England and Wales High Court (Commercial Court) Decisions

Neutral Citation Number: [2014] EWHC 2188 (Comm)

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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The Rolls Building
Fetter Lane
London, EC4A 1NL

3 July 2014

B e f o r e :

: The Hon Mr Justice Simon

Between:

Yukos Capital S.a.r.L — **Claimant**

and

OJSC Oil Company Rosneft — **Defendant**

Mr Gordon Pollock QC, Mr Jonathan Nash QC and Mr James Willan (instructed by Byrne and Partners LLP) for the Claimant
Lord Grabiner QC, Mr Conall Patton and Mr Ciaran Keller (instructed by Travers Smith LLP) for the Defendant
Hearing dates: 13-16 May 2014

HTML VERSION OF JUDGMENT

Mr Justice Simon:

Introduction

1. This hearing was concerned with preliminary questions relating to the entitlement of the Claimant to recover interest on principal sums awarded in four awards made on 19 September 2006 by arbitration tribunals with a Russian seat ('the Awards'). The Claimant seeks to recover interest on the principal sums awarded (Rbs 12,935,858,470 and US$ 857,507). The awards were paid on 16 August 2010; and the Claimant seeks to recover interest in relation to the awards on two alternative bases as set out later in this judgment.

2. The issue arises because on 23 May 2007, the Moscow *Arbitrazh* Court (which was the relevant supervisory court) annulled each of the Awards in judgments which were upheld on appeal, and in which the Claimant participated ('the Set-aside Decisions').

3. Despite the annulment of the Awards, the principal sums came to be paid because the Claimant identified assets of the Defendant within the jurisdiction of the Dutch Courts. Although the Dutch District Court initially refused leave to enforce the Awards, in April 2009 the Amsterdam Appeal Court reversed this decision and gave leave to enforce them. Applying principles of private international and domestic law it refused to recognise the Set-aside Decisions of the Moscow *Arbitrazh* Court.

4. The Awards were not paid and in March 2010 the Claimant commenced actions in the English High Court seeking to enforce them at Common Law and under the New York Convention. It also obtained a without-notice Freezing Order against the Defendant. This was subsequently discharged in exchange for the provision of acceptable security to meet a final judgment of either the English or Dutch Courts. In June 2010, the Dutch Supreme Court dismissed the Defendant's appeal from the decision of the Amsterdam Appeal Court, and the sums awarded were paid on behalf of the Defendant.

5. The Awards did not contain provision for the payment of interest, and no interest was paid in respect of the delay in paying the principal sums which had been awarded. Since the date of payment of the principal sums, the English proceedings have continued on the Claimant's claim for post-award interest. These claims have been advanced under Article 395 of the Russian Civil Code and/or s.35A of the Senior Courts Act 1981.

The procedural history

6. Although the statements of case have been amended many times, the present state of the pleadings is as follows.

(1) The Claimant has pleaded that the Defendant has breached its obligation under the arbitral agreement (including the ICAC rules) to honour the Awards, and is therefore liable in debt and/or damages for the amount of the Awards, together with interest on such debt/damages under Article 395 of the Russian Civil Code and/or s. 35A of the Senior Courts Act 1981.

(2) The Defendant has pleaded (among other points) that, as a consequence of the Russian Set-aside Decisions, (a) the Awards no longer exist in a legal sense (under the principle *ex nihilo nil fit*, or, 'nothing comes of nothing'), and (b) that the Claimant is precluded from asserting that the Awards are valid and binding on the parties. It has also advanced a number of other reasons why post-award interest is not recoverable.

(3) By its Re-Re-Re-Amended Reply, the Claimant contends that the Set-aside Decisions should not be recognised by the English court on the basis that they were (a) tainted by bias, (b) contrary to natural justice, in that the Russian courts deliberately misapplied the law, (c) procured in circumstances violating Article 6 of the European Convention on Human Rights, and (d) formed part of an illegitimate campaign of commercial harassment waged against the Claimant by the Russian Federation for political reasons. The Claimant denies the defences based on the *ex nihilo nil fit* principle and issue estoppel. There are also denials of specific defences regarding interest (§10A).

7. This is not the first trial of preliminary issues in this case. In *Yukos Capital Sarl v. OJSC Rosneft Oil Co (No.2)* [2011] 2 Lloyd's Rep 443, Hamblen J decided that (1) the Defendant was estopped by the decision of the Amsterdam Appeal Court from denying that the Russian *Arbitrazh* Court decisions were the result of a partial and dependent judicial process, and (2) the Claimant was not prohibited from alleging, and the Court was not prevented from adjudicating on, any of the points raised by the Claimant on the basis that they constituted acts of state or were otherwise non-justiciable. The Defendant appealed, and the Court of Appeal (Rix, Longmore and Davis LJJ) upheld Hamblen J's decision on the second point, but allowed the Defendant's appeal on the first point, holding that the Defendant was not subject to an issue estoppel, see *Yukos Capital Sarl v. OJSC Rosneft Oil Co (No.2)* [2014] QB 438.

8. The parties then agreed on the trial of further preliminary issues: (a) whether the *ex nihilo nil fit* principle precluded the enforcement of the Awards in the light of the Set-aside Decisions, and (b) the availability of an award of interest under Russian and/or English law. These have been characterised respectively as 'the Enforcement Preliminary Issue' and 'the Interest Preliminary Issues.' If the Claimant is successful on the Enforcement Preliminary Issue and at least partially successful on the Interest Preliminary Issues, it is common ground that there would need to be a trial determining, among other things, the Claimant's allegations that the Set-aside Decisions should not be recognised, and (to the extent permissible) the Defendant's 'public policy' defence based on an allegation of tax fraud.

The Enforcement Preliminary Issue

9. The issue is whether the Set-aside Decisions have the effect that the Awards cannot be enforced at Common Law because they no longer exist in a legal sense.

10. For the Defendant, Lord Grabiner QC submitted: first, that an action on an award is founded on the implied obligation to comply with the award or to comply with the agreement to submit the dispute to arbitration, see *Bremer Oeltransport v Drewry* [1933] 1 KB 753 (CA: Slesser and Romer LJJ). This obligation has its own *lex causae*. Secondly, English law does not recognise the concept of 'arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law', see *Bank Mellat v Helliniki Techniki SA* [1984] QB 291 (CA: Waller, Kerr and Goff LJJ). It therefore follows that an arbitral award is necessarily made under, and exists pursuant and subject to, the laws of a particular jurisdiction: in the present case, Russia. Thirdly, this approach has been adopted in the Claimant's pleaded case, which contends that the obligation to honour the Awards arises either as an implied term of the arbitration agreements or under the rules of the International Commercial Arbitration Court at the Chamber of Trade and Industry of the Russian Federation: in either case the governing law being Russian law. Fourthly, since the Awards have been set aside by the Russian courts in the Set-aside Decisions, they no longer exist as a matter of Russian law; and consequently there is no obligation under Russian law to comply with them. It therefore follows that there is no longer any extant obligation on which the Claimant can bring an action in the English court. Accordingly, there is no basis for awarding interest, whether under Article 395 of the Russian Civil Code or s. 35A of the Senior Courts Act 1981. This is so, irrespective of the circumstances in which the Set-aside Decisions came to be made.

11. For the Claimant, Mr Pollock QC submitted that English law approaches the question in a different way. At Common Law a foreign award can be enforced provided that it is made in accordance with a valid agreement to arbitrate, and is final and binding according to its governing law, see *Dicey, Morris and Collins*, (2012) 15th Ed. Rule 66 at §§16R-103 and 16-111 to 16-113. It is not, however, necessary for the award to be enforceable under the law governing the arbitration (for example, if the foreign law requires an exequatur of the award and no exequatur has been obtained), see *Dalmia Dairy Industries Ltd v. National Bank of Pakistan* [1978] 2 Lloyd's Rep 223, (Kerr J) at 249-250. The Claimant's claim is advanced on the basis of the agreements to arbitrate and awards made pursuant to that agreement. The Defendant has pleaded in its Defence that the Awards are without legal effect by reason of the Set-aside Decisions. It follows that an initial question arises as to whether the Defendant has established this defence. This in turn depends on whether the English Court will recognise the Set-aside Decisions. If it does, it follows that there are no final and binding awards. Since the parties by their agreement to arbitrate have necessarily submitted to the supervisory jurisdiction of the curial courts, the decisions of such court will normally be determinative. However, it is open to a party to contend that the decisions of the foreign court should not be recognised.

12. In my judgment the determination of this issue depends on where one starts in the analysis. For the reasons given by the Claimant the Awards are *prima facie* enforceable at Common Law. The Defence to the claim based on the Awards is that they are not

enforceable as a result of the Set-aside Decisions made by the Russian courts. However, it is open to the Claimant to argue that no effect should be given to the decisions of the Russian Courts, based on conventional English conflict of law principles, for example on the basis that the judgments were obtained by fraud, that it would be contrary to public policy to enforce the judgments, or that the judgments were obtained in breach of the rules of natural justice, see for example *Dicey* Rules 50-52. The editors of *Dicey* (at §16-148) suggest that this is the right analysis, albeit in the context of the New York Convention.

> In the absence of authority in England it is suggested that where [an award] has been set aside in the court of the seat, an arbitral award should be enforced only if recognition of the order setting aside the award would be impeachable for fraud or as being contrary to natural justice, or otherwise contrary to public policy, in accordance with Rules 50 to 52.

13. In the present case the Claimant has pleaded facts in its Re-Re-Re-Amended Reply which (if proved at trial) would sustain an argument that the Set-aside Decisions should not be recognised because of breaches of the rules of natural justice (and/or fraud and/or for reasons of public policy). If the Claimant fails to prove the facts alleged and/or in its argument, the Court would recognise the Russian Set-aside Decisions and would not give effect to the Awards.

14. As Mr Pollock submitted, this accords with both a conventional analysis of English conflict of law principles and such cases as throw light on the matter.

15. In *Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs of Government of Pakistan* [2009] EWCA Civ 755 [2011] 1 AC 763, Rix LJ observed at [91].

> Finally, I bear in mind ... the problem of an award perhaps improperly set aside in the courts of the country of origin. This is a delicate matter. However, it seems to me that this is not something which can be dealt with simply as a matter of an open discretion. The improper circumstances would, I think, have to be brought home to the court asked to enforce in such a way as either, in effect, to destroy the defence based on article V.1(e), or, which is perhaps effectively the same thing, to prevent an issue estoppel arising out of the judgment of the courts of the country of origin. In this connection see *Carl Zeiss Stiftung v. Rayner & Keeler Ltd (N.2)* [1967] 1 AC 853, 947 and Dicey, Morris & Collins, 14th Ed. at Rules 41 to 45.

16. Although Rix LJ was considering the position under the New York Convention, it is clear that he considered that a defendant's ability to rely on a foreign decision setting aside an award would depend upon whether it would be recognised in accordance with ordinary principles applying to the recognition of foreign judgments (*i.e.* the principles set out in Rules 41 to 45, as they were then, of *Dicey*). Moore-Bick LJ gave his own judgment but agreed, at [63], with the additional reasons given by Rix LJ; and Ward LJ agreed with both judgments.

17. In the context of a foreign judgment which had been set aside on appeal, David Steel J adopted a similar approach in *Merchant International Co Ltd v Natsionalna Aktsionerna Kompaniya Naftogaz Ukrayiny* [2011] EWHC 1820 (Comm). He held that it was possible to recognise a first-instance judgment which had been set aside on appeal if the appellate judgment was denied recognition. In the course of the judgment he said:

> [30] I start with [the defendant's] threshold submission that, since the Ukrainian courts have set aside the lower court's judgment it must by definition be set aside. This, to my mind, simply begs the question. The issue is not so much the enforcement of the original judgment but the recognition of the judgment setting it aside. If the judgment setting aside the judgment of the lower court lacked due process then the default judgment [enforcing the foreign lower court judgment] will stand ...
>
> [31] It is well established that a foreign judgment is impeachable on the ground that its recognition would be contrary to public policy: Dicey & Morris: The Conflict of Laws, 14th Ed, Rule 44 ...

18. The Court of Appeal, see *Merchant International Co Ltd v Natsionalna Aktsionerna Kompaniya Naftogaz Ukrayiny* [2012] EWCA Civ 196, dismissed an appeal from this judgment on the narrower ground that it would be wrong to exercise the discretion to set aside the default judgment in the circumstances. Nevertheless, it is clear that David Steel J's analysis attracted the majority of the Court of Appeal. Hooper LJ at [83] was 'minded to agree in its entirety with the judgment of David Steel J', but was content to adopt the narrower basis, and Lord Neuberger of Abbotsbury MR at [86] considered that David Steel J's reasoning had 'obvious force', although he could also see the force of the argument to the contrary, and concluded at [88]

> It is very tempting to resolve this difficult issue, and, indeed, in light of the obvious common sense merit of [claimant's case], to do so on the ground adopted by David Steel J.

He in fact decided on the narrower basis referred to above.

19. The argument based on the principle *ex nihilo nil fit* assumes that there is no valid arbitration award. It finds its expression in a passage from Van den Berg, '*Enforcement of Annulled Awards*' (1998) ICC International Court of Arbitration Bulletin 15.

> The disregard of annulment of the award… involves basic legal concepts. When an award has been annulled in the country of origin, it has become non-existent in that country. The fact that the award has been annulled implies that the award was legally rooted in the arbitration law of the country of origin. How then is it possible that courts in another country can consider the same award as still valid? Perhaps some theories of legal philosophy may provide an answer to this question, but for a legal practitioner this phenomenon is inexplicable. It seems that only an international treaty can give a special legal status to an award notwithstanding its annulment in the country of origin.

20. In my judgment the answer to the question is not provided by a theory of legal philosophy but by a test: whether the Court in considering whether to give effect to an award can (in particular and identifiable circumstances) treat it as having legal effect notwithstanding a later order of a court annulling the award. In applying this test it would be both unsatisfactory and contrary to principle if the Court were bound to recognise a decision of a foreign court which offended against basic principles of honesty, natural justice and domestic concepts of public policy.

21. I additionally have nevertheless borne in mind the other arguments raised in §§51-71 of the Claimant's skeleton argument, which (among other points) refer to the considerable body of academic opinion which disagrees with the view expressed by Professor Van den Berg that decisions to set aside awards must be recognised (in the words of Professor Born, in '*International Commercial Arbitration'* (2nd Ed) at §924) 'irrespective of the procedures or integrity of the annulment proceedings.'

22. For the above reasons I answer the Enforcement Preliminary Issue as follows: there is no *ex nihilo nil fit* principle which precludes the enforcement of the Awards; and if the allegations in §§6, 6A and/or 7 of the Re-Re-Re-amended Reply are proved, the Court has power to enforce the awards at Common Law notwithstanding the Set-aside Decisions of the Russian Courts.

The Interest Preliminary Issues

23. As noted above, there are two distinct sub-issues.

The claim for interest under Article 395 of the Russian Civil Code.

24. It was in respect of this aspect of the case that each side deployed expert evidence: Dr Vladimir Gladyshev (was called by the Claimant) and Professor Anton Asoskov (was called by the Defendant). Before considering their evidence it is convenient to summarise how the Court decides matters of foreign law. Although there were differences between the parties at the margins, the principles were very largely agreed.

25. First, the Court is required to determine the foreign law as a question of fact on the basis of the evidence deployed by the parties, according to the usual civil standard, see for among many examples, *Islamic Republic of Iran v. Berend* [2007] EWHC 132, Eady J at [50].

26. Secondly, although in the present case this involves looking at Article 395 of the Russian Civil Code and the various other provisions of Russian law relied on by the parties, it is not the Court's function to interpret the codified provisions. The Court's task is to determine how the Russian Courts have (or would) interpret them, see *Lazard Brothers & Co v. Midland Bank* [1933] AC 289, Lord Wright at 298.

> If the law is contained in a code or written form, the question is not as to the language of the written law, but what the law is as shown by its exposition,

> interpretation and adjudication: so in effect it was laid down by Coleridge J in *Baron de Bode's* case (1845) 8 QB 208, 266; in the *Sussex Peerage* case (1844) 11 Cl. & F. 85, 116, Lord Denman stated his opinion to the same effect as he had done in *Baron de Bode's* case. He said that if there be a conflict of evidence of the experts, 'you (the judge) must decide as well as you can on the conflicting testimony, but you must take the evidence from the witnesses.' Hence the Court is not entitled to construe a foreign code itself: it has not 'organs to known and to deal with the text of that law' (as was said by Lord Brougham in the *Sussex Peerage* case). The text of the foreign law if put in evidence by the experts may be considered, if at all, only as part of the evidence and as a help to decide between conflicting expert testimony.

27. In *A/S Tallinna Laevauhisus and others v. Estonian State SS Line and another* (1947) 80 Lloyd's Rep 104, at pp.107l-109r Scott LJ set out four further points. (1) The burden of proving the foreign law rests on the party seeking to establish that law. (2) The task of the expert evidence is,

> ... to interpret its legal effect, in order to convey to the English Court the meaning and effect which a Court of the foreign country would attribute to it, if it applied correctly the law of that country to the questions under investigation by the English Court.

(3) The degree to which the English Court can put its own construction on the foreign code arises out of and is measured by its right to criticise the oral (or written evidence) of the expert witness; and once the foreign law is before the Court, the Court is free to scrutinise the witness and what he says as it can on any other issue of fact. (4) If there is a clear decision of the highest foreign court on the issue of foreign law other evidence will carry little weight against it, see also Lord Sumner in *Bankers and Shippers Ins Co of New York v. Liverpool Marine & General Ins Co* (1926 24 Ll. Rep 85 (HL) at p.93.

28. Thirdly, in determining the question of foreign law the Court is entitled, and may be bound, to look at the source material on which the experts express their opinion. This is true of any expert evidence which comes before the Court, and if authority were required for the proposition in relation to foreign law it can be found in *Dicey* (see above) at 9-017 and the cases at footnote 91.

29. Fourthly, the Claimant (for reasons which I will come to) submitted that the relevant issue would have to be resolved in the 'Supreme Court' of the foreign jurisdiction; and that therefore the relevant question is: what would the 'Supreme Court' decide if the matter were before it? Mr Pollock relied in support of this proposition on: *In re Duke of Wellington, Glentanar v. Wellington* [1947] 1 Ch 506 (Wynn-Parry J at p.519); *Rendall v. Combined Insurance Company of America* [2005] 1 CLC 565 (Cresswell J) and *Dallah Real Estate and Tourism Holding Co v. The Ministry of Religious Affairs, Government of Pakistan* [2008] EWHC 1901 (Comm) (Aikens J at [103]). I accept that this may be the right approach in some circumstances, but it will not be the right approach in every case. The legal issue may, for example, have been plainly decided by a court which is inferior

in jurisdiction to the 'Supreme Court'. I have concluded that the law is correctly stated in *Dicey* at 9-020.

> Considerable weight is usually given to the decisions of foreign courts as evidence of foreign law ... But the court is not bound to apply a foreign decision if it is satisfied, as a result of all the evidence, that the decision does not accurately represent the foreign law. Where foreign decisions conflict, the court may be asked to decide between them, even though in the foreign country the question still remains to be authoritatively decided.

30. Fifthly, a further issue may arise where the foreign law is going through a period of change (as the Claimant contended in the present case). The question is then the extent to which the English Court can anticipate the 'trajectory' of the developing law. Mr Pollock referred to a passage in the judgment of Beatson J in *Blue Sky One Ltd v. Blue Sky Airways LLC* [2010] EWHC 631 (Comm) at [88] in support of his contention that it can. In that case Beatson J was considering a particular problem: that the decisions of the Iranian courts are seldom referred to, the views of commentators are seldom relied on and only decisions of the Supreme Court sitting *in banc* constitute legally binding precedent. In these circumstances I am not persuaded that Beatson J's reference to the 'trajectory of Iranian law' bears the weight that Mr Pollock sought to attach to it. To the extent that he was submitting that the English court should decide what conclusion a foreign court would reach on a developing area of the law, the point is unobjectionable. If he was intending to invite me to make findings which went beyond the present state of Russian law and to anticipate a rational development of it, his invitation must be declined.

31. I have adopted the approach set out above when considering the evidence and reaching my conclusions upon it.

Russian law – the evidence and the issue

32. Dr Gladyshev gave confident and fluent evidence in English. He struck me as a well-qualified practical lawyer, who had identified a way in which the Claimant's argument might ultimately succeed in the Russian courts. Professor Asoskov's approach was more cautious and conservative, and to an extent more academic. Both experts had thought extensively about the issue they were asked about and, although each party made points which were designed to undermine confidence in the other side's expert, I have concluded that both were trying to assist the Court and that I was assisted by their evidence.

33. Although I heard evidence from the experts over a period of 4 days, the issue between the parties and the experts was a relatively narrow one. The Claimant contended (with the support of Dr Gladyshev) that interest accrued automatically on an unsatisfied award under Article 395 of the Russian Civil Code without the need for a court order enforcing the award. The Defendant contended (with the support of Professor Asoskov) that interest under Article 395 only begins to accrue once a Court order enforcing the award comes into effect. It is common ground that there has been no order of the Russian Court enforcing the award: on the contrary the Set-aside Decisions had the opposite effect.

Russian law - common ground

34. It is convenient to start with a description of the three parts of the Russian judicial system: the Constitutional Courts of the entities of the Russian Federation (headed by the Constitutional Court of the Russian Federation), the Courts of General Jurisdiction (headed by the High Court of the Russian Federation) and the *Arbitrazh* courts (headed by the Supreme *Arbitrazh* Court of the Russian Federation).

35. The present case is primarily concerned with decisions of *Arbitrazh* courts, including the Supreme *Arbitrazh* Court. These courts consider commercial disputes, in contradistinction to courts of General Jurisdiction which consider criminal and civil cases concerning disputes of a non-commercial (or non-economic) nature. There are four levels of *Arbitrazh* courts: (1) 81 local first-instance *Arbitrazh* courts (for example the Moscow *Arbitrazh* court); (2) 20 *Arbitrazh* Appellate courts (for example the Ninth *Arbitrazh* Appellate court) which review the legality and soundness of decisions of the first-instance courts, by way of re-examination of the decided facts, and any new facts advanced; (3) 10 Federal *Arbitrazh* courts (including the Federal *Arbitrazh* court of the Moscow District), which examine subordinate decisions on cassation appeals to ensure compliance with the substantive and procedural law; (4) the Supreme *Arbitrazh* Court, which may review any judicial decision of subordinate courts in the exercise of its supervisory powers. There is a Presidium of the Supreme *Arbitrazh* Court with 12 member judges. A decision on whether to refer a case to the Presidium is decided by a panel of three judges. Article 16.1 of the *Arbitrazh* Procedure Code of the Russian Federation provides that decisions of an *Arbitrazh* Court that have entered into legal force shall be binding and are to be executed in the territory of the Russian Federation.

36. The Civil Code of the Russian Federation is the primary source of the relevant law. Article 395 provides for the payment of interest.

> Article 395. Liability for the non-performance of a monetary liability.
>
> 1. Use of someone else's monetary funds as a result of their unlawful withholding, refusal to return them, or other delays in their payments or unjustified receipts or savings at the expense of another person is subject to payment of interest on the amount of these funds…
>
> …
>
> 3. Interest for using someone else's funds shall be charged through the day of payment of the amount of these funds to the creditor, unless the law, other legal acts or contract establishes a shorter time period for calculation of interest.

37. It was common ground that interest under Article 395 accrues on overdue 'monetary obligations' (see section 3, §§5 and 7 of the Joint Memorandum).

38. Article 307 of the Civil Code defines the concept of an obligation (see Section 3, §5 of the Joint Memorandum.

> Article 307. Concept of an obligation and grounds for its emergence.
>
> 1. By virtue of an obligation, one person (debtor) is obligated to perform a certain action in favour of the other person (creditor), such as transfer property, perform work, pay money, etc., or to refrain from a certain action, and the creditor has the right to demand the performance of his responsibility from the debtor.
>
> 2. Obligations arise from contract, from causing harm and from other grounds specified in the present Code.

39. In order to identify the nature of 'other grounds' upon which an obligation can arise under Article 307(2), it is necessary to look at the grounds described in Article 8 of the Civil Code (see Section 3, §6 of the Joint Memorandum).

> Article 8. Grounds for creation of civil rights and responsibilities [sources of obligations].
>
> 1. Civil rights and responsibilities arise on the grounds provided by law and by other legal acts, as well as from the actions of citizens and legal persons which, although not specified by law or similar acts, but due to the general principles and sense of civil legislation give rise to civil law rights and responsibilities.
>
> In accordance with this, civil law rights and responsibilities arise:
>
> (1) From contracts and other transactions provided by law, as well as from contracts and other transactions, which even though not provided for by law, do not contradict it.
>
> (2) …
>
> (3) From the judgment of a court which establishes legal rights and responsibilities.

40. For the purposes of Article 8.1(3), a judgment of a court which establishes civil law rights and responsibilities includes awards of arbitral tribunals (see Section 3, §8 of the Joint Memorandum). This is because Article 11 of the Civil Code defines a 'court' for the purposes of the Civil Code as 'the court of general jurisdiction, *Arbitrazh* court or court of private arbitration.'

41. Based on these provisions, Dr Gladyshev's opinion was that, since the Arbitration tribunals were courts (see Article 11), awards providing that money sums were payable 3 months from the date of the awards (as the present Awards did) gave rise to a monetary obligation, either because the Awards were each a 'judgment… which establishes legal rights and responsibilities,' under Article 8.1(3) of the Civil Code; or because they were a type of contractual obligation arising out of the arbitral agreement, or both. Since Article 395 applied to all monetary obligations, it applied to the monetary obligation established by an award; and accordingly, if a party failed to pay money due under an award according to its terms, interest would be payable under Article 395.

42. In Professor Asoskov's opinion a state court enforcement order was essential to the existence of any obligation. There was what he described as a 'moral duty' to satisfy an

award when it was made, but no legal obligation to do so before a Court order was made. Article 8.1(3) of the Civil Code required this further step before a legal obligation to pay interest could arise.

Russian law - the cases

OJSC Kurba v. Slavneftstroy

43. Although a large number of cases were referred to in the course of the evidence, it is expedient to start with the decision of the Presidium of the Supreme *Arbirazh* Court in *OJSC Kurba v. Slavneftestroy* (Resolution 904/10 of 8 June 2010). The case concerned an award made on 21 April 2008, ordering the respondent to pay damages for failing to comply with certain obligations under a construction contract, plus costs. The respondent received the award on 3 June 2008 and took no steps to set it aside or pay the sums due under it. On 26 January 2009, the Moscow *Arbitrazh* Court issued a writ of execution (exequatur) enforcing the award. This was upheld by the Federal *Arbitrazh* Court of the Moscow District on 18 March 2009. The writ of execution was not complied with, and the claimant brought a claim before the Moscow *Arbitrazh* Court for interest under Article 395 on the sums awarded from 4 June 2008 (the day after the service of the award).

44. The Moscow *Arbitrazh* Court dismissed the claim on the basis that (a) interest under Article 395 did not accrue for non-performance of the award, which did not in itself establish civil rights and obligations between the parties and which had to be enforced in accordance with the provisions of the *Arbitrazh* Procedure Code, and (b) the sums awarded by the tribunal were losses within Article 15 of the Civil Code, which did not constitute a monetary obligation for the purposes of Article 395.

45. On 26 October 2009, on cassation appeal, the Federal *Arbitrazh* Court of the Moscow District, following a hearing at which the respondent was not represented, reversed that decision and allowed the claim, assuming (apparently without argument) that interest under Article 395 accrued from the date the award became binding between the parties.

46. In the 8 June 2010 decision on further appeal, the Presidium of the Supreme *Arbitrazh* Court held that interest under Article 395 was available in principle, but only from the effective date of the writ of execution enforcing the award (26 January 2009) and not from the date of service of the award on the respondent (4 June 2008).

> … when establishing the moment from which interest on the specified amount should accrue, the court of cassation court assumed that this moment is the date when the arbitration [award] became [binding] on the parties in accordance with the provisions of the law on arbitration tribunals. However, [based on] Article 16(1) of the *Arbitrazh* Procedure Code of the Russian Federation, taking into account the position of the Constitutional Court of the Russian Federation and of the Supreme *Arbitrazh* Court of the Russian Federation, such interest may not accrue before the date that the ruling issuing a writ of execution for mandatory performance of the arbitration [award] came into force.

47. The Presidium of the Supreme *Arbitrazh* Court further directed:

> The interpretation of legal provisions contained in this judgment of the Presidium of the Supreme *Arbitrazh* Court of the Russian Federation is universally binding and shall be applied by *arbitrazh* courts reviewing similar cases.

48. In my view, and despite the points made by Mr Pollock in the course of his cross-examination of Professor Asoskov, the decision of the Presidium of the Supreme *Arbitrazh* Court in *Kurba* is directly relevant to the issue that I have to decide, supportive of the Defendant's case and a formidable obstacle to the Claimant's case on the point. In his first report Dr Gladyshev accepted that one of the roles of the Supreme *Arbitrazh* Court was to safeguard a uniform application of the law throughout Russia (see §33), and that in practice, the *Arbitrazh* courts have quite deliberately developed a system for the consistent interpretation of laws, through decisions of courts on a hierarchical basis (see §36). He also accepted that where, as in *Kurba*, a resolution of the Presidium of the Supreme *Arbitrazh* Court contained a directive that its legal reasoning was to be followed by lower courts, the resolution is particularly authoritative (see §40). Furthermore in his evidence he accepted that the *Kurba* decision was 'absolutely on point.'

49. Although Dr Gladyshev continued to criticise the decision and reasoning of the Presidium of the Supreme *Arbitrazh* Court in *Kurba* and commended the reasoning of the cassation court which the Supreme *Arbitrazh* Court rejected, he acknowledged that, but for the decision of the Constitutional Court of the Russian Federation in *Resolution 10-P* of 26 May 2011, the decision in *Kurba* would be determinative of the central issue. He also accepted in evidence that the Supreme *Arbitrazh* Court in *Kurba* had considered the argument he espoused, based on Articles 8.1(3) and 11 of the Russian Civil Code and had rejected it in favour of the principle of the binding nature of judicial acts set out in Article 16.1 of the *Arbitrazh* Procedure Code. Although his view was that the Court had proceeded on the basis that Article 11 of the Civil Code (which sets out that an arbitral tribunal is within the definition of a 'court') was unconstitutional since they later referred a similar point to the Constitutional Court of the Russian Federation (see *Resolution 10-P* below) there is nothing to suggest that this was in fact the basis of the decision in *Kurba*.

Resolution 10-P

50. The issue with which the Constitutional Court of the Russian Federation was concerned is identified in §1.2 of the declaratory part of *Resolution 10-P*:

> Therefore the subject matter considered by the Russian Federation Constitutional Court in this case consists of the provisions of Article 11(1) of the Russian Federation Civil Code, Article 1(2) of the Federal Law 'On Arbitral Tribunals in the Russian Federation,' Article 28 of the Federal Law 'On the State Registration of Real Estate Rights and Transactions,' Article 33(1) and Article 51 of the Federal Law 'On Mortgage (the Pledge of Real Estate),' [to the extent that] such provisions taken together, regulate the question of the authority of the arbitral tribunal's to hear civil law disputes concerning real estate (including in regard to a

> levy of execution pledged under a mortgage agreement) and of the state registration of real estate rights on the basis of [awards] issued on such disputes by arbitration tribunals.

51. It is clear that the issue before the Constitutional Court was whether arbitral tribunals could rule on disputes about title to property and, if so, the implication for state registration of titles based on such arbitral awards. The case was brought before the Constitutional Court by the Supreme *Arbitrazh* Court which challenged the constitutionality of awards of arbitral tribunals in relation to real property, including awards which transferred rights to real property.

52. At §2, the Constitutional Court affirmed the constitutional rights of parties to settle civil disputes by arbitration. The Court recognised that arbitral tribunals did not exercise judicial authority and were not part of the judicial system of the Russian Federation consisting of government courts; but continued:

> This does not mean, however, that the Russian Federation Constitution thereby precludes the possibility that civil-law disputes may be resolved between private persons under arbitral proceedings through arbitral tribunals acting as institutions of civil society that are vested with publicly meaningful functions.

53. In short, the Court acknowledged the rights of parties to resolve their civil disputes by arbitration. In such cases, the right to judicial protection had to be complete, effective and timely; and this was ensured by the possibility of applying to a government court,

> ... in particular by filing an application for the quashing of a judgment of the arbitral tribunal or for the issuance of a writ of execution to enforce a judgment of the arbitral tribunal.

54. At §3.1 the Court referred to the established right of parties to refer disputes about real property to arbitration.

55. At §3.2, the Court made the following further observations:

> Under [the Federal law 'On Arbitral Tribunals in the Russian Federation'] an arbitral tribunal shall resolve disputes on the basis of the Russian Federation Constitution, laws and other regulatory legal acts in effect in the Russian Federation and shall issue a judgment in accordance with the terms and conditions of the contract and with due regard for customary business practices (article 6); arbitral proceedings shall be administered on the basis of the principle of legality, confidentiality, independence and impartiality of arbitral courts, discretion, adversarial procedure and equality of the parties (article 18); the judgments of an arbitral tribunal shall be implemented voluntarily; they may be challenged by filing an application with a competent court to quash the judgment, and may be reviewed by means of consideration of an application for enforcement of a

> judgment; enforcement of a judgment by an arbitral tribunal shall be imposed on the basis of a writ of execution issued by a competent court.

56. Later in the same paragraph the Court referred to the awards of arbitral tribunals having a number of publicly important consequences that were analogous to the consequences of judgments of government courts. The automatic accrual of interest on sums awarded was not described as one of these consequences.

57. At §4 the Court set out what Dr Gladyshev described as the key finding.

> In the system of current legal regulation, judgments of arbitral tribunals not only create the obligation for participants in the arbitral proceedings to implement them but are also the basis for other parties to take certain legally significant actions.
>
> For example, if a judgment by an arbitral tribunal, issued as a result of hearing a dispute concerning real property, has established rights to said property, the registration agency must take actions to execute their state registration …

58. In a later part of §4 the Court drew a distinction between the private law element of the arbitration agreement and award, and its 'public effect' which followed from the state certification.

59. At §5 the Court referred to Article 31 of the Federal Law 'On Arbitral Tribunals in the Russian Federation,' pursuant to which it was the duty of the parties to the arbitration to implement the award 'which must be performed voluntarily.'

60. Professor Asoskov's view was that the decision in *Resolution 10-P* had no material effect on the pre-existing law on the recoverability of interest on arbitral awards under Russian law: an order of the Court was a precondition to the recoverability of interest.

61. Mr Pollock (supported by Dr Gladyshev) engaged in a detailed examination of *Resolution 10-P* to show that it had necessarily established a new and different principle for the recoverability of interest, which was inconsistent with the prior decision of the Supreme *Arbitrazh* Court in *Kurba*. He submitted that the Court had analysed the nature of arbitrations and awards made by arbitral tribunals, and had made clear (particularly in §4) that there was a legal obligation to perform the award, and that if the money were not paid, then there was a legal entitlement to interest under Article 395 on the basis that the money was unlawfully withheld. Mr Pollock submitted that, since it was common ground that the ultimate authority under the Russian judicial hierarchy was the Constitutional Court of the Russian Federation (at least on matters which had a constitutional impact), the English Court had to put itself in the position of a Russian court of ultimate jurisdiction and consider what it would decide, if the matter came before it. His submission was that, even if the Supreme *Arbitrazh* Court adhered to its view expressed in *Kurba*, the Constitutional Court of the Russian Federation would, consistently with its view of the matter in *Resolution 10-P*, make clear that there was a legal (and not merely a moral) obligation to pay interest from the date of a Russian award.

62. Lord Grabiner QC drew attention to the fact that the Constitutional Court was not asked to consider, and did not in fact consider, whether (and if so, on what basis) interest was payable as a matter of law on an unsatisfied arbitral award. He noted that *Resolution 10-P* made no mention of that issue, and referred neither to Article 395 nor to the decision of the Supreme *Arbitrazh* Court in *Kurba*.

63. I have not been persuaded that the Claimant's submissions are correct. Mr Pollock's approach was (unsurprisingly) that of a Common lawyer, searching for the legal principle which underlies the decision (namely, there is a legal, and not merely a moral, obligation to perform the award) and, once he has identified it, advancing the logical conclusion based upon it (namely, if there is a monetary obligation, interest is recoverable on that sum under Article 395). However, nothing was said (at least not explicitly) in *Resolution 10-P* that undermines the approach of the Supreme *Arbitrazh* Court in Kurba that a writ of execution for mandatory performance of the arbitration (exequatur) is a precondition of an entitlement to interest on the award, indeed on one view of the passage cited above from §2, the decision reinforces it. I do not accept that *Resolution 10-P* has the wide effect on the recoverability of interest that the Claimant submits it has; and more importantly, I am clear that it would not be regarded as having such effect in the *Arbitrazh* courts where, unless a constitutional issue emerged, this issue would continue to be decided. In my view *Kurba* clearly established the law of the Russian Federation on this point and, notwithstanding *Resolution 10-P*, the law of the Russian Federation remains that interest on an award is only recoverable from the date that a writ of execution (exequatur) takes effect. I should add that I was also unpersuaded by one of Mr Pollock's bolder flourishes: that I should conclude that *Kurba* was wrongly decided.

Subsequent decisions

64. It was common ground between the experts that since 26 May 2011 (the date of the *Resolution 10-P* decision) no Russian Court had treated that decision as having changed the law in relation to post-award interest.

65. Dr Gladyshev was able to point to a decision of the *Arbitrazh* Court of the City of St Petersburg and the Leningrad region, dated 21 May 2012, in the case of *Shurukhin v. Akros* (for convenience '*Akros*'). Dr Gladyshev relied on this decision because, as he put it in evidence, 'The *Akros* court felt free to ignore *Kurba* ... and award interest on the award itself.' He added that the Judge had also rejected the reasoning of the cassation court (level 3) and the Supreme *Arbitrazh* Court (level 4) in an earlier case, *Mashinoproect Kopring*, on which Professor Asoskov had relied in support of his view that the *Arbitrazh* courts were still following the principles set out in the *Kurba* case.

66. I am not prepared to attach weight to the *Akros* decision. It was a decision at level 1 in the hierarchy of *Arbitrazh* courts, only the claimant appeared, there was no reference to either *Kurba* or *Resolution 10-P*, articles 8 and 11 were not referred to in the judgment and, as Dr Gladyshev accepted in cross-examination, the *Akros* case was in fact decided before either decision in the *Mashinoproect Kopring* case. As Mr Pollock conceded, the *Akros* case was decided by a busy judge in a busy court.

67. In my judgment the decisions in the *Mashinoproect Kopring* case at the Cassation Court (level 3) and (at least implicitly) by the 3-judge panel of the Presidium of the Supreme *Arbitrazh* Court (level 4) demonstrate clearly that the principles which apply to the recovery of interest on arbitration awards as established in *Kurba* are still applied in Russia notwithstanding *Resolution 10-P*. Dr Gladyshev recognised that he was alone in concluding that they were not and was driven to say that the decisions in the *Mashinoproect Kopring* case were wrongly decided. At this stage of the argument there was an air of unreality about his evidence.

Conclusion on the Russian law issue

68. For the above reasons I have concluded that since there were no Russian exequaturs in respect of the Awards, interest is not recoverable on the principal sum as a matter of Russian law. I understand that the parties are content to leave open a further issue as to whether an exequatur issued outside Russia might change the position as a matter of Russian law.

English law - the issue

69. There are two claims for interest

(1) A claim for interest on the amount of the Awards (including principal, interest accrued up to the date of the Awards, and costs) from the various dates in 2006 that those sums fell due in accordance with the Awards until the date of payment (10 August 2010). This is claimed primarily under Article 395 of the Russian Civil Code; alternatively under s. 35A of the Senior Courts Acts 1981 (Period 1).

(2) A claim for interest not on the Awards but on the accrued Period 1 interest, from 11 August 2010 until judgment (Period 2). This Period 2 claim is (a) made exclusively under s. 35A and (b) only in the event that the claim for Period 1 interest succeeds by virtue of Article 395. If interest in respect of Period 1 is only available by virtue of s.35A (or not at all), then the Claimant makes no claim for Period 2 interest.

70. On this basis and for the reasons set out above, the claim under English law only arises in respect of Period 1.

71. Section 35A of the Senior Courts Act 1981 provides.

> (1) Subject to rules of court, in proceedings (whenever instituted) before the High Court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest ... on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for all or any part of the period between the date when the cause of action arose and -
>
> (a) in the case of any sum paid before judgment, the date of the payment ...

72. The arbitration clause in the relevant Agreements between the parties provided,

> 5.1 All disputes and differences arising out of or in connection with the present Agreement shall be settled by means of negotiations. Should the parties fail to come to an agreement by negotiations then such unsettled dispute shall be submitted to the International Commercial Arbitration Court at the Chamber of trade and Industry of the [Russian Federation] in accordance with its rules and procedures. The argument shall be considered in the Russian language, and the laws of the Russian Federation shall be applicable at the settlement of dispute.

73. It is common ground that the tribunal could have awarded interest on the principal sums awarded and that it did not do so for the reasons expressed in §7 of the Awards dated 19 September 2006.

> The Plaintiff's request to compel the Defendant to pay interest on the amounts payable in favour of the Plaintiff, up to the date of the actual payment of these amounts, cannot be considered by the ICAC, since the request implicates - as it does in all other cases concerning material demands - an advance payment of the arbitration fees - [a] thing that has not been done in this case.

74. It is unclear whether this was remediable. In any event, as already noted, the Awards were subsequently set aside by the Moscow *Arbitrazh* Court on 23 May 2007.

75. Lord Grabiner submitted that the Court had no power to award interest under s.35A of the 1981 Act since the parties had excluded such power by agreeing that their disputes, including any dispute about post-award interest, should be referred to arbitration. The power to award statutory interest may be excluded by a contractual provision which provides for interest at a different rate or for no award of interest. Equally, an agreement to refer disputes to a court or tribunal that cannot exercise a particular statutory power amounts to an agreement to exclude the operation of such a power, see *Donohue v Armco Inc* [2001] UKHL 64, in a different context, Lord Bingham at [29]. In the present case, the parties by their arbitration agreements agreed that all questions of post-award but pre-judgment interest should be determined by arbitral tribunals in Russia; and since such tribunals have no power to award interest under s.35A of the 1981 Act, the parties are taken to have excluded that power. It would be highly unsatisfactory if parties could claim post-award interest in any country where they were able to enforce the award.

76. In support of these submissions, Lord Grabiner referred to *Dalmia Dairy Industries Ltd v National Bank of Pakistan* (see above), where the plaintiff brought a Common Law claim to enforce two Swiss arbitral awards, governed by Indian law, in England. The plaintiff sought post-award but pre-judgment interest at a higher rate than that stipulated in the awards, relying on s. 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934 (the predecessor to s. 35A of the 1981 Act). The claim was rejected by Kerr J; and the Court of Appeal dismissed an appeal (in fact a cross-appeal by the plaintiff) on this part of the judgment. Megaw LJ, giving the judgment of the Court stated (at 302r):

> The parties, it has to be assumed, have deliberately agreed to give jurisdiction to an arbitrator to decide on the rate of interest, including interest for the period between the award and payment of the amount awarded. The arbitrator has so decided. His decision, to revert to a point which we have decided in [the claimant's] favour in an earlier part of the case, is not merely 'provisional'. It is conclusive. In this international arbitration award, the governing law of which, in general, is Indian law, an English Court, even if it had a discretion to do so, ought not to do something which, in effect, would be to substitute its own decision for the arbitrator's decision on a matter within the arbitrator's jurisdiction. No sophistry or subtlety of phrasing can alter the reality. If the English Court were to do what [the claimant] asks it to do, it would be altering the arbitrator's decision on a matter which, for good or for ill, the parties by their arbitral agreement have left for him to decide.

77. Megaw LJ also referred to the judgment of Kerr J (at p.274r) and his reasons for coming to the same conclusion.

> I do not see how the defendants can be under two concurrent liabilities for different rates of interest at the same time. I cannot alter the awards, or get rid of the rates of interest for which they provide 'until actual payment.' In these circumstances I do not see how the defendants can also be subjected to a concurrent obligation to pay a commercial rate of interest from some date when they failed to honour the awards 'without delay.'

78. As the Claimant points out, in the present case the Arbitrators have not made any decision about interest, nor does the possibility of two rates of interest arise as an objection. Furthermore, on the facts of the present case, an award of interest would not have the effect of 'altering' the arbitrators' decision.

79. The claim to enforce the Awards in the English action was a claim to enforce a debt; and although the circumstances in which the arbitrators declined to grant an award of interest (and, if material, the circumstances in which the Amsterdam Appeal Court also refused to order the payment of interest), may be relevant to the exercise of the Court's discretion to award interest, there is no absolute bar to the award of interest in respect of the late payment of a foreign award under s.35A of the Senior Courts Act 1981.

80. Whether the Court should award interest is not a matter that I have been asked to determine.

Conclusion

81. I have therefore reached the following conclusions on the preliminary issues.

(1) There is no principle of *ex nihilo nil fit* in English law such as to prevent the English court giving effect to the Awards in the circumstances set out in the Re[3]-Amended Reply.

(2)(a) Interest on the Awards cannot be recovered as a matter of Russian law under Article 395 of the Civil Code of the Russian Federation, prior to the date on which an exequatur takes legal effect.

(2)(b) Interest on the sums claimed in the English proceedings can be recovered under s.35A of the Senior Courts Act 1981, in principle. Whether it should be awarded as a matter of discretion is for later determination.
