BOOK REVIEW NOTES

ELEVEN GOOD YEARS FOR INTERNATIONAL COMMERCIAL ARBITRATION IN RUSSIA: THE LEGACY OF THE SUPREME COMMERCIAL COURT[1]

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The aim William R. Spiegelberger sets for himself in the book 'Enforcement of Foreign Arbitral Awards in Russia' is moderate, even humble. It is to provide a foreigner who faces the prospect of enforcing an arbitral award in this country with a general overview of the basic features and common pitfalls within this complex area of Russian law. He does not envision his book becoming a comprehensive 'self-help' guide for foreign lawyers; rather it is positioned to familiarize non-Russian clients and counsel with the fundamentals of the process, and to enable them to ask intelligent questions of the local experts who – of course – will be making an application on their behalf. This aim is certainly accomplished – and arguably, in the end the book turned out to be more valuable than such a modest objective would imply.

The author of this short review has not had the pleasure of meeting Mr. Spiegelberger personally; however, the brief *curriculum vitae* at the publisher's web pages[2] suggests a background uniquely fitted to write this kind of text. A common law lawyer by education and early years of practice in New York, he has – since 2003 – been in Russia practicing law and observing the ongoing transformations in legislation and court practice. At the outset Spiegelberger makes it plain that he has never personally appeared before Russian courts, nor did he seem to consider it a good idea to do so. Nevertheless, being this close to the object of his research, he has avoided the regrettable shortsightedness which can sometimes be observed in writings by European and American authors, where Russia is only mentioned in passing without a benefit of an in-depth study.

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[1] Reviewed book: William R. Spiegelberger, Enforcement of Foreign Arbitral Awards in Russia (Juris Pub. 2014).

[2] <http://www.jurispub.com/cart.php?m=product_detail&p=17006> (accessed Jul. 29, 2015).

The basic approach of the book seems to have been fairly simple, and at the same time ambitious: to read and analyze, without delving much into the Russian doctrinal literature on the issue, all the cases decided in Russian courts in 2003–13 dealing with the enforcement of foreign arbitral awards and falling within the ambit of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[3] All the reviewed cases were decided by commercial courts, because this branch of Russian judiciary has an exclusive jurisdiction to hear applications to enforce foreign arbitral awards where the parties are organizations or registered entrepreneurs.

This approach is reflected in the structure of the book. First, Russian judicial system is introduced in Ch. I; the applicable national and international legal instruments are described in Ch. II, with the most important documents reproduced in English translation in Appendices A to I. The book then goes on to examine each individual ground for refusal to recognize and enforce a foreign arbitral award under Art. V of the New York Convention (Chs. III–IX), from an invalid agreement to arbitrate to a violation of the public policy of the Russian Federation.

Overall, within this simple structure the book has covered a very substantial ground addressing in detail many pressing and controversial issues, such as asymmetric arbitration clauses, consequences of the autonomy of arbitration agreement and so on.

Spiegelberger's manner of approaching individual cases is unusual for a Russian lawyer, but will appeal to anyone familiar with the common law tradition. For example, he refers to cases as 'A v. B' whereas it is conventional in Russia to refer only to a docket number. Further, a great deal of effort has been expended to investigate the circumstances and context of each case, which is not always possible by merely reading the courts' final decisions. This approach means that, for the reader, the book is mostly self-contained: the facts of each case are presented before the ruling of the court is explained. There is no need to get hold of any other materials in order for the discussion to make sense.

The majority of cases analyzed by the author were retrieved from the online database developed and implemented by the Supreme Commercial Court of the Russian Federation for itself and lower commercial courts.[4] This database is freely available to the public and contains all final decisions, interim rulings and minor resolutions on procedural matters made by the commercial courts. It covers, as of today, some 15.5 million cases. Very few case files remain outside of this system, and then only in limited circumstances such as where a state secret is involved. Even

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[3] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, at <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf> (accessed Jul. 29, 2015) [hereinafter New York Convention].

[4] Электронное правосудие [*Elektronnoe pravosudie* [*E-Justice Portal*]], <http://kad.arbitr.ru> (accessed Jul. 29, 2015). Registration in «Мой арбитр» ['*Moi arbitr*' ['My Arbiter']] satellite system may be required to access the database from outside Russia.

where the case files lie outside the system, some basic information about the dispute, if not the full judgment, is available. This level of transparency and ease of access was – and still is – able to raise the eyebrows of lawyers in many countries across Europe and America. Indeed, the parallel system of courts of general jurisdiction led by the Supreme Court of the Russian Federation, albeit much older and larger, has never developed a database which is nearly as complete or user-friendly and able to allow such empirical research.

Just as Spiegelberger was finishing his research in 2014, the Supreme Commercial Court (which, since its creation in 1992, had been at the top of the hierarchy of commercial courts and effectively 'set the tone' for all inferior courts), was undergoing an effective liquidation. What was declared to be a merger of the Supreme Commercial Court and the Supreme Court on an ostensibly equal footing resulted in a complete takeover, with comparatively few former Supreme Commercial Court justices making it into the new 'united' Supreme Court. Many experts were against the whole idea of such merger, but their views were apparently not heard.[5]

Thus, the timing of this book's publication can be regarded as either extremely fortunate or extremely unfortunate. Knowing the tendency of Russian courts to be susceptible to influences from the courts higher up in the judicial hierarchy – the tendency with its roots going much deeper than any nuances in judicial organization – it is likely that the 'new' Supreme Court will be in a position to change the direction of developments in enforcement of foreign arbitral awards. As a result, one role which Mr. Spiegelberger envisioned for himself, that of (in the words of Alexis de Tocqueville) an Egyptian hierophant predicting the future court decisions by looking at previous ones, might prove to be an impossible exercise. On the other hand, the coincidence of this book's publication with the dissolution of the Supreme Commercial Court provides a perfect opportunity to sum up the developments in Russian law in this area while it was under the leadership of this court. This book therefore makes a solid contribution into Russian legal history.

All the cases analyzed in the book are listed in Appendix J; altogether there were 287 cases. Arguably this number could have been a lot greater if the author had chosen a different methodology, in particular if the decisions equally concerning domestic and foreign arbitral awards had also been included. One good reason to do so would be that the grounds for setting aside and refusing to enforce domestic arbitral awards[6] are very similar, and indeed often identical to those provided in the New York Convention for foreign awards. Since the legal positions developed

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[5] Olga Binda, *National Legal Congress: Business, Theory, and Practice on the Same Platform*, 2(1) Russian Law Journal 137 (2014), available at <http://www.russianlawjournal.org/index.php/jour/article/download/52/46> (accessed Jul. 29, 2015). doi:10.17589/2309-8678-2014-2-1-136-141

[6] Articles 42, 46 of the Federal Law No. 102-FZ of July 24, 2002, 'On Arbitral Tribunals in the Russian Federation' [Федеральный закон от 24 июля 2002 г. № 102-ФЗ «О третейских судах в Российской Федерации» [*Federal'nyi zakon ot 24 iyulya 2002 g. No. 102-FZ 'O treteiskikh sudakh v Rossiiskoi Federatsii'*]].

in case law on domestic arbitration would be equally applicable to foreign awards, such decisions could also be of interest to foreign practitioners.

To take an example, Ch. VIII of the book concerns non-arbitrability of subject matter of the dispute (Art. V(2)(a) of the New York Convention). In the book, Spiegelberger only found one case which would fit within this ground. There had been many other cases decided in Russian commercial courts on this point, and some of them were widely discussed – but these other cases concerned domestic rather than foreign awards.

There is something to be said for author's approach, however, because for the foreign audience the actual treatment of foreign awards in Russia is an important indicator in itself. The perceived danger of prejudice from national judges – or absence thereof – is often a central consideration in matters concerning the choice of forum for dispute resolution and, more generally, overall structuring of business deals.

So what kind of picture does the book portray? What kind of legacy does the Supreme Commercial Court leave for the future? Spiegelberger's answer is, perhaps not altogether surprisingly, nuanced.

Several times in the book the author identifies cases where the courts have applied the rules of the wrong treaty or piece of legislation in enforcement-related actions. Thus, for example, in accordance with the New York Convention if there is a question about the adequacy of a notice received during the arbitral proceedings, the burden of proof lays firmly with the party resisting enforcement. However, in a few cases, the Russian courts have applied not the rules of the New York Convention but other non-applicable rules, such as those of Kyiv Convention or a bilateral mutual legal assistance treaty, which placed the burden of proof on the party seeking enforcement. In some instances, as Spiegelberger deftly puts it, the correct decision to grant or deny enforcement may have been reached by accident, as a result of misguided but fortunate application of the wrong provisions. This happened, for example, where the court first declared that the party seeking enforcement has the burden of proof on the issue of notice, but then this burden was properly discharged by the opposing party as the New York Convention requires.[7]

Sometimes when the decisions of Russian courts on a particular topic are simply listed together, they may appear contradictory at first sight when in fact they are not. Such was the situation with the question of whether the proportionality of penalties[8] awarded by the arbitral tribunal to the main debt constituted an element of Russia's public policy and therefore could be used as a ground to refuse recognition and

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[7] Decision of the Supreme Commercial Court of the Russian Federation of July 25, 2007. Case No. A41-K1-17994/06.

[8] These were termed by Spiegelberger, in a common law fashion, as liquidated damages – whereas in the Russian legal system there is no such thing; there is no requirement for contractual sanctions to be a 'genuine pre-estimate of loss suffered,' and penalties as such are perfectly enforceable, subject normally to the requirement of reasonableness.

enforcement of an award under Art. V(2)(b) of the New York Convention. Although some earlier decisions suggested an affirmative answer, the overwhelming bulk of later cases, including the leading ones from the Supreme Commercial Court, confirmed that it did not, and therefore this ground could not be invoked. Thus there was no real contradiction here but only the subsequent correction of earlier erroneous approaches.

Another special group of cases, and the one that perhaps has the greatest potential of capturing the imagination of non-Russian readers and engendering a prejudice in the easily impressed, relates to *Yukos*. *Yukos* was the Russian oil company whose owner Mikhail Khodorkovsky was jailed in 2003, allegedly in connection with fraud, embezzlement and tax evasion; after a great deal of litigation in Russian courts (some of which had to do with various arbitrations initiated by *Yukos*'s affiliated companies) the oil giant was bankrupted and later its assets were effectively purchased by state-owned corporations. The whole story became particularly famous after several cases initiated by former shareholders of *Yukos* against Russian Federation were decided by the European Court of Human Rights and investment arbitrations.

Having considering the legal merits of the Russian courts' positions in these arbitration-related *Yukos* cases in a fairly neutral manner, Spiegelberger makes an observation that has a clear ring of truth to it: one must not judge the Russian legal system by these cases, because too many factors prevent them from becoming a commonly followed precedent. These cases were a distortion, an anomaly against the general background – which is a universal rather than purely Russian phenomenon as Oliver Wendell Holmes once noted,[9] – and should be treated accordingly.

Apart from these major problematic groups, Spiegelberger often expresses agreement with the decisions of Russian courts. In a majority of cases, quality of decision making in Russian courts did not seem to be an issue. On the opposite, he found a number of the decisions interesting and remarkable in one or another aspect.

Mr. Spiegelberger's practical experience is evident throughout the book. Of particular interest is his description of the tactic where a third person (such as a shareholder of a losing party in arbitration) attacks the validity of the underlying contract in the dispute. This is done with the aim of obtaining a court ruling declaring the contract invalid and therefore incapable of producing any debt, and later using this judgment as a ground to invoke the public policy exception. The latter is based on the notions that court decisions must be complied with, arbitral award cannot disregard or directly contradict a court decision concerning the parties, and *res judicata* constitutes an element of public policy. Spiegelberger nicknamed this

[9] 'Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment' (*Northern Securities Co. v. United States*, 193 U.S. 197, 400 (1904)).

maneuver 'the Russian defense;' perhaps it is not completely unheard of elsewhere,[10] but the frequency of its use in Russia indeed does make this a fair label.[11]

In another place, he describes in passing a scheme – charming in its simplicity – allowing the circumvention of the rule on non-arbitrability of corporate disputes (*i.e.* the rule that disputes among shareholders of a company and between shareholders and the company itself cannot be arbitrated in Russia): introducing a 'proxy' Russian company wholly owned by an overseas corporation where, in turn, the real owners hold their shares and where corporate disputes can be arbitrated.

The meticulously compiled tables presented in appendices to the book provide the details of all cases granting or denying enforcement of awards which the author analysed; these tables are set out by year, arbitral institution, defense(s) pleaded, *etc*. The best compliment to the now liquidated Supreme Commercial Court (and of course to other actors such as local counsel, lower courts judges and legal community in general) is that throughout the period of 2003–13 the number of cases presented for enforcement, as well as the rate of enforcement, grew steadily and substantially. In 2013, for example, the overall enforcement rate in Russia, in accordance with Spiegelberger's calculations, was in the region of 90%, which is roughly the same as the estimates of enforcement rates worldwide.[12] This is an extremely welcome empirical proof that foreign arbitral awards have been routinely enforced in Russia in a consistent manner throughout a number of years.

It remains to be seen whether this tendency will continue in the coming years; there is nothing yet in the practice of the new Supreme Court to suggest otherwise, and this is certainly the hope of the present author that there will be no distortions and anomalies in the future, and that Russia will still be an arbitration-friendly jurisdiction another eleven years later. This excellent book by William R. Spiegelberger will certainly assist in realizing that hope.

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[10] For instance, in Switzerland: ATF 140 III 278; 4A_374/2014.

[11] The variation of this technique outside arbitration where one set of court proceedings to recover a contractual debt is 'torpedoed' or at least delayed by another one where the validity of such contract is questioned was once so popular that the Supreme Commercial Court devoted a special Informational Letter to dealing with it (Ruling of the Plenum of the Supreme Commercial Court of the Russian Federation No. 57 of July 23, 2009).

[12] Albert J. van den Berg, *Why Are Some Awards Not Enforceable?*, in New Horizons in International Commercial Arbitration and Beyond (= 12 ICCA Congress Series) 291 (Albert J. van den Berg, ed.) (Kluwer Law International 2005).