
THE
INTERNATIONAL
ARBITRATION
REVIEW

SEVENTH EDITION

EDITOR
JAMES H CARTER

LAW BUSINESS RESEARCH

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EDITOR'S PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another. The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more hours of reading from lawyers than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled by an analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world is consumed with debate over whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter

Wilmer Cutler Pickering Hale and Dorr LLP

New York

June 2016

Chapter 36

RUSSIA

Mikhail Ivanov and Inna Manassyan¹

I INTRODUCTION

The practice of resolving disputes through arbitration is undergoing rapid development in Russia. The arbitration system does not form part of the Russian judicial system, and thus provides an alternative form of dispute resolution. However, arbitration and the system under the state courts, despite all their differences, are in general equally recognised as instruments of civil rights protection, performing one and the same function of justice.

There are two types of commercial arbitration in Russia: international commercial arbitration and domestic arbitration. Separate laws have been developed with respect to both.

International commercial arbitration is governed by Russian Federation Law No. 5338-1 on International Commercial Arbitration dated 7 July 1993 (ICA Law), which is based on the Model Law on International Commercial Arbitration, adopted in 1985 by the United Nations Commission on International Trade Law (UNCITRAL Model Law). Amendments to the ICA Law were adopted on 29 December 2015 (see below), and will come into force on 1 September 2016.

The rules and regulations for domestic arbitration were set by Federal Law No. 102-FZ on Arbitration Courts in the Russian Federation dated 24 July 2002 (Law on Arbitration Courts). The Law on Arbitration Courts applies to domestic disputes provided that there is no foreign element, which would make the dispute subject to international commercial arbitration. Pursuant to Article 1(2) of the Law on Arbitration Courts, if the parties so agree, any dispute arising from civil law matters may be submitted to domestic arbitration courts, unless otherwise set forth in federal law. On 29 December 2015, a new Law on Arbitration (Arbitration Proceedings) No. 382-FZ was adopted (see below), which will regulate domestic arbitration in Russian starting from 1 September 2016.

¹ Mikhail Ivanov is a partner and Inna Manassyan is an associate at Dentons.

In the context of the enforcement and challenge of arbitral awards within Russia, the Commercial Procedural Code of the Russian Federation (CPC), which was adopted on 14 June 2002, must also be mentioned.

i International commercial arbitration

The ICA Law applies to international commercial arbitration if the seat of arbitration is in Russia. If the seat of arbitration is abroad, the ICA Law applies to such arbitration in specific cases provided by the ICA Law, such as for the enforcement and challenge of arbitral awards, the obligation of a state court to consider a claim that is subject to an arbitration agreement until one of the parties invokes such agreement, and taking interim measures in support of arbitration.

The main criterion qualifying arbitration proceedings as international is the presence of a 'foreign element' in the dispute, which means that either the parties to the dispute must be located in different countries or, if both parties to the dispute are Russian companies, at least one of them should have a foreign shareholder.

Pursuant to an agreement of the parties, the following disputes may be referred to international commercial arbitration:

- a* disputes resulting from contractual and other civil law relationships that arise in the course of foreign trade and other forms of international economic relations, provided that the place of business of at least one of the parties is situated outside Russia; and
- b* disputes arising between enterprises with foreign investments or international associations and organisations established in Russia, disputes between the participants of such entities, and disputes between such entities and other subjects of Russian law.

The revised version of the ICA Law that will enter into force on 1 September 2016 modifies the jurisdictional scope of the ICA Law. In particular, in line with the similar Article 1(3) (b)(ii) UNCITRAL Model Law provision, the ICA Law will provide that a dispute can be referred to international commercial arbitration if 'any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected' is situated outside Russia. At the same time, the proposed amendments remove the entitlement of Russian enterprises with foreign investments or their foreign shareholders to refer internal disputes to international arbitration, leaving place only for 'disputes arising out of foreign investments on the territory of the Russian Federation or Russian investments abroad'. The latter change has been proposed in view of certain restrictions imposed on arbitrating corporate disputes as described below.

The amended Law also provides that disputes involving foreign investors in connection with foreign investments on Russian territory or pertaining to Russian investments abroad, which are not covered by the above provisions of the Law, could be submitted to international arbitration in cases where it is so envisaged in international agreements to which Russia is a signatory or in Russia's federal law. The version of the ICA Law currently in force provides in a more general way for the supremacy of international law: in cases where an international agreement to which Russia is a signatory establishes rules other than those that are contained in Russian legislation relating to arbitration, the rules of the international treaty shall be applied.

Pursuant to Article 16(3) of the ICA Law, an arbitral tribunal is entitled to choose to examine the question of whether it has jurisdiction before considering the case on its merits, as a 'preliminary issue'; or at the same time as it makes its final award on the case.

This gives the tribunal the opportunity to take each case into consideration individually, and to weigh up the dangers of spending significant time and expense on unnecessary arbitration proceedings (if the decision on jurisdiction is retained until the issuance of the award on the merits). The ICA Law sets a time frame for judicial review of an arbitral tribunal's decision on its jurisdiction. If a separate decision on jurisdiction is made as 'a preliminary issue' under Article 16(3) of the ICA Law, this decision can be disputed in a state court within one month of the party's receipt of such decision.²

According to the ICA Law currently in force, a ruling of a state court issued upon examination of an arbitral tribunal's decision on its jurisdiction is not subject to appeal. While this wording was deleted from the amended version of the Law, it now appears in the amended Article 235(6) of the CPC. Pursuant to Article 16(3) of the ICA Law, while a decision on jurisdiction is examined by a state court, the arbitral tribunal may continue with the proceedings and make an arbitral award.

The restated Article 235(4) of the CPC further provides that if an award on the merits is rendered prior to consideration of the jurisdictional challenge by the state court, the court shall dismiss the challenge without prejudice to the claimant's right to raise its jurisdictional objections within the framework of procedures for annulment of the award or resisting its enforcement.

The ICA Law does not provide for a challenge in a state court of a tribunal's negative decision on jurisdiction to consider the dispute, rendered as a 'preliminary issue'. While such decision is not necessarily a final decision on the issue, an arbitral tribunal cannot be forced to examine a dispute.

The ICA Law provides for an exhaustive list of grounds on which an arbitral award may be set aside, basically reproducing the language of Article 5 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention). It should be noted that in general, state courts do not examine a case on its merits and do not oversee the reasoning of arbitral awards. The majority of grounds for setting aside an award are based on procedural breaches that have occurred within the course of the arbitral proceedings, and have to be proved by a party. An arbitral award may be set aside by the state court if:

- a* the party making the application for setting aside furnishes proof that:
- a party to the arbitration agreement was incapacitated, or the said agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereof, under Russian law;
 - a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case;
 - the award was made regarding a dispute not contemplated by or not falling within the terms of submission to arbitration, or contains decisions on matters beyond the scope of submission to arbitration, provided that if the decisions on matters submitted to arbitration can be separated from those on matters not so submitted, only that part of the award that contains decisions on matters not submitted to arbitration may be set aside; or

2 The amended ICA Law provides for an opportunity to opt out of such proceedings before the state court by parties' agreement.

- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the ICA Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with the ICA Law; or
- b* the court finds that the subject matter of the dispute is not capable of settlement by arbitration under Russian law, or the award is in conflict with Russian public policy.

The grounds for refusing recognition or enforcement of an arbitral award are almost the same as for the annulment of the award. Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

- a* at the request of the party against whom it is invoked, if that party furnishes proof to the competent court where recognition or enforcement is sought that:
- a party to the arbitration agreement was incapacitated in some manner or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereof, under the law of the country where the award was made;
 - the party against whom the award was made was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case;
 - the award was made regarding a dispute not contemplated by or not falling within the terms of submission to arbitration, or it contains decisions on matters beyond the scope of submission to arbitration, provided that if the decisions on matters submitted to arbitration can be separated from those on matters not so submitted, that part of the award that contains decisions on matters submitted to arbitration may be recognised and enforced;
 - the composition of the arbitral tribunal 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 foreign award has not yet become binding on the parties, or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or
- b* if the court finds that the subject matter of the dispute is not capable of settlement by arbitration under Russian law, or the recognition or enforcement of the award would be contrary to Russian public policy.

ii Domestic arbitration and domestic arbitration institutions

It should be noted that applicable Russian law provides for two types of arbitration: institutional arbitration and *ad hoc* arbitration (arbitral tribunals established for the resolution of a particular dispute). Permanent arbitration institutions have a permanent location and their own rules determining the procedure for arbitration proceedings, and do not terminate their activities when examination of a particular case is complete. An *ad hoc* tribunal is created for the resolution of a single dispute, and after the dispute's resolution is dissolved. There is no defined location; the proceedings are held at a location determined by agreement of the parties or by the *ad hoc* tribunal itself. The procedure for this type of arbitration proceeding, as a general rule, is determined by rules selected by the parties, with any deviations that the parties may agree upon.

According to both the ICA Law and the Law on Arbitration Courts, ‘arbitration’ means any arbitration whether conducted by a tribunal set up specifically for a given case or administered by a permanent arbitral institution. Recent amendments to the legislation on arbitration that take effect on 1 September 2016 draw a fundamental distinction between the status of institutional arbitration and *ad hoc* tribunals. In particular, in *ad hoc* arbitrations, a tribunal would not be authorised to consider corporate disputes, the parties cannot seek the assistance of the courts in collecting evidence and cannot agree on the ‘finality’ of the award (as explained below), which limits a court’s intervention in an arbitration in the form of setting a award aside. Following the completion of an *ad hoc* arbitration, the tribunal must deposit the entire file with an arbitral institution the parties have agreed on or, in the absence of such agreement, with the state court at the place of potential enforcement.

The new Law on Arbitration also introduces significant amendments to the functioning of institutional arbitration. One of the key novelties of the Law is that it has become considerably more difficult to form arbitration institutions in Russia.

Permanent arbitration institutions can now be created only as non-profit organisations, and will be able to engage in their activity only provided they obtain an authorisation from the government granting them the right to perform the functions of an arbitration institution. Such approval shall be adopted on the basis of a recommendation of the Council on Arbitration Development. Such restrictions on the formation of arbitration institutions could be explained by the excessive number of existing institutions (in Moscow alone, there are currently almost 500 such institutions);³ many such institutions were formed by Russian banks or commercial organisations, and have been recurrently criticised by the Russian courts for abuse of the arbitration process and for serving the business interests of their founders. The authorisation procedure established in the Arbitration Law aims to improve the existing situation.

To obtain a governmental authorisation, an arbitral institution must ensure that its rules and list of recommended arbitrators⁴ are in compliance with the provisions of the Law on Arbitration; the accuracy of the information provided with respect to the founding non-profit organisation; and that the effective management and financial sustainability of the arbitral institution could be supported by the reputation and activities of the founding non-profit organisation. A foreign arbitral institution is also required to obtain an authorisation in order to act on Russian territory, but the only requirement for obtaining such authorisation is its internationally recognised reputation. If the foreign institution fails to obtain an authorisation, arbitrations seated in Russia that it administers will be deemed *ad hoc*. This will entail certain negative consequences as described above. Further, the Law on Arbitration allows the forced dissolution of an arbitration institution on the basis of a decision of the state court in cases of repeated gross violations of the Law on Arbitration that have caused substantial damages to the rights of the parties to arbitration or of third parties.

3 See the list of arbitration institutions published by the Commercial Court of Moscow at www.msk.arbitr.ru/help_info/tret_su.

4 The list must contain at least 30 recommended arbitrators with at least half of the arbitrators on the list having more than 10 years of experience of settling disputes as an arbitrator or a judge, and at least one-third of the arbitrators having a relevant postgraduate degree obtained in Russia. The same arbitrator can appear on the lists of not more than three arbitral institutions.

As compared to the Law on Arbitration Courts, the new Law regulates in more detail the procedure for considering arbitration disputes, changes the procedure for appointing arbitrators, and clarifies arbitrator requirements (in particular, by setting a minimum age requirement of 25).

As previously mentioned, a large number of arbitration institutions have been established in Russia. The major arbitration institution in Russia is the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation in Moscow (ICAC). The ICAC is an independent and permanent arbitration institution operating in accordance with the ICA Law, the Statute on the ICAC annexed to the ICA Law and the ICAC Rules. Under the Law on Arbitration, the ICAC is exempt from the requirement to obtain a government authorisation.

Other well-established institutions are the Arbitration Court of the Moscow Chamber of Commerce and Industry (MCCI), the Arbitration Court of the St Petersburg Chamber of Commerce and Industry, and the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation in Moscow.

In 2013, the Russian Arbitration Association (RAA) was founded in Moscow with the aim of promoting arbitration in Russia and providing a possible alternative to the ICAC. The Arbitration Rules elaborated by the RAA stipulate its functions as an administering authority for disputes brought under the UNCITRAL Arbitration Rules. In accordance with its Rules, the RAA can act as an appointing authority (by assisting in the composition of the arbitral tribunal), review challenges of arbitrators and make decisions as to their replacement. To that end, RAA maintains a roster of arbitrators. In addition, the RAA can administer arbitration proceedings and, in particular, scrutinise draft awards, certify awards and administer the costs of arbitration proceedings.⁵

II THE YEAR IN REVIEW

i Developments affecting international arbitration

As discussed above, major changes were introduced in 2015 to the legislation on arbitration in Russia, including the CPC and the ICA Law, by way of adoption of Federal Law No. 409-FZ dated 29 December 2015.

While the Law on Arbitration primarily governs domestic arbitration in Russia, some of its provisions are applicable to international commercial arbitrations if the place of arbitration is Russia. For instance, the following provisions of the Law on Arbitration shall equally apply to international arbitrations taking place in Russia under Article 1(2) of the ICA Law:

- a* the creation and activities of permanent arbitral institutions administering international commercial arbitration on Russian territory;
- b* the storage of case materials;
- c* changes introduced into public and publicly significant registers in Russia on the basis of decisions of arbitral tribunals;
- d* the relationship between mediation and arbitration; and

5 The RAA Arbitration Rules are available at www.arbitrations.ru/upload/medialibrary/dd3/ar_en_web.pdf.

e requirements for arbitrators, and the liability of arbitrators and permanent arbitral institutions, within the framework of international commercial arbitration.

Among other changes, the amended ICA Law (as well as the Law on Arbitration) envisages that the state courts in a number of cases provide assistance to arbitration by performing certain functions. For example, a party to arbitration proceedings may file an application with a state court to request an appointment, dismissal or challenge of an arbitrator, or request the court's assistance in obtaining evidence. Similar amendments instructing the courts to act in support of arbitrations have been made to the CPC and the Civil Procedure Code.

Other important amendments were introduced by Federal Law No. 409-FZ to Articles 33 and 225.1 of the CPC with respect to the arbitrability of corporate disputes. These changes aim to clarify certain issues that have previously lacked uniform regulation and to provide safeguards against existing abuses of arbitration proceedings in the corporate sphere.

Lawmakers have approached the issue of the arbitrability of corporate disputes on a case-by-case basis. As a general rule, it is possible to refer corporate disputes to an arbitration court; however, parties may only refer them to an arbitration administered by an arbitral institution and not to *ad hoc* arbitration. A number of disputes are expressly declared non-arbitrable. For example, the following disputes cannot be referred to arbitration:

- a* disputes to challenge non-regulatory legal acts, actions and decisions of public authorities (and quasi-public bodies that have certain authorities), and the activities of notaries to certify transactions involving participatory interests;
- b* disputes over the convocation of a general meeting of participants of a corporation;
- c* disputes concerning the expulsion of participants of legal entities;
- d* disputes concerning the activities of strategic business entities (i.e., entities essential to ensure national defence and security); and
- e* disputes related to the acquisition and purchase of shares by a joint stock company and the acquisition of more than 30 per cent of the shares of a public joint stock company.

In addition, for the majority of disputes (other than disputes over the ownership of shares and participatory interests of a corporation, and disputes related to the activity of securities holders registrars), the possibility of referring a corporate dispute to arbitration for resolution is dependent on complying with a number of terms and conditions.

First, the parties to the arbitration clause must be the legal entity itself, all of its participants and all other participants in a specific corporate dispute. Second, only a permanent arbitration institution with its seat in Russia, which has adopted and published on its website special rules for adjudicating corporate disputes, may act as a relevant arbitration court.

Other types of disputes declared to be non-arbitrable by the amendments to the CPC and the Civil Procedure Code include:

- a* disputes arising out of relations regulated by the Russian laws on privatisation of state-owned or municipal property, or by Russian laws on government or municipal procurement contracts for the purchase of goods, works or services;
- b* disputes relating to personal injury;
- c* disputes relating to environmental damages; and
- d* disputes arising out of family, inheritance or employment relations.

The lists of non-arbitrable disputes under both Codes are non-exhaustive and could be supplemented by other categories of disputes established in other federal laws.

Other significant amendments to the legislation include the following.

The form of an arbitration agreement

For international arbitration, the revised Article 7 of the ICA Law in essence adopts 2006 UNCITRAL Model Law Option 1. The agreement must be in writing, but this requirement is met if the content is recorded in any form that makes it accessible in the future, including by way of an exchange of electronic communications. The amended provisions also contain:

- a* a presumption in favour of the validity and enforceability of an arbitration agreement;
- b* an extension of the arbitration clause in a contract to disputes concerning the validity and enforceability and termination of a contract, as well as to disputes concerning transactions entered into in performance of the contract, unless the parties have otherwise agreed; and
- c* an automatic extension of the arbitration clause in a contract to the assignees of the contractual rights and obligations, while it continues to apply as between the assignor and the other party to the contract as well.

Opt-out requirement

Russian law requires parties to expressly agree on certain terms and conditions. A reference to the arbitration rules will be deemed insufficient to evidence the parties' agreement. Such an agreement of the parties will only be valid if they agree to institution-administered arbitration and not *ad hoc* arbitration. These terms and conditions are:

- a* waiver of recourse to state courts: to appoint an arbitrator in the event that the procedure for the appointment that the parties agreed to use fails; to decide on a challenge regarding an arbitrator or applications for dismissal; to challenge the tribunal's decision on jurisdiction; and
- b* waiver of the right to challenge the award in set aside proceedings (the finality of the award): the parties may agree that the arbitral award will be 'final', in which case the award may not be challenged. This transpires from the language of the relevant provisions that if the parties expressly agree to the finality of the award, they may not apply to court to set the award aside even on public policy or non-arbitrability grounds.

Preliminary interim measures

Upon the parties' agreement, a permanent arbitration institution is entitled to issue preliminary interim measures before the tribunal is set up in a case.

Term for the court's decision on the enforcement of the award

In an attempt to expedite the enforcement of an arbitral award, revised laws require the court to rule on an application to recognise and enforce the award within one month instead of the previous term of three months. The decision of the first instance court is immediately enforceable, unless the cassation instance court decides to stay the enforcement on an application of the respondent.

Remedying the award

Russian law permits a court to stay set aside proceedings and to transmit an award back to an arbitral tribunal if the court identifies certain procedural defects that the tribunal can remedy.

Declaratory award

A procedure is set out for dealing with the recognition of foreign arbitral awards that do not require enforcement (such as a declaratory award). The law places the burden on the losing party to file an objection to recognition in Russia of such award on any of the grounds provided by law for the objection to the enforcement of an award.

In summary, the amendments to the applicable legislation are intended to eliminate the previous uncertainty and ambiguity of court practice on various issues related to arbitration proceedings. Special rules and restrictions were set by lawmakers with an intention to eliminate abuses in the area of domestic arbitration and to facilitate the arbitral procedure.

ii Arbitration developments in the local courts

Impartiality of arbitrators

In 2014, the Constitutional Court of the Russian Federation, Russia's highest court, which verifies the compliance of legal acts with the Constitution of the Russian Federation, provided clarifications as to the application of the principle of the impartiality of arbitrators, as codified by Russian law.⁶ Specifically, the Court was required to rule whether impartiality of the arbitrators could be questioned if one of the founders of a non-profit organisation with a permanent arbitration institution (court) is a party to a dispute considered by an arbitral tribunal formed by this arbitration court.

The Constitutional Court held that the said factual premises formed the basis for establishing the 'objective impartiality' of an arbitration court, which is insufficient to find that the particular arbitral tribunal constituted in the case was impartial. The Court held that a 'subjective impartiality' of an arbitral tribunal could be established in cases where an arbitrator has a direct or indirect interest in the outcome of the case. In the Court's view, even in cases where 'objective impartiality' exists, Russian legislation provides sufficient guarantees for the 'subjective impartiality' of arbitrators, such as the regulation of the appointment of and challenges to arbitrators, as well as the prohibition on an arbitration institute's founding members and its officers on interfering with the arbitral proceedings. The Constitutional Court later maintained its position and reasoning in another ruling, which concerned a case where the founder of an arbitration institution was affiliated with one of the parties to the dispute.⁷

Given the consistent position taken by the Constitutional Court, the Russian courts now tend to consider the issue of impartiality in compliance with these explanations. Specifically, the Presidium of the Supreme Court has recently ruled that to prove a violation of the impartiality requirement, it is not sufficient to show that the organisation under whose auspices an arbitration institution was formed was founded or financed by a party

6 Ruling of the Constitutional Court No. 30-P of 18 November 2014.

7 Ruling of the Constitutional Court No. 2750-O of 9 December 2014.

to a dispute or its affiliate. It is necessary to provide evidence showing how exactly this fact impaired the equality of the parties to the dispute and impacted the independence of the specific arbitrators.⁸

In another recent case, the Supreme Court acknowledged the existence of reasonable doubts as to the independence of arbitrators where the general director of a company affiliated with the respondent also owned and managed the arbitral institution.⁹ Overturning decisions of the courts of lower instances, the Supreme Court pointed out that while affiliation in itself was not a basis for invalidation of an award, the courts should not focus exclusively on the independence of the individual tribunal members and ignore evidence that shows structural links between the arbitral institution and one of the parties to dispute. These two cases demonstrate the Supreme Court's intention to balance in its assessment the 'objective' and 'subjective' impartiality criteria.

Finality of arbitral awards

The Supreme Court has recently confirmed that if parties agreed on the finality of an award, they have waived the right to apply to a court within the framework of a set aside procedure.¹⁰

In the case at issue, the government of Saint Petersburg filed a claim to set aside an award rendered against it by a Moscow-seated UNCITRAL tribunal in an *ad hoc* arbitration. The applicant argued that the award violated the fundamental principles of Russian law (public policy objection). Courts of two lower instances refused to grant the claim on the ground that under the arbitration agreement, the parties agreed that the award would be final, binding and not subject to an appeal. This position was supported and maintained by the Supreme Court.

The courts' particular attention was focused on the question of whether the agreement on the finality of the award should preclude the court from assessing whether the award violates Russia's public policy. On the basis of the existing decisions of Russia's highest courts, the circuit court arrived at the conclusion that the finality objection could be waived only in two cases: if the award is challenged by a third party that was not a party to the arbitration agreement; and if the award is not susceptible to being subject to the enforcement procedure, and the compliance of the award with Russia's public policy could not thus be otherwise verified. In the case at issue, enforcement proceedings were pending, and in the Court's view, this provided sufficient guarantees to ensure the claimant's rights. The Supreme Court supported these findings.

Proper notification of arbitration

Failure to ensure the proper notification of a respondent about arbitral proceedings is a recurrent ground for challenges to the enforcement of awards in the Russian courts. In a recent case, the lower instance courts refused to enforce an arbitral award issued under the Rules of the Ukrainian Arbitration Institute due to the failure of the claimant to prove the

8 Review of the court practice of the Supreme Court No. 3 (2015), approved by the Presidium of the Supreme Court on 25 November 2015, p. 4.

9 Ruling of the Supreme Court No. 305-ES15-4679 of 26 October 2015.

10 Ruling of the Supreme Court No. 305-ES16-1103 of 25 March 2016.

proper notification of the respondent about the arbitral proceedings. The courts held that notification by courier services (DHL) was not in compliance with the required notification procedure.

In particular, the courts considered that the provisions of the mutual legal assistance treaties concluded by the Commonwealth of Independent States CIS states – the Kiev Convention of 20 March 1992 and the Minsk Convention of 22 January 1993 – are applicable to the arbitration procedure. In the courts' opinion, the notification of the respondent had to be procured in accordance with the procedures established by the Conventions, and specifically, all documents served to a party had to be transmitted through the relevant state authorities of Russia.

Overturing these decisions, the Supreme Court stressed that the provisions of the Conventions are applicable exclusively to the service of process in international cases before state courts, and not in arbitration. In the case at issue, the Rules of the Ukrainian Arbitration Institute provided for notification via a courier service.

The Supreme Court further pointed out that the courts must apply the provisions of the New York Convention to the issue of notification. Under Article V(1)(b) of the New York Convention, a court verifies proper notification only when the party initiating the set aside procedure furnishes proof that it was not properly notified. In this case, however, the respondent did not raise any objections, as it did not participate in the court proceedings. The courts raised the notification issue at their own initiative, which was not in compliance with the provisions of the New York Convention. As can be seen, some Russian courts still tend to apply more rigorous procedural requirements than is required by the applicable legislation, and in such cases, the guidance of the Supreme Court proves to be indispensable.

Optional jurisdiction clauses

The issue of optional jurisdiction clauses has been addressed by Russian courts several times over the years. In particular, in 2012, the Presidium of the Supreme Commercial Court published the much-debated decision on the issue of 'asymmetric' jurisdiction clauses (i.e., a clause wherein one party has an option to choose another forum for the dispute resolution, whereas its counterparty waives its entitlement to such additional forum).¹¹ The Presidium held that:

[...] based on the general principles of protection of civil law rights, an agreement on dispute resolution cannot grant only one party (the seller) under a contract the right of recourse to a competent state court and deprive the second party (the buyer) of an analogous right. Where such an agreement is concluded, it is invalid as violating the balance of the parties' rights. Accordingly, a party whose right is infringed by such an agreement on dispute resolution also has the right of recourse to a competent state court, having exercised the guaranteed right to judicial protection on equal terms as its counterparty.

Consequently, the Presidium suggested converting the asymmetric jurisdiction clauses into 'symmetric' clauses, providing both parties with equal choice-of-forum rights.

11 Ruling of the Presidium of the Supreme Commercial Court No. VAS-1831/12 of 19 June 2012.

In its 2013 Overview of the courts' practice regarding the consideration of cases with the participation of foreign parties, the Presidium of the Supreme Commercial Court further held that optional jurisdiction agreements, wherein both parties are granted with a choice of different fora (e.g., arbitration, litigation or courts of different jurisdiction), are valid under Russian law.¹²

In a recent case considered by the RF Supreme Court, the issue of an optional jurisdiction clause was raised again. In this case, a supply contract contained an arbitration clause providing that the claimant shall have the right to submit its claim, at its discretion, to the state court or to a local arbitral institution.¹³ The supplier filed a claim in arbitration and obtained an award in its favour. However, the court of the first instance refused to enforce the award. The court considered that the arbitration clause granted only one party – the claimant – with the right to choose between two fora, which violated the procedural equality of the parties. This decision was upheld on cassation.

The Supreme Court disagreed with the position of the lower instance courts and reversed the underlying decisions. It held that the optional clause in the supply contract provided equal rights to both parties, as each of them could have been the claimant. Such clause thus cannot be considered as 'asymmetrical', as it does not indicate any specific party that possesses the right of choice in detriment to another party. In its ruling, the Supreme Court again confirmed that 'symmetrical' optional jurisdiction clauses are commonly used in Russian commercial practice and are recognised as valid by Russian courts.

Court jurisdiction where a party is an individual

In 2014, the court system in Russia was modified by way of abolishing the Supreme Commercial Court as the highest commercial court and transferring its functions to the Supreme Court, which remains Russia's highest civil court. In accordance with Article 3(1) of Federal Constitutional Law No. 8-FKZ of 4 June 2014, explanations of the Presidium of the Supreme Commercial Court on issues of court practice remain in force until any relevant decisions by the Presidium of the Supreme Court amend such explanations. As a rule, Russian courts rely on the recommendations and explanations of the highest courts in their rulings. Where the Supreme Court has not supported the position previously maintained by the Supreme Commercial Court, the courts would revise their practice in accordance with the restated position of the Supreme Court.

In a recent case, the Moscow circuit court considered on appeal a claim for enforcement of an award issued by the Czech Arbitration Court.¹⁴ The respondents in the arbitration proceedings were two legal entities and three individuals. The arbitral tribunal held that the companies failed to respect their payment obligations under the credit agreement, while the individuals were held liable as guarantors to the defaulted companies.

The circuit court considered that due to the involvement of individuals, the case did not fall within its jurisdiction. The Russian judicial system is formed by state commercial courts, which consider disputes connected with commercial (economic) activities, and courts of general jurisdiction. Commercial courts have jurisdiction in cases where disputes involve

12 Advisory Circular of the Presidium of the Supreme Commercial Court No. 158 of 9 July 2013.

13 Ruling of the Supreme Court No. 310-ES14-5919 of 27 May 2015.

14 Ruling of the Moscow circuit court No. 40-5286/15 of 11 November 2015.

individuals (persons not registered as individual entrepreneurs) only if this is specifically provided for by the relevant legislation. In the view of the circuit court, commercial courts were not vested with such jurisdiction with relation to set aside or enforcement actions.

The circuit court noted that the position of the Supreme Commercial Court previously expressed on this issue was to grant jurisdiction to commercial courts in set aside or enforcement cases where individuals were involved. However, the circuit court further held, with reliance on the recent review of court practice issued by the Supreme Court, that a claim to the debtor (legal entity), which is accompanied by a claim to the guarantor (individual), should be submitted to the courts of general jurisdiction, and not to the commercial courts. On this basis, the Court dismissed the case. It could be expected that recent changes to the Russian court system will entail further revisions of court practice on arbitration-related issues.

iii Investor–state disputes

Russia has entered into a number of bilateral investment treaties (BITs) that, in general, are similar in content, provide for the fair and equitable treatment of investments in signatory countries, and prohibit nationalisation or expropriation (or measures having the effect of nationalisation or expropriation) without compensation. The BITs typically provide for arbitration under the UNCITRAL Arbitration Rules, or before the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). Russia signed the ICSID Convention on 16 June 1992 but has not ratified it. None of the investment treaty arbitrations to which Russia is a party, therefore, have taken place before the ICSID.

The principal investment treaty cases involving Russia pertained to a series of arbitrations related to the Yukos ‘saga’ conducted under the auspices of the Permanent Court of Arbitration in The Hague under the Energy Charter Treaty (ECT), following the dismantling of the Yukos group by the Russian Federation. The UNCITRAL Arbitration Rules applied. Three awards on the merits came out in July 2014, and saw the claimants awarded a total of US\$50 billion in damages – the highest arbitration award ever.

In January 2015, Russia commenced set aside procedures before the District Court of The Hague as the seat of arbitration seeking the annulment of the awards. On 20 April 2016, The Hague District Court set aside the awards. The Court held that Russia, while being a signatory to the treaty, was not bound by the ECT’s unconditional offer to arbitrate because Russia never ratified the ECT.

The Court accepted Russia’s reading of Article 45 of the ECT on provisional application, and held that Russia was only bound by the provisions reconcilable with Russian law, specifically the 1993 Russian Constitution. The Russian Constitution requires that the Parliament of the Russian Federation ratify treaties that supplement or amend Russian law by adopting a federal law. Absent ratification, and based only upon the signature of the ECT, Russia was not bound by the provisional application of the arbitration regulations in the ECT. In the absence of a valid arbitration agreement, the arbitral tribunal was not competent to hear the case. Other grounds for reversal of the awards advanced by Russia were not discussed by the Dutch court. Yukos shareholders have confirmed their intention to lodge an appeal against this decision with The Hague Court of Appeal.

Another award on jurisdiction rendered in Yukos-related arbitration cases brought against Russia was also set aside earlier this year. In its jurisdictional ruling rendered in 2009, an SCC tribunal sited in Stockholm composed of Charles N Brower, Toby T Landau and Jan Paulsson as presiding arbitrator held that it had jurisdiction over the dispute. This was

followed by a 2012 award on the merits ordering Russia to pay approximately US\$2.6 million to Spanish minority shareholders in Yukos (*Quasar de Valores* case). The arbitral tribunal held that the actions of the Russian state authorities against Yukos amounted to an expropriation under the Russian Federation–Spain BIT. On Russia’s application to set aside the jurisdictional ruling, the Svea Court of Appeal held that the tribunal lacked jurisdiction to hear the case. The Court of Appeal considered that a dispute resolution clause in the narrowly worded 1990 BIT between Spain and the Soviet Union, which the Spanish companies had relied on in bringing their claim, did not permit the tribunal to consider whether their investments had been expropriated. Russia has initiated a separate proceeding to set aside the merits award, which is still pending.

A number of arbitrations against Russia were initiated in 2015 under the BIT between Russia and Ukraine by Ukrainian entities seeking the recovery of investments lost in the Crimea owing to the peninsula’s annexation in early 2014. These include:

- a* Ukraine’s largest private bank, Privat Bank, and an associated finance company;
- b* the former operators of the Belbek International Airport in Sebastopol;
- c* Ukrainian oil company Ukrnaft;
- d* a group of petrol companies led by Stabil; and
- e* a group of real estate companies led by Everest Estate.

These five cases are lodged with the Permanent Court of Arbitration in The Hague. In all these cases, it has been confirmed that the proceedings will be bifurcated, with jurisdiction and admissibility decided as preliminary issues. In January 2016, these companies were said to be joined by Ukraine’s state-owned commercial bank, Oschadbank, which had filed a notice of arbitration against Russia in Stockholm under the UNCITRAL Rules. The claims are premised on the theory that Russia has assumed obligations in respect of Ukrainian-owned investments in Crimea by virtue of its annexation and *de facto* control of the region. Russia is refusing to participate in any of the Crimea-related cases on the basis that there is no jurisdiction for them under the Ukraine–Russia BIT.

Moscow has recently been a seat for three investment arbitrations brought against the Kyrgyz Republic under the 1997 Moscow Convention for the Protection of Investors’ Rights, a treaty between CIS states that also protects investors from non-signatory states. The cases were considered under the auspices of the Arbitration Court of the MCCI. In all three cases, the tribunals ruled in favour of the investors, and the Kyrgyz Republic applied to the Moscow commercial court to set aside the awards. Specifically, the Kyrgyz Republic denied that it had given consent to arbitrate investment disputes under the Moscow Convention ‘at any international arbitration court’, including the Arbitration Court of the MCCI, as was held by the arbitral tribunals on the basis of Article 11 of the Moscow Convention. The Kyrgyz Republic requested an interpretation of Article 11 by the CIS Economic Court, which is designed to resolve disputes about the Convention’s meaning.

The CIS Economic Court confirmed that the treaty does not contain a standing offer to arbitrate investor–state disputes ‘at any international arbitration court’. Relying on the decision of the CIS Economic Court and its own findings, the first instance court set aside one of the three awards rendered against the Kyrgyz Republic.¹⁵ In two remaining set aside proceedings, the respective arbitral awards were also set aside by the relevant courts. On

15 Ruling of the Moscow commercial court in Case No. A40-25942/14 of 19 November 2014.

appeal, one of the cases was reviewed by the Supreme Court, which confirmed the findings of the lower instance courts that the arbitral tribunal had no competence to consider the dispute absent the Kyrgyz Republic's explicit agreement to arbitrate the dispute at the Arbitration Court of the MCCL.¹⁶ According to the Court, states must provide consent to arbitration 'clearly, plainly and concretely, distinctly and unambiguously'.

III OUTLOOK AND CONCLUSIONS

2015 has been marked by the significant reform of Russian legislation on arbitration. Apart from certain controversial proposals on the increased regulation of arbitration as described above, the new legislation can be regarded as a significant move forward in the development of arbitration in Russia that reflects the current trends in international arbitration, and sets the basis for the improvement and unification of law practices in the sphere of arbitration proceedings. It remains to be seen whether the new legislation on arbitration will make Russia a more attractive option for businesses and prevent the use of arbitration for abusive purposes.

It can also be expected that Russia's consistent arbitration-friendly position in encouraging the Russian state courts to abandon a formalistic approach to arbitration-related issues would be maintained by the Supreme Court. Most of the recent 2015 cases discussed above have witnessed persistent efforts to eliminate the uncertainty and ambiguity of court practice on various issues related to the recognition and enforcement of awards in Russia, and to improve the efficiency of the courts in line with international practices.

16 Ruling of the Supreme Court No. A40-64831/14 of 11 January 2016; Ruling of the Moscow circuit court No. A40-19518/2014 of 25 September 2015.

Appendix 1

ABOUT THE AUTHORS

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