000. Federal *Arbitrazh* Court, Moscow District, 27 August 2009, Ruling No. KG-A40/8155-09, Case No. A40-51596/09-68-437[1]

Parties:	Petitioner: Capital Group LLC (Russian Federation) Respondent: Eric van Egeraat Associated Architects BV (Netherlands)
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Subject matters:	– lack of impartiality by arbitrator (no) – scope of arbitration clause – review of evaluation of evidence (no) – review of merits of award (no)
Commentary Cases:	[5]-[7] = ¶ 521; [8] = ¶ 512; [9] = ¶ 501; [9]-[10] = ¶ 502

Summary

On 5 September 2003, Capital Group LLC (Capital) and Eric van Egeraat Associated Architects BV (Van Egeraat) entered into an agreement for certain works. The agreement contained a clause for arbitration of disputes at the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

A dispute arose between the parties. On 17 March 2008, an SCC arbitral tribunal rendered an award in favor of Van Egeraat, directing Capital to pay certain sums for the first stage of the works, additional work, loss of profit and violation of Van Egeraat's copyright, as well as the costs of the arbitration. Van Egeraat sought enforcement of the Swedish award before the Moscow *Arbitrazh* (Commercial) Court. On 30 June 2009, the court granted enforcement. Capital appealed.

[1] Prepared by Roman Zykov, Hannes Snellman Attorneys, Moscow/Helsinki.

The Federal *Arbitrazh* Court for the Moscow District affirmed the lower court's decision that there was no ground to deny enforcement. It denied in particular Capital's allegation that one of the arbitrators had been biased because she participated in a conference where claimant's counsel was one of the speakers and that was allegedly organized by his law firm. The court noted that the law firm at issue was merely a media sponsor of the conference and concluded that participation in the conference led to "no legal relation, interrelation or commercial interest" between the law firm, its partner who then became Van Egeraat's counsel, and the arbitrator in the SCC arbitration.

Nor was Capital's argument that the arbitrators decided on matters beyond the scope of the arbitration clause successful. The court reasoned that the arbitration clause in the contract was a broad clause that encompassed Van Egeraat's claim for payment for additional work because this work was performed under the Agreement and had an "obvious and close link" with it.

The court finally rejected Capital's argument that the amount of the compensation was not proportionate to the extent of Capital's liability and a further argument in respect of Van Egeraat's copyright claim, holding that they both concerned the merits of the case, which could not be reviewed by the enforcement court.

Excerpt

[1] "Having discussed the arguments in the appeal and having reviewed the accuracy of the court of first instance's application of the procedural law provisions and the conformity of the arguments given in [the decision below] with the existing evidence in the case – in the manner provided for in Arts. 284, 286 and 287 of the *Arbitrazh* Court Procedure Code of the Russian Federation [the *Arbitrazh* Code] – this Court of Appeal concludes that the contested ruling is to be upheld and this appeal is not to be granted.

[2] "According to Article 241.1 of the *Arbitrazh* Code, decisions of foreign state courts rendered by said courts in disputes and other cases arising in respect of entrepreneurial and other

economic activities (foreign court decisions) and awards of arbitral tribunals and international commercial arbitration panels rendered by said tribunals and panels in foreign states in disputes and other cases arising in respect of entrepreneurial and other economic activities (foreign arbitral awards) are recognized and enforced in the Russian Federation by the *Arbitrazh* courts if recognition and enforcement of such court decisions and arbitral awards is provided for in an international agreement of the Russian Federation and in federal laws.

[3] "In accordance with Art. III of the [1958 New York Convention], to which the Russian Federation and the Netherlands are parties, each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is enforced. Pursuant to Art. V Convention, recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(1) the parties to the agreement referred to in Art. II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;
(2) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case;
(3) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration; or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration

took place; or the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
(1) the award has not entered into legal force under the law of the state in which it is invoked;
(2) the party against whom the award is invoked was not timely or properly notified of the time and place of the proceedings or was otherwise unable to present its case to the court;
(3) pursuant to an international agreement of the Russian Federation or a federal law, the court proceeding is considered to be under the sole jurisdiction of a court of the Russian Federation;
(4) a court ruling exists which has entered into force in the Russian Federation and was rendered in a dispute between the same parties, on the same subject and on the same grounds;
(5) a court in the Russian Federation is trying a case concerning a dispute between the same parties, on the same subject and on the same grounds, and that proceeding was commenced before a proceeding concerning the case was commenced in a foreign court; or a court in the Russian Federation first commenced proceedings in relation to a claim concerning a dispute between the same parties, on the same subject and on the same grounds;
(6) the statute of limitations for enforcing an award of a foreign tribunal has expired and this term was not restored by an *Arbitrazh* court;
(7) the enforcement of the award of a foreign tribunal would contradict the public policy of the Russian Federation.

[4] "When granting the petition of Van Egeraat to recognize and enforce the award of the Arbitration Institute of the Stockholm Chamber of Commerce dated 17 March 2008 ..., the court of first instance reasonably concluded that in this particular case there were no legal grounds for refusal as provided for in the Convention and in Arts. 244.2 and 239.4 of the *Arbitrazh* Code. This cassation court agrees with the conclusions of the court of first instance. Capital's arguments

stated in the appeal are unfounded and are not accepted by this appellate court on the following grounds.

[5] "*Interest in the outcome of the case by one of the arbitrators, … as a result of her participation in the academic training conference 'United Nations Convention on Contracts for the International Sale of Goods: 25 Years of Application – Achievements and Perspectives', which took place on 7-8 December 2005 in Moscow*. Claimant's legal counsel, at the time a partner in the law firm which later represented the interests of claimant in the dispute with respondent, was among the lecturers at said conference. Further, according to respondent, the law firm was the organizer of said conference in 2005.

[6] "However, neither claimant's legal counsel nor its law firm was a conference organizer, paid for the conference to be held or could have influenced its program or the makeup of participants, including the participation of said arbitrator in said conference. The law firm was a media sponsor of said conference. As a result of the participation in said academic conference, no legal relation, interrelation or commercial interest arose between the law firm, its partner (claimant's legal counsel) and the arbitrator.

[7] "As a consequence, the arbitrator fully conforms to the requirements of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce and to international laws.

[8] "*The review by the Arbitration Institute, when rendering the award, of a number of issues which did not come within the purview of the arbitration clause.* This argument of Capital's does not agree with the subject matter of the arbitration clause stipulated in Clause 8 of the Agreement dated 5 September 2003, which provides that 'any dispute, controversy or claim arising out of or in connection with this Agreement, or the breach, termination, or validity thereof, shall be subject to final review by the parties through arbitration in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce'. The Agreement contains a so-called 'broad' arbitration clause, which testifies that an agreement to refer a broad number of issues arising out of or in connection with the Agreement [to arbitration] was reached between the

parties. The arbitration clause applies to claimant's claims for payment for additional work, on the basis of the obvious and close link of these claims with the Agreement dated 5 September 2003. Hence, the Institute of the Chamber of Commerce had jurisdiction to hear claimant's claims for payment for additional work. The additional work was performed under the Agreement.

[9] "*The amount of compensation sought does not comply with the principle of proportionality of civil liability*. This argument concerns the essence of the adjudicated dispute and does not relate to the grounds for refusing recognition and enforcement of a foreign court decision and a foreign arbitral award, the exhaustive list of which is embodied in Art. 244.1 of the *Arbitrazh* Code.

[10] "Further, the copyright issue is connected with the performance of the Agreement. The court of first instance fully and completely reviewed the circumstances of the case and accurately applied the norms of procedural law. The appeal does not contain arguments which refute the conclusions indicated in the contested judicial act. The arguments in the appeal amount to a re-evaluation of the existing evidence in the case, which, by virtue of Arts. 286 and 287.2 of the *Arbitrazh* Code, is not permissible in an appellate court.

[11] "There are no grounds in the case to reverse the court decision in cassation under Art. 288 of the *Arbitrazh* Procedure Code; therefore, the [present] appeal is not to be sustained.

[12] "In accordance with Arts. 274, 284, 186, 287.1.1 and 289 of the *Arbitrazh* Code, the Federal *Arbitrazh* Court for the Moscow District decides: (1) to uphold the ruling of the Moscow *Arbitrazh* Court dated 30 June 2009 in Case No. A40-51596/09-68-437; (2) not to grant the appeal of Capital Group LLC and (3) to reverse the suspension of the enforcement of the judicial act in first instance, which was rendered in Ruling No. KG-A40/8155-09 of the Federal *Arbitrazh* Court for the Moscow District dated 28 July 2009."