ALERT MEMORANDUM

Russia's Supreme Court Discusses Key Arbitration-Related Cases

January 17, 2019

On 26 December 2018, the Presidium of the Russian Supreme Court (the "**Supreme Court**") has approved a review of jurisprudence relating to state court assistance and control in arbitration (the "**Review**").[1] The Review provides helpful guidance on certain provisions of Russian arbitration laws including, *inter alia*, those relating to (I) the validity and enforceability of arbitration agreements, including the matters of competence of arbitral tribunals, (II) the arbitrability of disputes, and (III) issues referring to setting aside and enforcement of arbitral awards in Russia.

Notably, the Supreme Court has *de facto* upheld the validity and enforceability of the ICC model arbitration clause following a controversial Fall ruling in which the Supreme Court refused discretionary review of the lower Moscow courts' decisions that failed to recognize an ICC award, *inter alia*, due to "imprecise" nature of the contractual arbitration clause based on the ICC model arbitration clause.[2] While the parties are still advised to carefully draft the dispute resolution provisions in their Russia-related commercial contracts, this allows to conclude that no revision of ICC, SCC, LCIA etc. arbitration clauses in existing contracts is required for those to be valid and enforceable in Russia.

While the Review itself is non-binding on lower courts, the Supreme Court's guidance is usually followed in practice.

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[1] Review of Cases Related to the Functions of Assistance and Control in Relation to Arbitration and International Commercial Arbitration (Adopted by the Presidium of the Supreme Court of the Russian Federation on December 26, 2018).

[2] Case no. 305-ЭС18-11934 (decision of September 26, 2018).

I. VALIDITY AND ENFORCEABILITY OF ARBITRATION AGREEMENTS

Overall, the Review confirms that Russian courts should respect the parties' agreement to submit their disputes to arbitration, provided that mandatory requirements of Russian laws are met:

1. The Supreme Court has recognized the validity and enforceability of an ICC model arbitration clause and noted that pursuant to the Russian arbitration laws,[3] all doubts must be resolved in favor of the validity and enforceability of the arbitration clause, unless proven otherwise[4]

The case, commented upon by the Supreme Court, concerned a shipping contract which contained the following dispute resolution clause (translated from Russian):

> *"In the event of a dispute, the Parties will try to resolve it through negotiations. If the Parties do not come to mutual understanding, the dispute shall be submitted to arbitration at the location of the respondent, and heard in accordance with the laws of the respondent's country and on the basis of the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or several arbitrators authorized to do so in accordance with the said Rules. The arbitral award is final, not subject to revision and binding on both Parties."*

While the above wording differs in some respects from the ICC model arbitration clause, it is similar in the sense that no name of the specific institution administering the arbitration (*i.e.*, the ICC International Court of Arbitration) is mentioned in the clause. According to the Supreme Court, a reference to the ICC Rules of Arbitration is sufficient for an arbitration clause to be deemed valid and enforceable, since the parties' intent as to formation of the arbitral tribunal can be easily drawn from the reference to the ICC Rules of Arbitration.

The Supreme Court's position comes as a relief to the Russian business community after an opposite conclusion was reached by the courts (including the judge of the Supreme Court) in *Dredging and Maritime Management SA v. InjTransStroy AO*,[5] where the courts decided that a mere reference to the ICC Rules of Arbitration in the absence of explicit wording regarding the parties' choice of arbitral institution was not sufficient to determine that the ICC International Court of Arbitration was a competent forum for hearing the dispute.[6]

By analogy, the Supreme Court's current position outlined in the Review can be applied to the relevant model arbitration clauses of major arbitral institutions, where the reference is made to the institution's arbitration rules (*e.g.*, "Any dispute, controversy or claim <…> shall be finally settled by arbitration in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce"), and no amendments to the existing arbitration clauses of such type is required to make them valid and enforceable in Russia.

2. The Supreme Court reaffirmed that 'asymmetric' dispute resolution clauses are invalid in part, granting only one party the right to choose the dispute resolution forum

The Supreme Court has reminded that as a general rule, a dispute resolution clause providing for alternative fora (*i.e.*, the right to resolve a dispute in state court or in arbitration) and granting the right to choose the forum to only one party is unenforceable as the principles of equality and fairness are violated. According to the Supreme Court, despite any attempt to impose an asymmetric dispute resolution clause, each party has the right to apply either to state court or to arbitration notwithstanding the provisions of the respective clause.[7]

[3] Art. 7(8) of the Federal Law "On Arbitration (Arbitration Proceedings) in the Russian Federation" (the "**Law On Arbitration**"); Art. 7(9) of the Law "On International Commercial Arbitration" (the "**Law On ICA**").

[4] *Review*, para. 5.

[5] *Supra* note 2.

[6] The Court was also concerned with a potential public order issue as enforcing the award would result in what the Court described as "unsubstantiated priority over other creditors in the bankruptcy".

[7] *Review*, para. 7.

Such approach was originally developed by the Supreme Arbitrazh (Commercial) Court in *RTK v. Sony Ericcson.*[8] In the said case, the Supreme Arbitrazh (Commercial) Court was not clear as to whether such asymmetric dispute resolution clause was entirely or only partially invalid. However, it was sometimes interpreted in practice by Russian courts as suggesting that the 'asymmetry' in the dispute resolution clause renders the entire clause invalid, thereby making Russian state courts the statutory forum in case the dispute is otherwise subject to jurisdiction of foreign courts. Following *RTK v. Sony Ericcson*, the drafting practice in Russia has changed: the lawyers dropped alternative dispute resolution clauses and began including either an arbitration clause or a prorogation clause in contracts involving Russian parties (including syndicated loan facilities with foreign banks and underwriting agreements).

The Supreme Court seems to have taken a more nuanced approach and expressly clarified that asymmetric alternative dispute resolution clause is invalid only in part depriving one of the parties' of the right to choose the forum. Literally interpreted, this means that such dispute resolution clause survives but for the asymmetry, which is rectified by granting the other party the right of forum choice.

It is yet to be seen how Russian courts will apply this interpretation in practice. Based on the Supreme Court's clarification, Russian courts should respect the choice of specific Russian litigation forum in case of an 'asymmetric' dispute resolution clause but rectify the asymmetry. It is not entirely clear whether Russian courts will likewise respect the choice of foreign court (*e.g.*, English court) in case of an asymmetric dispute resolution clause. This issue is particularly relevant to dispute resolution clauses in certain historical loan agreements between foreign financial institutions and Russian borrowers governed by English law which typically allow foreign lenders to unilaterally decide to refer the dispute to litigation before an English court (notwithstanding the arbitration clause). In these specific cases, Russian courts may decide that the asymmetry may not be rectified by granting a Russian borrower the right to apply to an English court because it will likely respect the asymmetric dispute resolution clause and will not allow the Russian borrower to commence litigation before an English court. In this situation the possible resolution would be to refer the relevant dispute to arbitration because the arbitration clause (that usually does not contain any asymmetry) in the alternative dispute resolution clause survives. It may not be excluded though that Russian court may still decide to accept the Russian borrower's claim for consideration in light of circumstances of a particular case.

Another issue which remains in relation to the asymmetric arbitration clauses is the enforceability in Russia of a foreign arbitral award or a foreign court judgment handed down on the basis of the asymmetric dispute resolution clause. There were instances in the past in which Russian courts refused to enforce arbitral awards because they had been rendered on the basis of an asymmetric dispute resolution clause (that included an arbitration clause), which Russian courts considered to be invalid as a whole. Following the position of the Supreme Court in the Review, and provided that both parties have the right to apply for arbitration, the arbitration clause and the resulting arbitration award in the alternative asymmetric dispute resolution clause should survive. However, it remains unclear whether the same is true in relation to a foreign court judgment handed down on the basis of the asymmetric dispute resolution clause if only one party had the right to apply to court. Since the asymmetry is not rectified in case of such foreign judgment, there is a risk that Russian courts may refuse to recognize and enforce such foreign court judgment based on public policy grounds or otherwise.

At the same time, the Supreme Court has recognized that in situations where both parties have a 'symmetrical' set of rights to commence proceedings in arbitration or state courts (*e.g.*, where the alternative dispute resolution clause

[8] Resolution of the Presidium of the Supreme Arbitrazh (Commercial) Court of the Russian Federation No. 1831/12 dated June 19, 2012.

makes reference to a 'claimant' and both parties can become claimants at various points), such dispute resolution clause is valid.[9]

3. The arbitration clause does not need to be contained in a single document

As explained by the Supreme Court, an arbitration agreement or document(s) containing an arbitration clause do not have to exist as a single document (*i.e.*, a contract with two signatures).[10] Any form of contract execution provided for by the Russian Civil Code (*e.g.*, exchange of letters) satisfies the requirement for entering into an arbitration agreement between the parties.[11]

In line with Russian arbitration laws, [12] the Supreme Court has also noted that the invalidity of certain contractual provisions or the entire contract does not result in invalidity of the arbitration clause since the latter is separable from the principal contract.[13]

4. The existence of arbitration clause cannot be established using indirect evidence[14]

As noted by the Supreme Court, to be enforced by a court of law, an original (or a certified copy) of an arbitration agreement or document(s) containing arbitration clause must be presented in the proceedings. Indirect evidence, such as witness statements or sworn affidavits, cannot substitute this requirement.

This clarification by the Supreme Court is based on *Korean National Insurance Corporation (DPRK) v. VTB Insurance* of last year.[15] In that case, Korean National Insurance Corporation has also argued that the parties performed the reinsurance contracts that contained the arbitration clauses thereby confirming their binding effect on such parties. However, the courts rejected this argument and ruled that the performance of the main contract does not confirm that the parties entered into an agreement to arbitrate their disputes. The Supreme Court did not address this argument in the Review. Since Russian courts often take formalistic approach when evaluating evidence, it is likely that the evidence of the performance of the main contract with an arbitration clause may not be enough for a Russian court to conclude that the parties entered into a valid arbitration clause if the original or certified copy of such main contract with the arbitration clause is missing.

5. The arbitration clause can be contained in adhesion contracts[16]

The Supreme Court has held that a valid arbitration clause can be included in contracts of adhesion (*e.g.*, when joining an association, undergoing listing on an exchange or otherwise consenting to internal regulations) as long as the other party to arbitration has signed the same contract or consented to arbitration. This clarification reiterates the relevant provisions of the Law On Arbitration but does not address one of the frequently raised questions in connection with the enforceability of adhesion contracts, *i.e.*, whether the arbitration clause may be held invalid because it is unreasonably one-sided and the other party had no opportunity to negotiate the terms of the contract but could only adhere thereto in its entirety.

II. ARBITRABILITY OF CERTAIN DISPUTES

With respect to the disputes that may not be submitted to arbitration *ipso jure*, the Supreme Court has literally repeated the new rules contained in Russian procedural laws: [17]

[9] *Review*, para. 6; Case no. 310-ЭС14-5919 (Decision dated May 27, 2015); Case no. 5-КГ-16-242 (Decision dated February 14, 2017).

[10] *Review*, para. 1.

[11] In our view, the same logic shall apply to foreign law governed contracts by analogy, *i.e.*, any form of contract execution provided for by the law applicable to the contract shall satisfy the requirement for entering into an arbitration agreement between the parties.

[12] Art. 16(1) of the Law On Arbitration; Art. 16(1) of the Law On ICA.

[13] *Review*, para. 3; Case no. 306-ЭС16-4741 (Decision dated November 2, 2016).

[14] *Review*, para. 2.

[15] Case no. 305-ЭС17-993 (Decision dated September 4, 2017).

[16] *Review*, para. 8; Case no. 309-ЭС15-20465 (Decision dated May 30, 2017).

[17] For non-exhaustive list of such disputes, see, *e.g.*, Art. 33(2) of the Arbitrazh (Commercial) Procedure Code.

1. As a general rule, no disputes involving public interest may be submitted to arbitration[18]

The Supreme Court has provided the following examples of disputes involving public interest: (i) disputes on taxes and amount of state fees, [19] (ii) state registration of property, [20] (iii) privatization.[21]

On the issue of arbitrability of disputes involving state procurement and tender procedures, the Supreme Court has agreed with the existing line of cases which suggest that disputes involving procurement for state and municipal needs under 44-FZ (the statute governing procurement for state organizations (state bodies, state corporations, state treasury institutions, etc.) rather than state-controlled companies) are non-arbitrable, [22] whereas procurement for state controlled businesses under 223-FZ may be subject to arbitration provided no public interest is otherwise involved.[23]

III. ENFORCEABILITY OF ARBITRAL AWARDS AND MISCELLANEOUS POINTS

1. For an arbitral award with seat of arbitration in Russia to be final, the term concerning its finality has to be expressly set out in the agreement between the parties[24]

The Supreme Court has clarified that if the parties intend for the arbitral award, seated in Russia, to be final and not subject to set aside proceedings before Russian courts, they must expressly provide for the finality of the arbitral award in the arbitration agreement. The reference to the finality of the arbitral award in the arbitration rules which are deemed to be incorporated in the arbitration agreement is not sufficient for this purpose. If the arbitration agreement of the parties provides for the finality of the arbitral award, the proceedings initiated before the state court shall be terminated.

2. The fact that a Russian company undergoes a winding up procedure does not *per se* prevent the counterparty from demanding recognition and enforcement of the foreign arbitral award rendered in its favor[25]

The Supreme Court has clarified that the substance of the court procedure for recognition and enforcement of a foreign arbitral award is to confirm its legal effect in Russia. A creditor of the Russian company that undergoes winding up procedure has to go through such court procedure of the recognition and enforcement of the foreign arbitral award first before applying directly to the winding up administrators in order to obtain the status of a lawful (ranked) creditor. According to the Supreme Court, the lower court's position whereby the Russian company's winding up status prevents the creditors of such company from applying for recognition and enforcement of the arbitral award against it to the court, puts those creditors in an unequal position with the other creditors of such company and is, therefore, wrong.

This position of the Supreme Court may be interpreted as confirming that the Russian procedure for recognition and enforcement of foreign arbitral awards shall be construed as a formal "legalization" of a foreign arbitral award in Russia, which does not include the assessment of perspectives of its execution. Therefore, the recognition and enforcement of a foreign arbitral award in Russia shall not be conditional on the debtor's status (*e.g.*, its winding up) or existence or absence of debtor's assets in Russia.

[18] *Review*, para. 13.

[19] *Ibid.*

[20] *Ibid.*

[21] *Review*, para. 14; Case no. 310-ЭС17-12469 (Decision dated December 27, 2017).

[22] *Review*, para. 15; Case no. 305-ЭС14-4115 (Decision dated March 3, 2015).

[23] *Review*, para. 16; Case no. 305-ЭС17-7240 (Decision dated July 11, 2018).

[24] *Review*, para. 19.

[25] *Review*, para. 23; Case no. 310-ЭС15-5564 (Decision dated July 29, 2015).

3. The Supreme Court has clarified that provisions of Russia's international treaties on mutual legal assistance pertain to enforcement of foreign state courts' judgments, not arbitral awards[26]

In litigations involving parties from CIS countries, Russian courts often mistakenly relied on the provisions of the Minsk Convention in cases involving enforcement of arbitral awards. To tackle this issue, the Supreme Court drew on provisions of the 1993 Minsk Convention on Legal Assistance between the CIS states (the "Minsk Convention") to demonstrate that it only applies to enforcement of court judgments rendered in the participating jurisdictions. The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards remains the principal source for provisions guiding recognition and enforcement of foreign arbitral awards in Russia.

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[26] *Review*, para. 24; Case no. 310-ЭС15-4266 (Decision dated October 22, 2015).