

Case No: CL-2016-000720

Neutral Citation Number: [2017] EWHC 2208 (Comm)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

Rolls Building, 7 Rolls Buildings

Fetter Lane, London

Date: 01/09/2017

Before :

MR JUSTICE BLAIR

Between :

	In an arbitration claim	
	ZAVOD EKTRAN OAO	<u>Claimant</u>
	- and -	
	MAGNECO METREL UK LTD	<u>Defendant</u>
	And in the matter of an arbitration	
	ZAVOD EKTRAN OAO	<u>Claimant in the arbitration</u>
	- and -	
	MAGNECO METREL UK LTD	<u>Defendant in the arbitration</u>

Andrew Lenon QC and Ekaterina Sjostrand (instructed by **Marriott Harrison LLP**) for the
Claimant

Philip Gillyon (instructed by **Archers Law LLP**) for the **Defendant**

Hearing date: Friday 9 June 2017

Judgment

Mr Justice Blair :

1. This is an application by the defendant (“D”) pursuant to s. 103(2)(c) of the Arbitration Act 1996 and CPR r 62.18(9) to set aside an order of Males J dated 16 January 2017 by which he (i) gave the claimant (“C”) leave to enforce an arbitration award against D pursuant to s. 101(2) and (ii) entered judgment against D in the terms of the award pursuant to s. 101(3) of the Act. The arbitration award (“the Award”) is dated 13 July 2016 and was made by an arbitral tribunal of the International Commercial Arbitration Court (“the ICAC”) at the Chamber of Commerce and Industry of the Russian Federation.
2. The sole issue for decision is whether D was given “proper notice” of the arbitration proceedings within the meaning of s. 103(2)(c) Arbitration Act 1996. C says that “proper notice” was given, and that the application should be dismissed.
3. D to the contrary says that it was not (i) given proper notice of the appointment of the arbitrators, (ii) given proper notice of the arbitration proceedings, and (iii) was otherwise unable to present its case in the arbitration, and that consequently the court should refuse recognition and enforcement of the Award.

The making of the contract

4. There are a number of witness statements and exhibits before the court which set out the facts so far as relevant. C is a Russian glass manufacturing company based in Novosibirsk, Siberia, and D is an English company based in County Durham which manufactures refractory materials: it is a subsidiary of Magneco Metrel Inc, an Illinois company.
5. On 30 April 2013, C and D entered into a sale and purchase contract under which D agreed to supply certain refractory materials to C for use in the repair of one of C’s furnaces (“the Contract”). The Contract contained text in English and in Russian side by side, providing that “in case of any discrepancies the English text will prevail”.
6. The Contract was expressed to be subject to Russian law, and provided for disputes to be referred to arbitration at the ICAC at the Russian Chamber of Commerce and Industry in Moscow. In full, the relevant clause was as follows:

“10. Arbitration.

10.1 All disputes and discrepancies arising during the fulfilment of this Contract will be resolved as far as possible by negotiations between parties. Should the parties not negotiate, the matter should be transferred with the exception of general courts jurisdiction to the International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry under the Russia law.

10.2 The parties agree that during the settlement of disputes the Rules of the International Commercial Arbitration Court at Russia’s Chamber of Commerce and Industry and the substance of Russia shall be applied.

10.3 The Contract shall be governed by the laws of Russia. The place of arbitration – Moscow, Russia.

The language of arbitration – Russian.

10.4 In all other cases not stipulated in this Contract the parties are governed by Russia law and International regulations of interpretation of Incoterms 2010.

10.5 The Arbitrage award is final and obligatory for both parties.”

The dispute and the subsequent arbitration

7. The goods were supplied, and repair works were carried out in 2013, but problems arose with the repaired furnace (furnace no 4) after it was put back into operation in 2014. The cause is strongly disputed. C’s case is that the concrete wall showed signs of damage and in November 2014 there was a major leak of molten glass. C alleges that the goods supplied by D were of poor quality and that D is liable to compensate it for failure to fulfil the Contract. This is denied by D which contends that the materials were compliant with the contractual specification, and that the problem may have been caused by C’s failure to operate the dry-out procedure. D says that an acceptance certificate had been issued by C, but that it sought to assist by providing expert opinions, and that no claim was made within the contractual period of 90 days. These are factual matters which the court cannot, and is not asked to, resolve on this application.
8. The dispute was not settled amicably, and C’s case is that it referred the dispute to arbitration under ICAC on 22 December 2015. This does not seem to be in issue, and although no evidence of the referral is exhibited, paragraph 1 of the English translation of the Award refers to it. The parties do however disagree as to whether the possibility of arbitration was raised by C with D in advance, and this is considered below. It is accepted that D received the arbitration claim form and documents annexed to it under cover of a letter from ICAC dated 14 January 2016, but this was almost entirely in Russian, and D did not receive a translation. Various other documents were similarly received by D from ICAC over the next few months, including as to the appointment of arbitrators. C itself does not appear to have been in contact with D at this time.
9. D took no part in the arbitration. The hearing took place in Moscow on 26 May 2016. On 13 July 2016, the Tribunal issued an Award, awarding C its full claim, being damages for breach of contract in the sum of US\$270,233, euros 3,743.28, RUB (Russian roubles) 54,955,310.89 and costs. D points out that the Award included both the contract price and damages for breach of contract, and argues that such an apparently excessive result shows the importance of proper notice of the arbitration being given, which it says was lacking here. The Award has not been paid, and as noted above, by order dated 16 January 2017 made on the papers on C’s application, judgment was entered on the Award pursuant to s. 101 of the Arbitration Act 1996. As it is entitled to do, D applies to set the order aside.

The law

10. It is common ground that the Award made in the Russian Federation is a New York Convention award as defined by s.100(1) Arbitration Act 1996. Accordingly, its recognition and enforcement are governed by ss. 101 and 102. The grounds on which recognition and/or enforcement may be refused are set out in s. 103, which implements Art. V of the Convention.

11. Section 103 Arbitration Act 1996 provides (so far as relevant):

“103 Refusal of recognition or enforcement

(1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.

(2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves—

...

(c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;”

12. D relies on the grounds in s 103(2)(c). There is little English authority as to the meaning of “proper notice”, but in context, it is an aspect of the wider notion that the party contesting enforcement was unable to present its case (Merkin, *Arbitration Law*, §19.53), so that lack of proper notice suggests some unfairness (*Russell on Arbitration*, 24th edn, §8-040: and see generally *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315 at 327, *Irvani v Irvani* [2000] 1 Lloyd's Rep 412 at 426, *Kanoria v Guinness* [2006] 1 Lloyd's Rep 701 at [23]). In the context of s 103(2)(c) Arbitration Act 1996, “proper notice” is such as is likely to bring the relevant information to the attention of the person notified, taking account of the parties’ contractual dispute resolution mechanism, including any applicable institutional arbitration rules (as to the relevance of the latter points see Born, *International Commercial Arbitration*, 2nd edn, p. 3509). In this sense, notice is treated by the court as a question of fact (as in *LKT Industrial Berhad (Malaysia) v Chun* [2004] NSWSC 820), the onus of proof being on the party raising it as a ground of refusal of enforcement of the award, as expressly specified in s. 103(2) Arbitration Act 1996.

Discussion

13. In putting its case, D relies on a number of specific points, which apply in general terms to all three of its points. It is convenient to begin with its contention that it was not given proper notice of the arbitration proceedings. D asserts that no letter before action was sent by C threatening arbitration. It is common ground that this is

potentially relevant not just as a usual precursor of the arbitral process, which it clearly is, but more broadly in the context of the notice issue.

14. In its evidence, C relies on a letter (in Russian) dated 10 February 2016, but as D says, this letter does not specifically refer to arbitration. It refers to C being “still interested in the peaceful settlement of the incident”. In any case, it comes after the commencement of the arbitration, and was presumably intended to offer negotiation as an alternative. It does not advance C’s case on notice as given by itself.
15. At the hearing, C produced a further letter dated 20 July 2015 sent to D. The production of a letter at the last minute in this way is unsatisfactory, and though D did not seek an adjournment, the court directed an affidavit to be filed by C as to the provenance of the letter. This was duly filed on 16 June 2017, and together with the courier documentation, appears to show that the letter was indeed received by D in England, as well as by D’s head office in Illinois, and by Mr Edward Goncharov, a Russian speaker said to be D’s area manager in St Petersburg.
16. At the bottom of page 4 at the end of this letter, there is a specific threat of arbitration. C says that if its demand for payment is not met, it would have no choice but to bring a claim at the International Commercial Arbitration Court at the International Chamber of Commerce and Industry of Russia. The evidence also shows a letter proposing a settlement signed by Mr Goncharov dated 18 August 2015 which could be a response to the letter of 20 July 2015, though it is not referred to (nor is arbitration).
17. However, whatever the precise facts, the letter of 20 July 2015 does not go very far to meet D’s assertion that it did not get proper notice of the arbitration which was actually commenced much later in the year. D rightly submits that a feature of the case is that there is not the kind of chain of correspondence between the parties with threats of arbitration culminating in express notice that the dispute is about to be referred to arbitration that one might normally expect.
18. In this regard, what is crucial to the issue for decision is what D received from the arbitral body itself. The most important part of the evidence in this respect has already been noted. On 15 January 2016, at its offices in England, D received the arbitration claim form and documents annexed to it under cover of a letter from ICAC dated 14 January 2016. The receipt is evidenced by the documentation issued by the courier, DHL, being the airway bill, which shows that the shipper was “Commercial Arbitration Court” in Moscow, and the “proof of delivery/statement of final status” sent to its customer (i.e. ICAC) dated 28 January 2016. According to the latter document, the package was signed for by the receiver (i.e. D), the name of an individual being given. There has been no suggestion made by D that it was not signed for, and it clearly was.
19. D accepts that it received this package at its offices in England. The package consisted of C’s arbitration statement of claim, and documents annexed to it totalling some 150 pages. D’s objection is that the letter of 14 January 2016 was almost entirely in Russian, and D did not receive a translation. D accepts that the letter drew attention to the Rules of ICAC requiring D (i) to appoint an arbitrator and a reserve arbitrator within 15 days, and (ii) to present its written explanations on C’s claim (i.e. file a defence) within 30 days. D objects that those requirements were never notified

to it in English. It says that there was nothing in any of the documents exhibited by C which would have alerted D to either of those requirements or the deadlines. Accordingly, D submits that it was not notified of any procedural steps required to be taken by it following service of the arbitration claim.

20. This obviously raises the question what D thought that the package, clearly a significant one, and delivered by courier, actually consisted of. Its witness evidence is to the effect that it believed the documents were a repeat of C's earlier and unfounded complaints about the company. D says that it did not know the significance of the ICAC, or what it was, and had never had any dealing with it. It was not a case, D says, of choosing to ignore the proceedings—D was prevented from understanding the documents by the absence of an English translation. That is why it did not take advice in relation to them.
21. There has to be some question mark as to the credibility of this explanation. However, there is no need to resolve the issue for the following reason. D accepts that though the body of the covering letter of 14 January 2016 is in Russian, the heading is in English. It states in English that it comes from the "THE INTERNATIONAL COMMERCIAL ARBITRATION COURT AT THE CHAMBER OF COMMERCE AND INDUSTRY OF THE RUSSIAN FEDERATION". Additional wording in English says that this body was, "Founded in 1932" and a "Member of the International Federation of Commercial Arbitration Institutions (IFCAI)". The address at the bottom of the letter is in Russian and in English, but the email address in both includes the English word "arbitration".
22. A further important point is that though the attached documents were relatively voluminous, the letter of 14 January 2016 itself is a one page letter, which D could easily have arranged to have translated. It is unclear why it was not translated.
23. In the course of oral argument, the issues narrowed somewhat. It is not now in dispute that the letter of 14 January 2016 would have been proper notice of the arbitration had it been in English. It was accepted on behalf of D that the mere fact that the body of the letter is in Russian does not in itself rule the letter out as "proper notice" of the arbitration. It was accepted that had the letter stated in English that it was a "notice of commencement of arbitration", or "in the matter of an arbitration", that would have been sufficient notice of the arbitration proceedings, even though the rest of the letter was in Russian.
24. That acceptance was clearly correctly made. The language of communication of official documents can raise important issues of principle. For example, EU citizens have the right to use any of the EU's 24 official languages in correspondence with EU institutions, which have to reply in the same language. However, in the context of international commerce, the fact that notice of an arbitration is received in England in a language other than English should not in itself affect the validity of the notice, though it may do so, depending on the circumstances. It is easy to envisage some circumstances in which it would not amount to proper notice.
25. However, such circumstances do not obtain in this case. It is relevant in this regard that the parties entered into a Contract providing for arbitration in Moscow under Russian law through the ICAC, that at least some of the communications between the parties were in Russian, and that a dispute had arisen between the parties as to

performance of the Contract in Russia (albeit D says that the dispute was quiescent). Further, as C points out, the Contract provides that the language of the arbitration was to be Russian. However, the most important point from a practical perspective is that the heading of the letter of 14 January 2016, in English, states that it comes from the Moscow arbitration body—the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation. As C submits, from that alone it should have been obvious that an arbitration was being commenced. There was no other reason for ICAC to be writing to D.

26. Applying the test set out above, the letter of 14 January 2016 was clearly likely to bring the relevant information to the attention of the person notified. It follows that D cannot show that it was not given proper notice of the arbitration proceedings.
27. This also answers D's contention that it did not receive "proper notice of the appointment of the arbitrator". Again, the sole ground is that the information was stated in Russian. Had D obtained a translation of the letter of 14 January 2016, which it reasonably should have done, it would have read that C had at that time chosen an arbitrator (and reserve arbitrator), who were named. D was informed that unless an appointment was made within 15 days, D's arbitrator would be chosen according to the Rules of ICAC.
28. What in fact happened was that D was subsequently notified by letter of 9 March 2016 (in Russian) that an arbitrator and reserve arbitrator had been appointed for it under the ICAC rules, along with a Chairman and reserve Chairman of the arbitral tribunal. The arbitrators appointed for D later appear to have stood down, and D was notified by letter of 24 May 2016 (in Russian) of their replacements again appointed under the ICAC rules.
29. Both the letters of 9 March and 24 May 2016 were brief, with the same heading etc. as the letter of 14 January 2016. Both were delivered to D in England by DHL in the same way as before. It was equally reasonable to expect D to have them translated, but again no action was taken. In the circumstances, the fact that the body of the letters was in Russian does not show that D "was not given proper notice of the appointment of the arbitrator" under s.103(2)(c), and it clearly was.
30. Between these letters, by letter of 30 March 2016 from ICAC, D was notified (in Russian) that the hearing of the claim would take place in Moscow at 10.30am on 26 May 2016 at a stated address, and the arbitral tribunal was named. Again, the letter was in the same form, and delivered by DHL, as before. D contends that because this information was given in Russian not English, it was unable to present its case within the meaning of s.103(2)(c). The points made above apply equally, and this contention is not accepted either. There was no breach of natural justice in this case.
31. In the same way as before, by letter of 30 May 2016, D was invited to comment on the claim for costs, and again no action was taken. On 15 July 2016, D was sent a copy of the Award.
32. On 25 April 2017, D applied to annul the Award in the Arbitration Court of Moscow, but those proceedings were dismissed on 5 June 2017 (on grounds apparently related to the authority to bring proceedings on behalf of D, although C contends that the

proceedings are time-barred in any event). D does not rely on the proceedings in Russia for the purposes of the present application.

Conclusion

33. It may be thought that this is an unfortunate case, and it may fairly be said that C could have done more to alert D to the commencement of the arbitration. It may also fairly be said that ICAC itself could have done more to explicitly flag in the English language the importance of dealing with its notifications, since the letters were sent to and received in England. But for the reasons given above, on the facts of this case the importance of dealing with the notifications was obvious, and the overall conclusion is not open to doubt. Applying the legal test, D was (i) given proper notice of the appointment of the arbitrators, (ii) given proper notice of the arbitration proceedings, and (iii) was otherwise able to present its case in the arbitration. There are therefore no grounds on which the court should refuse recognition and enforcement of the Award, and the application must be dismissed. The court is grateful to the parties for their assistance, and will hear them on any consequential matters.