



Russian Telecoms Giants Battle in the Isle of Man Courts

On 10 March 2011 the UK Privy Council sitting as the highest Court of Appeal for the Isle of Man ruled that a dispute between two Russian groups Mobile Telesystems (MTS) and Altimo, the telecoms branch of the Alfa Group, over the control of Bitel LLC, the leading mobile telecom provider in Kyrgyzstan, should be heard in the Isle of Man Courts.

It ruled that there is a substantial risk that the Claimants (three Isle of Man Companies under the ownership of MTS known as the KFG Companies) would not obtain justice in Kyrgyzstan and that, in reality, to deny them the ability to litigate in the Isle of Man would be to deny them any recourse to justice.

Bitel had been owned through the KFG companies, by individuals linked to the former Kyrgyz president Askar Akayev. In 2005 MTS, Russia's largest telecommunications operator, acquired the Manx holding companies after Akayev fell from power. A dispute arose between the KFG Companies and a Bermudian company which claims to have acquired the right to the Bitel shares in 2003 under a transfer agreement. This is the subject of a separate arbitration in the London Court of International Arbitration.

However, rather than resolve issues through arbitration as the contract required proceedings were commenced in Kyrgyzstan and in 2005 a Kyrgyz court ruled not only that the transfer agreement was valid, but that the Bermudian company had succeeded in passing the shares to a BVI registered company known as Fellowes.

A year later, despite the ongoing arbitration and a series of injunctions granted by courts in England and the BVI against Fellowes, the Supreme Court of Kyrgyzstan held that Fellowes was entitled to Bitel.

Its shares have subsequently passed through the hands of many different owners, also parties to the Isle of Man proceedings. The company's assets are now held by Russian telecommunications company Vimpelcom, in which the Alfa Group, the well known Russian energy, banking and telecoms consortium, is a major shareholder. Alfa's telecoms arm, Altimo, has been joined to the Isle of Man proceedings, it being alleged that it is complicit in the wrongful misappropriation of Bitel.

Ironically, it was Bitel itself, under its new control, that brought the matter to the Isle of Man. In 2006 it issued proceedings in the Isle of Man High Court, seeking to enforce a separate Kyrgyz court Judgment (unusually, a claim against the KFG Companies, its former shareholders) which awarded it US\$28 million in compensation for damage allegedly caused to its business during a raid on its offices by Kyrgyz “officials” said to be executing the Supreme Court judgment.

At the same time Bitel, under its new control, sought and obtained gagging and freezing orders against the KFG companies, in ex parte proceedings (brought without notice to them). In due course these draconian orders were lifted, the Court holding that they should never have been granted and that Bitel had been guilty of serious material non-disclosure and misrepresentation on the without notice application.

The KFG Companies then brought a series of counterclaims alleging that Fellowes and the other intermediate owners of the Bitel shares acted as agents – or front companies – for the Alfa Group in a conspiracy to gain control of Bitel through the Kyrgyz judgments that were obtained by fraud. It applied to join all the owners – 13 companies in total, none of which are based in the Isle of Man – to the proceedings and for leave to serve them with process out of the jurisdiction. The KFG Companies claim substantial damages of hundreds of millions of dollars.

Although Deemster Doyle initially granted leave to the KFG Companies to bring their claims against the foreign parties, he discharged that at the end of 2007. In November 2008 the KFG Companies successfully appealed that ruling before the Isle of Man Staff of Government Division.

Exceptionally, the Privy Council, constituted by a panel of five UK Supreme Court judges (Lords Collins, Phillips, Clarke, Mance and Kerr) granted leave to Appeal and this was heard in November and December 2010. The Appellants argued that the Isle of Man Court did not have jurisdiction to hear the dispute and further that even if it did have jurisdiction the matter should properly be heard in the Courts of Kyrgyzstan.

On 10 March 2011 the Privy Council handed down its Judgment with the leading opinion being delivered by Lord Collins. The Appeals were dismissed.

The case was described as “excessively complicated by any standards.”

The Judgment is important in a number of respects, not least in its detailed consideration of the rules of jurisdiction over foreign parties and the principles of forum non conveniens (the doctrine of the common law whereby courts may refuse to take jurisdiction over matters where there is a more appropriate forum available to the parties).

In his judgment, which reviews and clarifies the extensive English and Commonwealth case law on this and other issues, Lord Collins held that although “there can be no doubt that Kyrgyzstan is the natural forum” to hear claims based on Kyrgyz law and concerning events in Kyrgyzstan (as the KFG Companies admitted), “the fundamental point in this case is that, if there is no trial in the Isle of Man, there will be no trial anywhere.” He said it was “wholly unrealistic” to assume that the KFG Companies (the Respondents to the Appeal) “will ever be in a position” to assert civil claims in Kyrgyzstan.

One of the principle points in dispute in the litigation was the treatment afforded to the KFG Companies by the Kyrgyz Courts in earlier proceedings and the likelihood of them obtaining justice in that forum in the future.

Referring to the judgments of the Kyrgyz courts, Lord Collins said there was “substantial evidence of specific irregularities, breach of principles of natural justice, and irrational conclusions”, suggesting that KFG Companies would face “considerably more than a risk of injustice” in Kyrgyzstan.

In its strongly worded judgment, the Privy Council found that the 2005 Kyrgyz judgment, which recognised Fellowes as the owner of the Bitel shares, “can only be regarded as bizarre, and even [counsel to] the Alfa parties accepted that several of these conclusions may look strange through English eyes.”

The Kyrgyz court had held that Fellowes was a party to the 2003 transfer agreement, but that it was not bound by the arbitration agreement because it hadn’t signed the contract – an arbitration agreement that was, in the Kyrgyz court’s view, invalid because it did not name the tribunal.

Lord Collins said it was “impossible to understand” the reasoning of the Kyrgyz court, not least “how it could have decided that the arbitration agreement did not identify the arbitral tribunal when the clause plainly provided for appointment by the LCIA and when arbitral proceedings were already on foot”.

The decision is an important one that has clarified English and Manx law on the jurisdictional issues which arise where there is a risk of not obtaining justice in a foreign forum. The judgment confirms that “whether a foreign court or court system is corrupt or lacking independence is a justiciable issue”, contrary to the arguments of the Appellants on the Appeal.

The litigation is now expected to proceed in the Isle of Man, one of the most complex and substantial pieces of litigation ever to be brought here.

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