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RUSSIAN ARBITRATION REFORM, TWO YEARS LATER

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"For everything there is a season… time to cast away stones, and a time to gather stones together; a time to embrace, and a time to refrain from embracing…"
Ecclesiastes, 3

The Russian arbitration reform started at the end of 2015 when major changes were made to the Law On International Commercial Arbitration ("ICA Law") and the procedural codes, and a new law on domestic arbitration was enacted ("Law on Domestic Arbitration") (jointly "New Arbitration Laws"). The New Arbitration Laws came into force on 1 September 2016. More than two years have passed since, and thus one could consider whether the declared goals of the arbitration reform were achieved.

1. Harmonize Russian Arbitration Law with the 2006 Uncitral Model Law

One of the purposes of the arbitration reform was to bring Russian arbitration laws into compliance with the UNCITRAL Model Law. The ICA Law declares that it takes into account the provisions of the UNCITRAL Model Law, not only in its original version of 1985, but as amended in 2006. However, as a matter of fact, only insignificant changes from the 2006 Model Law were implemented.

Just to recap, the changes made to the 2006 UNCITRAL Model Law dealt with two major issues:

First, the 2006 amendments to UNCITRAL Model Law allowed arbitration agreements to be concluded orally.

Second, they extended the tribunal's authority to take decisions on preliminary or conservatory measures and provided for the mandatory enforcement of such decisions.

The new ICA Law does not allow an arbitration agreement to be concluded orally, although it recognizes that an arbitration agreement is concluded in writing in the form, "allowing to fix the information contained therein and to make it accessible for subsequent reference."

As to the tribunal's authority to grant interim measures, although declaring the right of the arbitral tribunal to take a decision on preliminary or conservatory measures, the ICA Law does not provide for the possibility to enforce such measures through state courts.

II. Prevent the Abuse of Arbitration

The main goal of the arbitration reform was to prevent the abuse of arbitration.

Such abuse can conventionally be classified into three groups:

(i) "Corporate" arbitration courts, which were established by large, medium and even small companies, with the purpose of administering disputes between said companies and their counterparties. Such courts created by major Russian companies (such as Gazprom, Sberbank and Lukoil, etc.) had nice premises for hearings and serious financial and administrative support from the parent.

The legality of such courts was indirectly supported by a rather controversial decision of the Russian Constitutional Court,[1] which recommended analyzing the matter of the independence of the arbitral tribunals from such courts and its founder in each specific case.

(ii) "Pressure cookers," which quickly manufactured arbitral awards in favor of the claimants. Representatives of these institutions promised the party bringing their dispute against a naïve counterparty a quick and efficient arbitration with a guaranteed award in the claimant's favor. Some arbitration courts even offered an additional service by assisting in getting the writ of execution for the enforcement of such awards.

Although the basic procedural principles (such as equal treatment of both parties and the right to be heard) were normally ignored in arbitrations administered by such courts, state courts nevertheless routinely issued writs of execution for enforcement of "pressure cookers"' awards, turning a blind eye to procedural defects in place (often with no participating respondent).

(iii) "Fixers," i.e., arbitration institutions which were created to fix a specific problem. For example, they could issue a backdated arbitral award confirming inflated debt (to be added to the list of creditors in case of the respondent's bankruptcy) or fabricate an award legalizing the title to the disputed property, usually real estate.

Such forms of abuse are normally unheard of in developed arbitration-friendly jurisdictions, and state courts or the criminal police could efficiently deal with every case of abuse.

Unfortunately, state courts and law enforcement agencies in Russia, for various reasons, were unable to prevent the abuse of arbitration, thus, the Russian

[1] Ruling of the Constitutional Court of the Russian Federation on the case of verification of constitutionality of the provision of Article 18 of the Federal Law On Arbitration Courts in the Russian Federation, Clause 2, Part 3, Article 239 of APC RF and Clause 3, Article 10 of the Federal Law On Non-Profit Organizations due to the complaint of the Open Joint Stock Company "Sberbank of Russia," dated 18 November 2014 No. 30-P.

government decided to deal with it by using administrative measures.

The most significant change in Russian Arbitration Laws was the introduction of a special licensing system for permanent arbitration institutions ("**PAIs**"). Such PAIs can only be established by a non-profit organization as a measure to eliminate arbitration courts established by companies and individuals.[2]

Two arbitration courts at the Russian Chamber of Commerce (International Commercial Arbitration Court and Maritime Arbitration Commission) were exempted by law from the licensing requirements.

Since the most obvious way to circumvent these restrictions would be to establish an arbitration institution outside of the Russian Federation and administer Russian disputes from abroad, the law extended the licensing requirements to foreign arbitration institutions under the condition that such a foreign arbitration institution should have a "well-regarded international reputation."

Over 50 Russian arbitration institutions applied for the license from the Russian government,[3] but almost all applications were rejected with references to various bureaucratic formalities. Only two Russian non-profit organizations received a license: the Russian Union of Industrialists and Entrepreneurs (based on membership of major Russian corporations) and the Russian Institute of Modern Arbitration.

Only two foreign arbitration institutions applied: the Arbitration Court "Just" from Kazakhstan and the Vienna Center. While the former was denied permission due to the lack of an "internationally recognized reputation," the latter was hindered by the new requirements of registering a branch in Russia (see more on this topic by Anna Grischenkova on pages 19. On the potential expansion of foreign arbitration institutions to Russia, see the article by Roman Zykov and Vladimir Khvalei on page 33.)

The fact that almost all "corporate" arbitration courts[4] have ceased their existence is the most significant positive result of the Russian arbitration reform (see more in the article by Alexander Muranov on page 50). However, the fact that only four arbitration institutions for such a large country as Russia have received the license, raises certain concerns (on the fate of Russian regional arbitration, see more in the article by Mikhail Morozov on page 53).

Even more concerns are raised by the fact that two other types of corporate courts, "Pressure cookers" and "Fixers," survived the arbitration reform and continue their questionable activity in the form of *ad hoc* arbitrations.

3. Bring Russian Disputes Back to Russia

Another goal of the arbitration reform was to bring Russian disputes from London, Stockholm, Paris and other cities abroad, back to Russia.

This was planned to be done primarily through administrative measures (licensing of arbitral institutions in Russia), by requiring certain types of disputes to be resolved by licensed arbitral institutions and introducing certain other statutory restrictions.

The former ICA Law covered not only disputes between Russian and foreign entities, but also disputes between Russian companies if one of them was a company with foreign investments.

The new ICA Law excluded from its scope domestic Russian disputes, which opened the floor for debate as to whether domestic Russian disputes could be administered by foreign arbitration institutions.

The New Arbitration Laws also provide that certain types of disputes could be administered only by "licensed" PAIs. In particular, it concerns the administration of arbitration in corporate disputes (such as arising from share purchase agreements). Some types of corporate disputes can be administered only by those PAIs that have drafted, published and deposited with the authorized federal executory authority special rules for corporate disputes.[5]

[2] Article 44 of the Law on Domestic Arbitration.

[3] See 2017 Public Report on the Activities of the Council for Development of Arbitration at: http://minjust.ru/ru/deyatelnost-v-sfere-treteyskogo-razbiratelstva/otchety-o-deyatelnosti-soveta-po-sovershenstvovaniyu.

[4] With the exception of the Arbitration Center at the Russian State Corporation "Rosatom," which joined the Russian Institute of Modern Arbitration as a shareholder.

[5] Article 45(7) of the Law on Domestic Arbitration.

At the moment, three "licensed" PAIs[6] have developed such rules, but so far not even one corporate dispute has been registered by them.[7]

Although one could say that two years is not enough to make a conclusion as to whether these administrative measures have succeeded in bringing corporate disputes back to Russia, at least the lack of a single case under the new rules is a strong indication that the introduced restrictions on corporate disputes are not extremely popular in Russia and abroad (see more on this topic in the article by Alexandra Komaritskaya on page 59).

[6] With an exception of the Maritime Arbitration Commission at the Russian Chamber of Commerce.

[7] Under the law, PAIs are obliged to publish on their websites information on pending corporate disputes.

Conclusion

It seems that the time has come to have a fresh look at the results of the Russian arbitration reform and propose measures that could further improve the situation (see the article by Professor Alexander Komarov on page 46 for more on this topic).