# Important English High Court decision for all resolving disputes connected to Russia

19 JANUARY 2016

**CATEGORY:**
ARTICLE

In a decision which will be of great interest to all those involved in Russian related disputes in particular, the English court has overturned the decision of an LCIA tribunal that it did not have jurisdiction over a Russian company which was not a signatory to the relevant arbitration agreements.

This long-running case relates to the re-development of the former Moskva Hotel. The claimants alleged that the City of Moscow, and a company owned by it called OJSC OEK Finance, had participated in a corporate raid designed to oust the claimants from the BVI company which owned the project.

The Shareholders' Agreement and a Share Purchase Agreement in respect of the BVI company, both of which contained LCIA arbitration clauses, were stated to be governed by English law (and it was not in issue that the arbitration agreement itself was governed by English law).

The claimants commenced an arbitration at the LCIA and contended that although the City of Moscow was not a signatory to the arbitration agreements, it could be joined to the arbitration pursuant to Article 105 of the Russian Civil Code. The arbitrators heard evidence from Russian law experts and held that Article 105:

*'… makes a parent jointly and severally liable on the relevant contract as a whole. To the Arbitral Tribunal's mind, this includes liability to perform the Arbitration Agreement. The parent is as liable to arbitrate disputes as it is to perform the primary obligations under the relevant contract.'*

However, the arbitrators concluded that since English law was the proper law of the arbitration agreements, Article 105 was irrelevant *[1]*.

Under the English Arbitration Act a party may apply to the Court under Section 67, which is mandatory, to challenge any award on jurisdiction, and the second claimant made such an application.

The judge accepted that English substantive law, being the law of the arbitration agreement, governed the question of who was a party to the arbitration agreements but, the judge said, that was not the question. He said that under English law there are instances of parties who were not signatories to an arbitration agreement being entitled, or being compelled, to be a party to the arbitration; he gave examples such as agency, assignment, and universal succession or merger and suggested that these examples may also be applicable under other systems of law.

He then said that in order to determine the question whether the tribunal had jurisdiction over a non-signatory to the arbitration agreement, English conflict of laws may point to another system of law as the relevant one. As an example, he said that just as the proper law of the arbitration agreement would not determine issues of agency, so too it would not apply to determine whether there had been, as a matter (for example) of German law, a merger between an old company entitled or obliged to arbitrate and a new company. Rather, he accepted the submission of the claimant that English choice of law rules would look to the law of the place of incorporation of the signatory as being the system of law which would govern whether a parent is liable to perform an agreement entered into by its subsidiary. He summarised the law as follows:

*'… if the question is one as to whether a non-signatory of the agreement can be joined by virtue of a concept such as agency or, in this case, a principle that shareholders or parents are obliged to arbitrate on contracts entered into by the signatory, then it is not the proper law of the contract which gives the answer, but English conflicts rules would look to another law, in this case the law of incorporation of the signatory.'*

The judge accordingly concluded that the arbitrators did have jurisdiction over the City of Moscow.

Although the judge's reasoning is clearly set out, there will be many who believe it is flawed and that there was no reason for the judge to depart from the position that the law governing the arbitration agreement is the applicable law for questions relating to the scope of the arbitration agreement and the parties to it.

The court also had to decide another issue relating to the jurisdiction of the arbitrators. The arbitrators had decided that the claimants' claim under Article 1064 of the Russian Civil Code was

*'……a claim ….. insufficiently connected with the relationship created by the [shareholders agreement and share purchase agreement] to fall with the arbitration clause.'*

The judge said:

*'It is difficult to see how that can be justified.'*

The Judge held that on the basis of the claims made, as summarised by the arbitrators, there was a claim in tort by the claimant against the respondents, the core point being that the claimant alleged the loss of his shares and his interest in the project, which fell within the terms of the arbitration clauses, bearing in mind the wide construction of such clauses as encouraged by the court in the Fiona Trust case.

It remains to be seen whether the decision will be successfully appealed.

*[1] Article 105 was repealed on 1 September 2014 but there is a very similar provision in the new Article 67.3*

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