

Supreme *Arbitrazh* Court of the Russian Federation, 1 March 2010, No. VAS-17095/09 (BAC-17095/09)<sup>1</sup>

Parties:                   Petitioner: Edimax Limited (Cyprus)  
                                  Respondent: S.P. Chigirinskiy (Russian Federation)

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*Summary*

By agreements signed on 2 July 2008, Russian Land (Cyprus) Holding 1 Limited (Russian Land) bought certain shares from Edimax Limited (Edimax). Mr. Shalve Pavlovich Chigirinskiy signed letters of guarantee as security for payment by Russian Land. The agreements also provided that Divieto Limited (Divieto), a company owned by Chigirinskiy, issue a promissory note.

On 7 April 2009, Edimax commenced arbitration against Chigirinskiy at the London Court of International Arbitration, claiming payment of US\$ 32,029,982.40 for unpaid purchase price of the shares, loans and interest on delay in the performance of the agreement, and seeking an order that Divieto issue a promissory note. This proceeding was pending at the time of the present decision.

On 8 May 2009, Edimax sought an interim injunction in aid of the LCIA arbitration from the *Arbitrazh* (Commercial) Court of the City of Moscow, seeking to attach an apartment owned by Chigirinskiy in Moscow. On 12 May 2009, the court denied the application, holding that Edimax failed to prove the existence of any of the grounds set out in the *Arbitrazh* Court Procedure Code of the Russian Federation (the *Arbitrazh* Code) for granting an interim injunction. On 9 July 2009, the Ninth *Arbitrazh* Court of Appeals reversed and granted an injunction attaching Chigirinskiy's apartment. Tat'yana Romanovna Panchenkova, Chigirinskiy's former wife, appealed to the Federal *Arbitrazh* Court for the Moscow District, seeking annulment of this latter decision on the ground that the apartment had become her exclusive property following their divorce. On 26 November 2009, the Federal *Arbitrazh* Court reversed both earlier decisions and terminated the proceedings, finding that Edimax's application did not fall within the jurisdiction of the *arbitrazh* courts because one of the conditions for such jurisdiction - that the subjects involved are legal entities or sole owners - was not met, as the claim at issue was against Chigirinskiy, an individual guarantor who was not a sole owner. Edimax appealed.

The Supreme *Arbitrazh* Court of the Russian Federation referred the case to the Presidium of the Court, as it found that the lower court's decision holding that the court could not hear the application because the dispute was not commercial contrasted with the

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accepted interpretation of the law – that is, that *arbitrazh* courts may grant injunctions in aid of arbitration and have jurisdiction over commercial disputes – because the dispute at issue was in fact commercial.

The Court noted at the outset that Russian legislation provides that *arbitrazh* courts may grant interim injunctions in aid of (international) arbitration on certain listed grounds, and that they have jurisdiction over commercial disputes. Whether a dispute is commercial depends on the nature of the activities involved, in particular if they concern property and aim at making profit. Here, the letters of guarantee secured payment under agreements for the sale and purchase of shares: the agreements, the letters and the dispute were all of a commercial nature.

The Court found that, as a consequence, the decision of the Federal *Arbitrazh* Court was at odds with the accepted interpretation and application of the law by the *arbitrazh* courts. It therefore referred the case to the Presidium of the Supreme *Arbitrazh* Court.

The Court granted Edimax’s application to suspend enforcement of the disputed ruling of the Federal *Arbitrazh* Court, noting that Edimax had proved that it would be impossible to reverse the effects of the enforcement of that court decision if it were eventually held to be incorrect by the Presidium.

### *Excerpt*

[1] “This Chamber of the Supreme *Arbitrazh* [Commercial] Court of the Russian Federation examines in court hearings the submission of Edimax Limited ... [the Company] dated 4 December 2009 (unnumbered) to review by [the Court’s] supervisory power the ruling of the Federal *Arbitrazh* Court for the Moscow District of 26 November 2009 rendered in respect of Case No. A40-19/09-OT-13 of the *Arbitrazh* Court of the City of Moscow, concerning the Company’s application to grant interlocutory injunctions in relation to the residential apartment located ... in Moscow, with a total area of 339.7 square meters ..., in order to secure the claim submitted by the Company to the London Court of International Arbitration against Shalve Pavlovich Chigirinskiy.... Other individuals who participated in the case: Tat’yana Romanova Panchenkova....

[2] “The ruling of the *Arbitrazh* Court of the City of Moscow dated 12 May 2009 rejected the Company’s application, finding that claimant did not provide evidence of [the existence of] the grounds for granting interlocutory injunctions provided for in Art. 90.2 of the *Arbitrazh* Procedure Code<sup>2</sup> and that the request for provisional measures was unsubstantiated.

[3] “The ruling of the Ninth *Arbitrazh* Court of Appeals dated 9 July 2009 overruled the ruling of the court of first instance. Interlocutory injunctions were granted by attaching the apartment owned by S.P. Chigirinskiy ...; prohibiting the Administration of the Federal Registration Service for the City of Moscow to register the transfer of the title to said residential apartment to any third parties; and prohibiting the Central Territorial Bureau of Technical Inventory of the State Unitary Enterprise of the City of Moscow [Moscow City Bureau of Technical Inventory] to perform any actions in relation to the abovementioned apartment.

[4] “Tat’yana Romanovna Panchenkova, the owner of the apartment attached, appealed to the Federal *Arbitrazh* Court for the Moscow District with a cassation appeal, seeking to

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2.Art. 90.2 of the *Arbitrazh* Court Procedure Code of the Russian Federation (the *Arbitrazh* Code) reads:

overrule the ruling of the court of appeals. Tat'yana Romanovna Panchenkova stated that, until 14 April 2009, she and S.P. Chigirinskiy were married, and that the apartment, which was acquired after they were married, was jointly owned by the married couple. However, after they were divorced and their mutual property was divided, the apartment was transferred to Tat'yana Romanovna Panchenkova's personal ownership under the ruling (which has entered into force) of the Simonovskiy District Court of the City of Moscow dated 3 July 2009 in Case No. 2-2943/09. Consequently, the interlocutory injunctions violated her interests and deprived her of the possibility to freely dispose of her property.

[5] "The ruling of the Federal *Arbitrazh* Court for the Moscow District dated 26 November 2009 repealed the rulings of the court of first instance and the court of appeals and terminated the proceedings. The court held that the application to secure the claims pending before the London Court of International Arbitration did not fall within the jurisdiction of the *Arbitrazh* courts because the defining characteristics which determine whether a case falls under the jurisdiction of the *Arbitrazh* courts are the subjects involved ([that must be] legal entities or private owners) and the economic nature of the claims. Based on the documents provided by the Company, the letters of guarantee of 2 July 2008 were given by S.P. Chigirinskiy as a natural person (individual) to a company as security for the payment obligations of legal entities under agreements for the sale and purchase of shares. Accordingly, the claim examined by the *Arbitrazh* court was against citizen S.P. Chigirinskiy, who was not an owner and did not conduct any other business activity, which are the grounds for the *Arbitrazh* courts' jurisdiction.

[6] "By its application to the Supreme *Arbitrazh* Court of the Russian Federation to review by [the Court's] supervisory powers the ruling of the Federal *Arbitrazh* Court for the Moscow District dated 26 November 2009, the Company seeks to have this ruling repealed, arguing that it breaches the uniform interpretation and application of procedural law provisions by the *arbitrazh* courts, and to have the ruling of the Ninth *Arbitrazh* Court of Appeals dated 9 July 2009 upheld.

[7] "After reviewing the case materials, this Court concludes that there are reasons to transfer this case to the Presidium of the Supreme *Arbitrazh* Court of the Russian Federation because of the following.

[8] "According to Art. 90.3 of the *Arbitrazh* Code, *arbitrazh* courts can grant interlocutory injunctions - upon the application of a party to arbitration proceedings held at the place of the *Arbitrazh* court, the place of residence of the debtor, or the place where the debtor's property is located - as foreseen by Art. 90.2 and the general provisions of the *Arbitrazh* Procedure Code,

[9] "Item 34 of Decree No. 55 of the Plenum of the Supreme *Arbitrazh* Court of the Russian Federation dated 12 October 2006 explains that *Arbitrazh* courts grant interlocutory injunctions upon the application of a party to the commercial arbitration, on the basis of the general provisions set forth in the Code. As a result, according to the *Arbitrazh* procedure legislation of the Russian Federation, *Arbitrazh* courts have competence to grant interlocutory injunctions in cases reviewed *ad rem* by arbitral tribunals (international commercial arbitration).

[10] "The materials before the court show that the dispute between the Company and S.P. Chigirinskiy arose from letters of guarantee dated 2 July 2008 given by S.P. Chigirinskiy to companies and two natural persons as security for the obligations of legal entities under agreements for the sale and purchase of shares. Art. 27.1 of the *Arbitrazh* Code provides that *Arbitrazh* courts of the Russian Federation have jurisdiction over business and other economic activities. When determining the type of activity, the registration of an individual as a sole owner performing the activity is of no importance as an economic fact. Of more importance is the nature of those activities, in particular the performance of activities

regarding property and the intent to make a profit. There is a unified practice of *Arbitrazh* courts and courts of general jurisdiction of the Russian Federation that is based on the jurisdiction of *Arbitrazh* courts over cases concerning disputes in which citizens participate, when those citizens participate in economic or business relations.

[11] “In the case under review, S.P. Chigirinskiy gave letters of guarantee to secure the performance of the payment obligations of legal entities under agreements for the sale and purchase of shares. There is evidence in the case materials that the debtor giving the letters of guarantee acted on behalf of the entity controlling Russian Land (Cyprus) Holding 1 Limited, which was the buyer in the agreements for the sale and purchase of shares for which S.P. Chigirinskiy acted as guarantor, as well as on behalf of Divieto Limited (which issued the promissory note), of which [Chigirinskiy] states that he was the beneficiary owner.

[12] “Further, the agreements for the sale and purchase of shares for whose performance S.P. Chigirinsky provided security were of an economic nature, since their purpose was to effectuate a change in the shareholders of foreign companies. As a result, the letters of guarantee, which were issued as a security for transactions of an economic nature, and the dispute arising from the letters of guarantee are themselves of an economic nature.

[13] “Under these circumstances, the *arbitrazh* courts of the Russian Federation had jurisdiction to grant interlocutory injunctions in this case. Hence, this Chamber is of the opinion that the court decision at issue breaches the uniformity in the *arbitrazh* courts’ interpretation and application of the provisions of the law. According to Art. 304.1 of the *Arbitrazh* Code, this is a reason to transfer the case to the Presidium of the Supreme *Arbitrazh* Court of the Russian Federation.

[14] “The Supreme *Arbitrazh* Court of the Russian Federation also received an application of the Company to suspend the ruling of the Federal *Arbitrazh* Court for the Moscow District dated 26 November 2009. Taking into account the above considerations, and, enforcement of the ruling of the Federal *Arbitrazh* Court for the Moscow District dated 26 November 2009 in this case shall be suspended until the end of the supervisory review proceedings in accordance with Art. 298 of the *Arbitrazh* Code of the Russian Federation.

[15] “Taking the above into account and pursuant to Arts. 298, 299, 300 and 304 of the *Arbitrazh* Code, this Court rules to:

(1) suspend enforcement of the ruling of the Federal *Arbitrazh* Court for the Moscow District dated 26 November 2009, rendered in respect of Case No. A40-19/09-OT-13 of the *Arbitrazh* Court of the City of Moscow, until the end of the supervisory review proceedings in Case No. VAS-17095/09 (BAC-17095/09);

(2) transmit Case No. A40-19/09-OT-13 of the *Arbitrazh* Court of the City of Moscow to the Presidium of the Supreme *Arbitrazh* Court for supervisory review of the ruling of the Federal *Arbitrazh* Court for the Moscow District dated 26 November 2009 in this case;

(3) send copies of the decision, applications and attached documents to the entities participating in the case;

(4) propose to the entities participating in the case that they provide statements to the Presidium of the Supreme *Arbitrazh* Court on the application of Edimax Limited dated 4 December 2009 (unnumbered) - seeking review by [the court’s] supervisory powers of the ruling of the Federal *Arbitrazh* Court for the Moscow District dated 26 November 2009, rendered in respect of Case No. A40-19/09-OT-13 of the *Arbitrazh* Court of the City of Moscow - before 1 April 2010.”