

Hong Kong court hears Russia's challenge to arbitrator in BIT case

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A Hong Kong court is hearing Russia's challenge to an arbitrator appointed by a German company in a bilateral investment treaty claim administered by the HKIAC – the same arbitrator having already been removed from a parallel Energy Charter Treaty case.

The previously unreported cases have come to light through a recent Hong Kong court [decision](#) rejecting the German company's request that Russia be ordered to post HK\$2.9 million in security for costs while the challenge to the arbitrator is decided.

While the parties' names and nationalities are redacted, the judgment indicates that the investor launched parallel arbitrations in October 2024 under the ECT and a bilateral investment treaty (the date of signature of the treaty is that of the 1989 Germany-USSR BIT). Both cases concern measures adopted by the respondent state in response to sanctions imposed on it by EU member states.

GAR believes it is highly likely that the claimant is German state-owned utility Uniper, which saw its Russian subsidiary Unipro placed under temporary state administration by Russian presidential decree in April 2023. Uniper has a nearly 84% stake in Unipro, which operates five power plants in Russia with around 4,300 employees. In 2021, it accounted for around €160 million of Uniper's adjusted net income.

Uniper has not made any disclosure about bringing investment treaty claims against Russia but GAR understands it instructed Herbert Smith Freehills Kramer for such claims, the same firm that is acting for the unnamed investor in the Hong Kong proceedings.

Contacted by GAR, Uniper declined to comment while HSF Kramer did not respond to requests for comment.

The arbitrator under challenge in Hong Kong is referred to in the judgment as "SS", which GAR understands to mean German academic **Stephan Schill**.

Russia is using Hong Kong boutique BF & Co for the court proceedings and Curtis Mallet-Prevost Colt & Mosle for the BIT case. The firms were contacted.

While the ECT case is being administered by the Permanent Court of Arbitration (PCA) in The Hague, the parties agreed in April last year for the BIT arbitration to be administered by the Hong Kong International Arbitration Centre (HKIAC) and seated in Hong Kong.

The claimant nominated SS as its arbitrator in both the ECT and BIT cases, leading Russia to challenge his appointment in both arbitrations. In the ECT proceedings, an appointing authority designated by the PCA upheld Russia's challenge in May last year, finding that SS's concurrent service in both the ECT and BIT arbitrations would give rise to justifiable doubts as to his impartiality. He has since been removed from the ECT panel.

However, a dispute arose as to how the challenge in the BIT arbitration should be handled because of a "lacuna" in the Germany-USSR BIT. The treaty provides that, unless otherwise agreed, each party to a dispute may request the chairman of the SCC Arbitration Institute to appoint arbitrators – but it does not specify by whom a challenge against an arbitrator is to be decided.

The claimant had initially proposed London as the seat of the BIT proceedings in its notice of arbitration, with the proceedings to be governed by the 1976 UNCITRAL rules. Russia did not agree to these proposals.

After the claimant said it would ask the SCC to determine Russia's challenge to SS in the BIT case. Russia objected and requested instead for it to be heard by an appointing authority designated by the PCA. Russia then said it would permit an individual on the SCC board to decide the challenge, but the parties failed to agree on which board member.

The impasse continued until April 2025, when the parties entered into a “procedural agreement” that the BIT arbitration would be administered by the HKIAC and seated in Hong Kong and that the challenge would be decided by the HKIAC instead of the SCC.

In its challenge in the BIT case, Russia cited SS’s appointment as arbitrator in multiple cases against the state – not just the two treaty claims by the German claimant but also a BIT claim launched by another party against Russia in February 2024.

GAR understands this refers to a [€3 billion claim](#) lodged by Finnish majority state-owned energy company Fortum, in which Schill is serving as claimant-appointed arbitrator. Fortum’s claim relates to thermal power plant assets that were put under state administration by Russian presidential decree at the same time as those of Uniper.

Russia also cited other grounds including SS’s authorship of academic writings on certain issues featured in the BIT arbitration which the state said give rise to concerns of prejudgment.

The HKIAC’s proceedings committee dismissed the challenge to SS in August last year. The BIT tribunal remains unconstituted, however, as SS and Russia’s appointee “NZ” – understood to mean **Nassib G Ziadé** – have not been able to agree on a presiding arbitrator.

The state applied in September last year to the Hong Kong Court of First Instance to decide on its challenge against SS, leading the German company to ask the court to grant security for costs.

Russia argued that as a sovereign state it was immune from the security summons by virtue of China’s 2023 law on foreign state immunity, which is applicable in Hong Kong.

In his decision dated 30 January, Deputy Judge **Jonathan Wong** noted the 2023 law has not been considered in any Hong Kong decision and that according to the parties’ experts there has been no Chinese case reported in connection with its implementation.

However, he said he was able to refuse the investor’s security application without engaging Russia’s arguments on sovereign immunity. While he said it was “tempting” to address the arguments raised, he said he should refrain from doing so here given the “importance and novelty” of the issue and its potential repercussions.

Even if Russia was not entitled to claim immunity, the judge said that in the exercise of his discretion no security should be ordered in the circumstances.

The judge said that “pro-award policy considerations” identified in a recent Hong Kong court decision on security for costs at the award enforcement stage “should not apply with full rigour” to security for costs applications where the parties’ claims are still to

be determined in the arbitration. Here, he said Russia was exercising its rights to ensure disputes will be determined by a tribunal that it considers to be independent and impartial.

He concluded that Russia's foreign residency and lack of assets in Hong Kong and the merits of the underlying challenge were not weighty factors.

The German company also argued security was justified because of Russia's failure to comply with any of the HKIAC's requests for payment of costs in the BIT arbitration. The investor noted that by contrast Russia has succeeded in making payments to the PCA in the ECT arbitration and that its ability to make international payments was underscored by the fact it has engaged a US law firm in the BIT arbitration.

Curtis explained on behalf of Russia that to facilitate payment in the ECT arbitration, the PCA has opened a bank account in a jurisdiction that has not adopted sanctions against certain banks, into which Russia has been able to transfer funds. The law firm said Russia has requested that the HKIAC take similar steps to help facilitate payment in the BIT arbitration but that no solution has yet been reached.

The judge said this was a "legitimate explanation" for Russia's failure to pay its share of the arbitration deposits in the BIT case because of sanctions, and did not prove that Russia would attempt to avoid paying any costs orders. He also noted that the amount of security sought was a very small portion of the monetary claim by the German investor in the arbitration.

The security request was determined on the papers on an urgent basis ahead of a substantive hearing on the challenge to SS that was fixed for 10 February.

GAR understands Schill was also unsuccessfully challenged by Russia in Fortum's BIT arbitration. Quinn Emanuel Urquhart & Sullivan acts for Fortum in that case, while Russia is using Pinna Goldberg.

Quinn Emanuel previously helped Uniper [win more than €13 billion](#) in a Stockholm-seated arbitration against Gazprom Export in 2024 over undelivered Russian gas.

Another German energy company, Wintershall Dea, is pursuing parallel ECT and BIT arbitrations worth €7.5 billion against Russia over measures taken against its assets following the invasion. The ECT case has received much publicity, partly thanks to the Russian courts' imposition of [injunctions and penalties](#) on the claimant, its German counsel and the arbitrators. Aurelius Cotta acts for Wintershall while Pinna Goldberg is again defending Russia.

In the Hong Kong Court of First Instance

Counsel to Russia

- BF & Co

Principal **Bryan Fok** in Hong Kong

Counsel to the German company.

- Herbert Smith Freehills Kramer

Partners **Simon Chapman KC** and **Antony Crockett** and registered foreign lawyer **Joris Bertrand** in Hong Kong



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