THE INTERNATIONAL ARBITRATION REVIEW

NINTH EDITION

Editor
James H Carter

THE LAWREVIEWS

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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 often debates 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 2018

Chapter 37

RUSSIA

Mikhail Ivanov and Inna Manassyan[1]

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 (the 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 came into force on 1 September 2016. On 1 November 2017 the transition period of this arbitration reform came to an end.

Until 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 (the Law on Arbitration Courts). On 29 December 2015, a new Law on Arbitration (Arbitration Proceedings) No. 382-FZ was adopted (see below), which regulates domestic arbitration in Russia starting from 1 September 2016.

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.

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

The revised version of the ICA Law that entered into force on 1 September 2016 modified 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 provides 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, these amendments removed 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 made 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.

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 previous version of the ICA Law, a ruling of a state court issued upon examination of an arbitral tribunal's decision on its jurisdiction was 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

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

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
- 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.

Recent amendments to the legislation on arbitration that took 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 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 introduced 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.

To obtain a governmental authorisation, an arbitral institution must ensure that its rules and list of recommended arbitrators[3] 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.

3 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.

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. To our knowledge, none of the foreign arbitral institutions, including the Stockholm Chamber of Commerce (SCC) and the International Chamber of Commerce (ICC), had not yet obtained the state authorisation.

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.

As indicated by the Ministry of Justice, as on 1 November 2017 (the date when the transition period under the Law on Arbitration came to an end) only four arbitral institutions obtained government authorisation, two of which were granted this right by federal law:

a the International Commercial Arbitration Court (ICAC) at the ICC of Russia;
b the Maritime Arbitration Commission at the ICC of Russia;
c the Arbitration Centre at the Russian Union of Industrialists and Entrepreneurs; and
d the Arbitration Centre at the Institute of Modern Arbitration.

Thus, as of 1 November 2017 all other permanent arbitral institutions in Russia do not have the right to administer arbitration cases, and in particular to appoint or replace the arbitrators, or manage the arbitration fees. Arbitration awards rendered after 1 November 2017 under the auspices of such non-authorised institutions will be considered as breaching the arbitral procedure set by the law and thus will be susceptible of being set aside or having their enforcement refused. All arbitral cases commenced at such institutions prior to 1 November 2017 will be requalified into *ad hoc* arbitrations, with the respective restrictions described above applicable to such cases. Arbitration agreements that provide for settlement of disputes at the non-authorised institutions will be considered as non-enforceable and the parties are advised to conclude new arbitration agreements, choosing between the approved arbitral institutions.

The number of the approved arbitral institutions is rather surprising, given that before the reform the number of existing institutions was approximately several thousand.[4] However, one should keep in mind that one of the main purposes of the reform has been to eliminate the so-called 'pocket' arbitral institutions. The founders of such institutions frequently imposed arbitration agreements providing for arbitration under the auspices of their own institutions on their counterparties, thus compromising the principle of independence of the arbitration process. However, some arbitral institutions complained that the procedures imposed by the state authorities were overly formalistic and not in accordance with the law. The institutions are also blaming the Council on Arbitration Reform – created at the auspices of the Ministry of Justice for consideration of applications – for delaying the process of authorisation and breaching the law provisions during the process of consideration. A number of institutions that existed before the reform decided to appeal the authorisation refusal to state courts. It is to be hoped that the authorisation procedure will be further elaborated and the list of the approved institutions expanded.

4 Mikhail Galperin, Arbitration Reform. Post Scriptum, Zakon, No. 9, 2017.

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)[5].

The major arbitration institution in Russia is the International Commercial Arbitration Court at the ICAC.[6] 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.

Following the recent reform of the arbitration law in Russia, in early 2017 the previous ICAC Rules were replaced by a set of rules governing the procedure in the ICAC depending on the type of the dispute, in particular: the Rules of Arbitration Relating to International Commercial Disputes; the Rules of Arbitration Relating to Domestic Disputes; and the Rules of Arbitration Relating to Corporate Disputes. The latter establish specific rules applicable in resolution of corporate disputes, both domestic and international. To the issues not governed in these Rules, the provisions of the rules regulating the international commercial arbitration or the domestic arbitration shall apply respectively.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

As discussed above, major changes were introduced in 2015–2016 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

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.

5 Official site of the RF Ministry of Justice, available at http://minjust.ru/ru/novosti/zakonchilsya-perehodnyy-period-reformy-arbitrazha-treteyskogo-razbiratelstva-v-rossiyskoy.

6 Official site of the ICAC, available at http://mkas.tpprf.ru/en/.

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

Seat of arbitration

In a recent case Russian courts had considered whether two Russian companies could arbitrate abroad.[7] In this case, the arbitration agreement provided for the arbitration of disputes at an institution named Russia-Singapore Arbitration, with its registered address at Singapore. The court of first instance had initially refused enforcement of the award on the grounds that arbitrating disputes between two Russian parties in Singapore, when such parties have no legal connection to Singapore, is against Russian public policy. However, on appeal the cassation court reversed this decision on lack of merit and inconsistent interpretation of Russian law. The case was sent back to the first instance court for reconsideration.

On retrial, the first instance court refused the enforcement of the award on the following grounds. First, it ruled that the actual seat of arbitration had been not Singapore but Russia, because the hearing was held in Moscow. Hence, the award's enforcement procedure should be governed not by the New York Convention and respective Russian law on enforcement of foreign arbitral awards, but by the legislation on enforcement of domestic arbitral awards. Second, the court established the breach of independence and impartiality of the arbitrators, as well as of the principle of equality of the parties to arbitration. As confirmed by the evidence in this case, the claimant was a professional actor rendering enforcement services for the institution named Arbitration Court of the City of Moscow. The chairman of this arbitral institution turned out to be simultaneously the chairman of the Russia-Singapore Arbitration and the sole arbitrator in the case at issue. On appeal, the cassation court upheld the conclusions of the first instance court.

This case raises several interesting issues. First, the parties to arbitration should take note of the courts' position on affirming the place of the hearing as the seat of arbitration. This could cause potential problems for the enforcement of foreign awards, where the place of hearing had been within the territory of Russia. Second, this case could serve as illustration for the 'pocket' arbitral courts problem that Russian arbitration reform is trying to resolve.

Public policy – goodwill of the parties to arbitration

Similar issue of the abuse of arbitration process had been considered by the Russian Supreme Court in another recent case.[8] In that instance, the court of first instance had issued a writ of execution on the basis of a domestic arbitral award. However, a third party claiming to be a pre-bankruptcy creditor (the Bank) for the debtor company, filed an appeal requesting refusal of the award enforcement. The Bank asserted that the claimant and respondent in arbitration proceedings were in fact affiliated companies that conspired to create a factitious indebtedness in order to forestall the Bank's claims, and be able to suggest the candidature for the position of an insolvency receiver. In particular, the Bank noted that the writ of

7 Case No. A40-219464/2016, available at https://kad.arbitr.ru/.

8 Case No. A40-147645/2015, available at https://kad.arbitr.ru/.

execution was issued on 19 October 2015, but the claimant did not apply for execution until 20 July 2016, when the Bank notified its intention to initiate bankruptcy proceedings against the debtor company.

The Supreme Court took due notice of the arguments of the Bank and held that the bad faith of the parties to arbitration proceedings had breached the fundamental principles of Russian law and therefore was against its public policy. The Court highlighted that the protection of the rights of the third parties falls within the state's public policy domain. The Court also noted that in bankruptcy proceedings it is sufficient for a creditor to present *prima facie* evidence that gives rise to reasonable doubt as to the existence of indebtedness. It then falls to the party that insists on the existence of the debt to prove its relations with the debtor. In this case, the parties to arbitration proceedings failed to do so. Also noteworthy is the Court's indication that the third parties whose rights are infringed by an arbitral award may raise the public policy exception. The Court concluded by stating that deployment of an arbitral procedure for abuse of rights and not for the resolution of disputes is not granted judicial protection.

Parties to the arbitration agreement

In a dispute between two Russian members of a Dutch internet operations association the Russian courts considered whether an arbitration agreement included into a standard service agreement between association and its members could be extended to the disputes between the members of the association.[9] Courts of the two lower instances deemed that the dispute between the members of the association falls within the limits of the arbitration agreement included into the association's standard documents and on these grounds dismissed the claim of the Russian member of the association. The Russian Supreme Court took a different view of this matter. The Court first held that the arbitration agreement could be concluded by way of adhesion to the arbitration clause included in the organisation's charter, procedural rules or regulations. The Court then stressed the importance of obtaining confirmation of the parties' express agreement to such adhesion. In the case at issue, the standard documents contained the agreement to arbitrate the disputes between the association and its members, but not between the members themselves. The Court thus confirmed the absence of the parties' express agreement to arbitrate these types of disputes.

Disputes arising out of the concession agreements

The issue of arbitrability of the concession agreements had been addressed by Russian courts before the arbitration reform described above. Article 17 of the Law on Concession Agreements provides that disputes between a concessor and a concessionary shall be resolved by state courts, state commercial courts and 'arbitral tribunals of the Russian Federation'. The wording of Article 17 fails to specify whether it includes only domestic arbitration, or also encompasses international commercial arbitration with a seat in Russia. In the case considered in 2013–2014, the state courts affirmed that resolution of a dispute arising out of a concession agreement by an international commercial arbitration sited in Russia complies with the above provisions of the law.[10]

9 Case No. A60-12039/2016, available at https://kad.arbitr.ru/.

10 Case No. A56-45107/2013, available at https://kad.arbitr.ru/.

In a recent case, the issue of arbitrability of the concession agreements was raised again. In this case, the concession agreement contained an arbitration clause providing for the resolution of disputes at the ICAC.[11] However, the court of the first instance refused to stay the proceedings and ruled on the merits on the case. The court considered that the dispute fell within the public law domain and was therefore non-arbitrable.

The appeal court disagreed with this position. Overturning the ruling, the appeal court stressed that the sole fact that the state was the party to a civil law relationship did not point towards the public nature of the dispute. In the court's opinion, the subject matter of the dispute – alleged non-payment under the concession agreement – affirms the private law interest of the state in this case.

The appellate court further pointed out that the reliance of the first instance court on non-arbitrability of public procurement contacts was without merit. It indicated that the legislation on the public procurement contracts is not applicable to the concession agreements as they are regulated by a special law. Also, in the court's opinion, the law on concession agreements – unlike the legislation on public procurement contacts – grants to the parties broad discretion to negotiate the terms of the agreements, including the dispute resolution method. The cassation appeal on this ruling is currently pending, and it is yet to be seen what position the courts of the higher instance will take.

Pathological arbitration clause

In a recent case the first instance court had refused enforcement of an ICC arbitral award on two grounds.[12] First, it held that in the context of the bankruptcy proceedings enforcement of an arbitral award would lead to the preferential discharge of claims of one creditor over other creditors. With reference to the findings of the Russian Supreme Court in case No. A40-147645/2015 cited above, the court held that the protection of the rights of the third parties (e.g., other creditors) falls within the state's public policy. The court further held that the preferential discharge of claims under the arbitral award is against Russian public policy.

Second, the Court ruled that the arbitration clause was ambiguous and thus pathological. The arbitration agreement in this case provided for settlement of disputes by international arbitration, and indicated that the dispute shall be finally settled under the Rules for Arbitration of the ICC. In the Court's view, such arbitration agreement should be considered defective, as it does not define the specific institution that would consider the dispute. The Court stressed that the 'broad definition' of the institution is not acceptable. The Court also noted that in arbitration proceedings the respondent raised jurisdictional objections that were rejected by the arbitral tribunal. As the parties had not agreed on an institution in their arbitration agreement, the ICC lacked authority to consider this dispute. On these grounds the Court concluded that the award violated the principle of legality and was against Russian public policy. The appeal on this ruling is pending. It remains to be seen whether the cassation court will uphold this restrictive interpretation of the defective arbitration agreement, which is not in line with the current tendencies in arbitration.

11 Case A40-93716/2017, available at https://kad.arbitr.ru/.

12 Case A40-176466/2017, available at https://kad.arbitr.ru/.

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 lodged an appeal against this decision with The Hague Court of Appeal, which is currently pending.

In the meanwhile, Russia opposes enforcement procedures initiated by Yukos shareholders in different countries, and in particular in France and Belgium. Also, in 2017 Russia's Constitutional Court – Russia's highest court, which verifies compliance of legal acts with the Constitution of Russia – has held that the state need not comply with a ruling of the European Court of Human Rights that it pay €1.9 billion damages to former Yukos shareholders.

Another award on jurisdiction rendered in Yukos-related arbitration cases brought against Russia was also set aside. 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 Russia–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. 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 Ukrnafta;
d a group of petrol companies led by Stabil;
e a group of real estate companies led by Everest Estate;
f private entities Lugzor, Libset, Ukrintervest, DniproAzot and Aberon; and
g NJSC Naftogaz.

These seven cases were lodged with the Permanent Court of Arbitration in The Hague. 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. As far as it is known, in at least three of the PCA cases the tribunals had already reached a positive jurisdictional decision. The other claims are still to reach jurisdictional decisions.

III OUTLOOK AND CONCLUSIONS

2017 was marked by the first results of the arbitration reform of Russian legislation. The new legislation had been conceived as a significant move forward in the development of arbitration in Russia that would reflect the current trends in international arbitration, and set the basis for the improvement and unification of law practices in the sphere of arbitration proceedings. Unfortunately, at the implementation stage it became obvious that the emphasis of the reform has shifted to the reinforcement of the state control over the arbitration. Complications with obtaining state authorisation by the arbitral institutions could be seen in this connection as a decision of the state to put constraints on the development of arbitration in Russia. Between these two considerations, 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.

Appendix 1

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