jurisdiction. At the same time, prorogation clauses where disputes (including disputes not involving Russian persons) are to be heard by Russian courts are also deemed valid.
- The Digest also treats a number of other important issues on the ascertainment of the competence of Russian national courts. Thus, HAC's legal position is that the filing of a statement of claim and a corresponding statement of defense in which neither party challenges the competence of the *arbitrazh* court rules out any further challenge to the court's jurisdiction.
- The HAC also states that the *arbitrazh* court's jurisdiction to hear a case may be ascertained, *inter alia*, based on a strong connection of the legal relationship in question with the Russian Federation (similar to the Anglo-Saxon doctrine of *forum conveniens*), which may include such factors as the place of performance of the obligation, location of the majority of the body of evidence, and the applicable substantive law.
- In addition, the HAC states that if the defendant has set up a corporate management body, branch or representative office in the Russian Federation, this only serves as a ground to establish the competence of the *arbitrazh* courts (as provided for in

Article 247.1(2) of the *Arbitrazh* Procedure Code of the Russian Federation) if the dispute is related to the activities of the relevant corporate management body, branch or representative office. To establish competence on this ground it is sufficient to prove that the defendant engages in commercial operations through a permanent establishment in the Russian Federation, regardless of whether the formal requirements of registration of the relevant branch or representative office at the place where these operations are carried out have been complied with.

Ascertaining and Applying Foreign Law

- The Digest touches upon a whole range of important issues related to choice of law applying to a dispute. Firstly, the HAC directs the courts to note that the parties' choice of a particular court as the venue to hear disputes does not mean that the parties have also agreed to automatically apply the national law of the court to the dispute. The HAC also points out some permissible methods of choice of law (including choice of law of the country of the future claimant (or defendant), or choice of law by an exchange of trial documents).
- The HAC draws the attention of the courts to the fact that should the *arbitrazh* courts apply foreign substantive law, in accordance with Art. 1192 of the Civil Code of the Russian Federation certain mandatory norms of Russian law (the so-called "supermandatory norms") could prevail over foreign law. However, not all mandatory norms in Russian law may be deemed supermandatory norms.
- The HAC states that foreign law may be ascertained for pleading in *arbitrazh* courts using the opinions of international law firms presented by the parties themselves (so-called legal opinions or affidavits), which opinions are not subject to the "expert review" provisions of the *Arbitrazh* Procedure Code of the Russian Federation. If one party presents a legal opinion on the content of the norms of foreign law that is not contested by the other party, the *arbitrazh* court may deem the foreign law as having been ascertained.

Status of Foreign Persons

- The HAC states that in establishing the legal status, competence and capacity of a foreign person involved in proceedings (such as the right to engage in commercial activities, or the right to act as a party to legal proceedings), *arbitrazh* courts apply the rules of its *lex personalis*, i.e., the legal norms of the country of incorporation of the legal entity. Official documents confirming the status of a foreign legal entity (such as a certificate from the register of legal entities) must be issued by the competent authority

of the foreign country, contain up-to-date relevant information as at the time of the proceedings, be duly legalized or apostilled and be accompanied by a properly certified translation into Russian. Documents establishing the tax status of a company are not sufficient to establish its legal status and legal capacity.

Injunctive Relief

- The HAC's position is that *arbitrazh* courts may, on the parties' petitions, grant injunctive relief in support of proceedings in a foreign international commercial arbitral tribunal or a foreign court, provided that the *arbitrazh* court has so-called "effective jurisdiction" (for instance, where the court's injunctive relief is granted at the location of the petitioner or of the property in dispute);
- Injunctive relief issued by a foreign court in the form of an anti-suit injunction in respect of Russian courts does not prevent a case from being heard by an *arbitrazh* court.

Below we provide more detail on some of the more important provisions of the Digest.

COMPETENCE OF *ARBITRAZH* COURTS TO HEAR PROCEEDINGS INVOLVING FOREIGN PERSONS

The Digest contains a number of important clarifications related to prorogation clauses.

Paragraph 1 of the Digest explains that a prorogation clause nominating *arbitrazh* courts as the dispute resolution body may be concluded even if both parties are foreign persons.

Paragraph 2 deems prorogation clauses in which the parties do not specify a particular competent court, but instead provide that any disputes must be heard in a court of the party that will be acting as the claimant (or defendant), valid and enforceable. At the same time, such permissible symmetrical agreements on the procedure for dispute resolution (which assume that both parties have equal opportunity to choose a competent court or arbitration tribunal) must be distinguished from so-called "asymmetric" or unequal agreements (which give one party more scope in the choice of the competent court or arbitration tribunal). The latter type of agreement on the procedure for dispute resolution was deemed impermissible by the HAC Presidium in the Sony Ericsson case.[1] Although the original version of the Digest contained additional clarifications on asymmetric agreements that were meant to throw light on issues related to certain findings in the Sony

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[1] Ruling of the HAC Presidium of June 19, 2012 in Case No. 1831/12. *See* also our Client Update ARE ASYMMETRICAL DISPUTE RESOLUTION CLAUSES VALID UNDER RUSSIAN LAW AFTER THE SONY ERICSSON JURISPRUDENCE?

Ericsson case that were not quite clear,[2] the final version of the Digest does not contain these clarifications.

Paragraph 3 of the Digest contains an important clarification, whereby it is not required that a prorogation clause refer to a specific national court authorized by the parties to hear disputes (e.g., the Moscow *Arbitrazh* Court): if the parties simply specified that disputes are to be heard in Russian courts, then, to determine the specific competent *arbitrazh* court, the prorogation clause can be supplemented by the norms on competence and jurisdiction set forth in the *Arbitrazh* Procedure Code of the Russian Federation, using, say, the rules on filing a lawsuit in an *artbitrazh* court in the district where the defendant, its branch or representative office is located, or the district where the obligation was to be performed. However, if the parties to a prorogation agreement choose *arbitrazh* courts to hear their disputes, they may not alter the rules laid down by the *Arbitrazh* Procedure Code of the Russian Federation on competence and exclusive jurisdiction if they are mandatory in nature and not subject to amendment by agreement between the parties. E.g., the parties may not provide in their agreement that a lawsuit is to be filed not with an *arbitrazh* court of first instance, but to go straight to the cassation court of the HAC (paragraph 4 of the Digest).

In accordance with long-established Russian court practice,[3] if an agreement is novated (assigned) the new obligee and obligor continue to be bound by an arbitration clause providing for the resolution of any disputes in a particular arbitral institution. Now paragraph 5 of the Digest also gives similar clear guidance in respect of the survival of a prorogation clause in the event of novation.

The similarities in the legal nature of prorogation and arbitration clauses also leads to conclusions on a number of other matters. In particular, previously there was uncertainty about how an *arbitrazh* court should act if it is hearing a dispute arising from a contract that has a prorogation clause designating a foreign national court and at the same time precluding any disputes from being heard by courts of other national jurisdictions.[4] The *Arbitrazh* Procedure Code of the Russian Federation does not expressly deal with this issue, while paragraph 7 of Ruling No. 8 of the HAC Plenary of June 11, 1999 on the Application of International Treaties of the Russian Federation in Matters of *Arbitrazh*

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2 *See* original draft of the Digest on the official HAC website - http://arbitr.ru/_upimg/A01992BA9752F783347696B18559B8F0_Jun.pdf

3 *See, e.g.,* paragraph 15 of the Digest of Case Law on Certain Matters Related to the Consideration by *Arbitrazh* Courts of Proceedings Involving Foreign Persons (endorsed by Information Letter No. 29 of the HAC Presidium dated February 16, 1998).

4 So-called exclusive prorogation clauses.

Proceedings contained an extremely vague instruction that "*in the event of a prorogation clause referring a dispute to the competent court of a foreign jurisdiction, the Russian arbitrazh court will terminate proceedings in the case on the motion of the defendant between the same parties, on the same subject and on the same grounds that it has accepted for hearing under general jurisdictional rules*". Experts have noted that the option of terminating proceedings in the case is not optimal, since it prevents with prejudice the filing of the same claim again with the *arbitrazh* court in future, even if the foreign court nominated in the prorogation clause does not accept the claim for consideration for whatever reason and finds itself to be out of jurisdiction to hear the case.

Paragraph 6 of the Digest explains that proceedings may be terminated only if this is expressly provided for by an international treaty. As a general rule, however, *arbitrazh* courts must by analogy to the law apply the rule in Art. 148.1(5) of the *Arbitrazh* Procedure Code of the Russian Federation, which is devoted to arbitration clauses, and dismiss the case without prejudice, but only provided that the defendant files an objection against the case being heard in the *arbitrazh* court before his first pleading on the merits of the case. Application of the rule in Art. 148.1(5) of the *Arbitrazh* Procedure Code of the Russian Federation by analogy to the law is noteworthy, given that the *Arbitrazh* Procedure Code of the Russian Federation (as opposed to the Civil Procedure Code of the Russian Federation) does not actually expressly provide for the application by analogy of the rules of procedural law, rather than substantive law.

This same paragraph 6 of the Digest also sets forth that a prorogation clause (like an arbitration clause) is autonomous in nature, and thus the invalidity of the principal agreement (such as a loan agreement of which the prorogation clause is a part) does not automatically render the prorogation clause invalid.

Paragraph 7 of the Digest points out that even if the *Arbitrazh* Procedure Code of the Russian Federation does not provide for grounds to apply to an *arbitrazh* court in a specific case, such court may nevertheless hear the dispute if the defendant does not file a timely objection to the case being heard in the *arbitrazh* court. In other words, the filing of a statement of claim and a corresponding statement of defense in which neither party challenges the competence of the *arbitrazh* court creates its own ground for the case to be heard in the *arbitrazh* court, and strips the defendant of the right henceforth to object to the case being heard in the *arbitrazh* court.

Paragraphs 8 and 9 of the Digest are devoted to the frequently applied provision of Article 247.1(2) of the *Arbitrazh* Procedure Code of the Russian Federation, which allows the filing of a claim in the *arbitrazh* court if a foreign entity has a branch, representative

office or corporate body based in Russia. On the one hand, the HAC is expanding the purview of this rule, since it emphasizes in paragraph 9 of the Digest that a branch or representative office can be any permanent place of operation through which the foreign entity conducts its business, in whole or in part, in Russia, regardless of whether the requirements of Russian law on accreditation or registration of the relevant operating unit have been complied with. On the other hand, paragraph 8 of the Digest indicates that this rule may apply only if the claim against the foreign entity relates to the operations of the corporate body, branch or representative office of the foreign entity in question. However, if the dispute is not related to the operating unit situated in Russia, this will not serve as a ground to establish the competence of the *arbitrazh* court.

In Paragraph 10 of the Digest the HAC draws attention to an important but hitherto little-used provision of Article 247.1(10) of the *Arbitrazh* Procedure Code of the Russian Federation. This rule gives *arbitrazh* courts broad powers to establish their competence in cases involving foreign entities: even if there are no other special grounds in a particular situation, under Article 247.1(10) of the *Arbitrazh* Procedure Code of the Russian Federation the *arbitrazh* court may accept a case for hearing if there is a strong connection between the elements of the dispute and Russia. Paragraphs 8 and 10 of the Digest indicate that in identifying such strong connection the *arbitrazh* court must take into account, *inter alia*, the following factors: place of performance of the obligation, location of the majority of the body of evidence, applicable substantive law. It is noted in relation to this rule that it opens up the possibility of applying the Anglo-American concept of *forum conveniens* (appropriate forum), which is not customary for Russian international civil law procedure, having developed primarily along the lines of the approaches taken by continental Europe.

DETERMINATION BY THE *ARBITRAZH* COURTS OF APPLICABLE SUBSTANTIVE LAW

Paragraph 12 of the Digest focusses on the customary approach of Russian private international law, pursuant to which the parties' entering into a prorogation clause does not in itself result in automatic applicability of the substantive law of the country in whose court disputes are to be heard. In other words, it must be borne in mind that in the case of disputes involving foreign entities the choice of the venue where the dispute will be heard (the competent state court or international commercial arbitration) and the choice of applicable substantive law are two entirely different things, and it is best to agree and set down a clear understanding on both of them when signing an international contract.

Paragraph 13 of the Digest states that a governing law clause shall be deemed to have been agreed, *inter alia*, if the parties to a dispute refer to one and the same governing law in substantiating their stated claims and defense (e.g., in a statement of claim and statement

of defense). It is noted therefore that, as a result of legal counsel's insufficiently considered actions in the course of legal proceedings, the applicable substantive law that was originally agreed by the parties in the contract could undergo a change.

Paragraph 15 of the Digest approves of the choice of law clauses whereby the governing law is defined as the law of the home country of the defendant (or the claimant) in a possible future dispute whoever that party is. The HAC also notes that the risk inherent in such agreements of uncertainty about the governing law until such time as a claim is filed, because there is no way of knowing beforehand which of the parties will be the claimant and which the defendant, is borne by the parties that entered into such an agreement on the governing law. An important point is also made that the governing law is determined upon the filing of the initial statement of claim on the basis of such agreement (the so-called "crystallization" of the governing law), and therefore the subsequent filing of the statement of defense does not change the governing law.

Paragraph 16 of the Digest points out that should the *arbitrazh* courts apply foreign substantive law (e.g., if the parties have agreed to choose foreign law), in accordance with Art. 1192 of the Civil Code of the Russian Federation certain mandatory norms of Russian law (the so-called "supermandatory norms" (*sverkhimperativnye normy*)[5]) could prevail if the mandatory norms themselves state so or their special significance requires that such norms govern the relations, regardless of the governing law that is to be applied. Paragraph 16 of the Digest cites as an example of such Russian supermandatory norms the provisions of Federal Law No. 57-FZ on Foreign Investment in Commercial Entities with Strategic Importance for National Defense and National Security dated April 29, 2008.

In addition, in this same paragraph the HAC draws the following important conclusions on the application of the concept of supermandatory norms:

- not all mandatory norms in Russian law may be deemed supermandatory. For example, despite the fact that under Art. 198 of the Civil Code of the Russian Federation the parties cannot agree to amend the statute of limitations and the way the limitation period is calculated, Russian mandatory norms pertaining to the statute of limitations (e.g., the general limitation period of three years established in Art. 196 of the Civil Code of the Russian Federation) are not supermandatory norms within the meaning of Art. 1192 of the Civil Code of the Russian Federation;

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[5] This doctrinal term is not expressly referred to in the law, but is used frequently throughout the Digest. It must be borne in mind that in the draft amendments to the Civil Code of the Russian Federation it is proposed that in Art. 1192 another term synonymous with the original be used: "direct application norms (*normy neposredstennogo primeneniya*)".

- the application of Russian supermandatory norms to a dispute between parties that invalidate certain provisions of a contract does not make the valid portion of a disputed contract subject to Russian law and does not rule out the application to such disputed portion of the foreign law chosen by the parties.

PROCEDURE FOR ASCERTAINMENT OF FOREIGN LAW IN *ARBITRAZH* COURTS

Paragraph 19 of the Digest is of much importance as it expressly permits the ascertainment of foreign law in *arbitrazh* courts using the opinions of international law firms presented by the parties themselves on the content of the norms of the relevant foreign law (so-called legal opinion or affidavits). Paragraph 19 of the Digest expressly states that the provisions of the *Arbitrazh* Procedure Code of the Russian Federation on expert review do not apply to such opinions. This means that to invite a legal expert and present his opinion in the *arbitrazh* court does not require that such expert first be approved or that the *arbitrazh* court rule on the terms of reference for such testimony.

Paragraph 20 of the Digest points out that if one party presents a legal opinion on the content of the norms of foreign law that is not contested by the other party by providing evidence to the contrary, the *arbitrazh* court need take no further measures for the ascertainment of the foreign law and may hand down its judgment based on the conclusions set forth in the legal opinion. It is only in the event that the parties have presented legal opinions on the content of the norms of foreign law that contradict each other that an *arbitrazh* court need resort to other methods of ascertainment of the foreign law, such as appointing an expert (paragraph 21 of the Digest).

Paragraph 22 of the Digest states that failure to perform, or undue performance, by an *arbitrazh* court of its obligation to ascertain the foreign law serves as a ground for courts of higher instance to amend or set aside the court judgment. This emphasizes that, contrary to the approaches inherent in English private international law, the application of foreign law is seen as a separate legal issue, rather than a matter of ascertaining the facts of a case.

PROCEDURE FOR ASCERTAINMENT OF FOREIGN ENTITIES' LEGAL STATUS IN *ARBITRAZH* COURTS

Paragraph 26 of the Digest clarifies an important practical aspect of the requirements for certification of documents confirming the legal status of a foreign entity (including its capacity to act as claimant or defendant in an *arbitrazh* court). This usually requires the presentation of official foreign documents issued abroad. As a rule these documents require consular legalization, or apostillation (for countries, that are, along with Russia, parties to the Hague Convention, 1961, abolishing the requirement for legalization of

foreign public documents).[6] A practical question arises as to the possibility of legalizing or apostilling documents that are not originals (e.g., a company's certificate of incorporation, which may only exist in the one original copy), but notarized copies. Paragraph 26 of the Digest recommends that *arbitrazh* courts accept such documents where a notarized copy is legalized or apostilled provided that as well as checking that the copy of the document corresponds to the original, the notary has also authenticated the signature and seal of the official issuing one or another public document. It can be expected that these clarifications will be applied not only in *arbitrazh* court practice, but also in other Russian governmental spheres.

At the same time paragraph 24 of the Digest indicates that proof of permanent domicile of a company for tax purposes is not sufficient to establish its *lex personalis* and legal capacity (capacity to sue or be sued in an *arbitrazh* court); proper proof requires the presentation of a certificate of incorporation/state registration of the company, its constitutional documents, extract from the register of legal entities or other similar documents.

Paragraph 27 of the Digest notes that a power of attorney issued on behalf of a legal entity in a foreign country is not a public document, and therefore as a general rule does not require mandatory certification in the form of consular legalization or apostillation. However, if the power of attorney is notarized, in this case it will have to be legalized or apostilled, since the notarial mark is considered a public document and thus requires legalizing or apostilling for use in other countries.

GRANTING OF INJUNCTIVE RELIEF BY *ARBITRAZH* COURTS IN CASES INVOLVING FOREIGN ENTITIES

The question of whether injunctive relief may be sought in Russia in support of legal proceedings in a foreign court or in foreign international commercial arbitration is of vital importance. The problem lies in the fact that in accordance with paragraph 33 of Ruling No. 55 of the HAC Plenum dated October 12, 2006 on injunctive relief issued by *arbitrazh* courts "*foreign court rulings on injunctive relief are not eligible for recognition and enforcement in the Russian Federation because they are not final judicial acts on the merits of a case handed down in an adversarial proceeding"*. In practice, a similar approach is taken towards injunctive relief issued by an international commercial arbitral tribunal (regardless of whether the injunctive relief is issued in the form of a procedural order or interim ruling at arbitration).

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[6] There is no need to legalize or apostille foreign public documents if such formalities are waived in a special treaty to which the Russian Federation is a party (*see*, e.g., Art. 13 of the Minsk Convention 1993 of the CIS Countries on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters).

At the same time, the *Arbitrazh* Procedure Code of the Russian Federation does not expressly provide for *arbitrazh* courts to provide injunctive relief in support of foreign legal proceedings. For this reason it is very important that the HAC has explained that it is permissible for parties in dispute to apply directly to the *arbitrazh* courts with a petition for injunctive relief in support of proceedings being heard by a foreign international commercial arbitral tribunal (paragraph 29 of the Digest) or a foreign court (paragraph 30 of the Digest). An *arbitrazh* court may issue injunctive relief if it has so-called "effective jurisdiction", namely: if it is local to the location of the petitioner, or the location of the monetary funds or other property in respect of which the petitioner is applying for injunctive relief, or the place where the petitioner's rights were violated.

Finally, paragraph 32 of the Digest explains that injunctive relief issued by a foreign court in the form of an anti-suit injunction in respect of Russian courts does not prevent a case from being heard by an *arbitrazh* court, since such injunction is issued not in respect of the *arbitrazh* court, but the relevant party to the dispute. Any natural persons or legal entities in respect of whom an anti-suit injunction is issued and who continue with legal proceedings in an *arbitrazh* court regardless should understand and bear in mind the risks of any potential adverse consequences outside the Russian Federation. Such consequences could loom very large and include criminal charges for contempt of the foreign court issuing the anti-suit injunction.

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