Russian Arbitration Reform: A Leap into the Unknown?

Kluwer Arbitration Blog
August 14, 2015

Daria Astakhova (Arbitration Court at the Russian Union of Industrialists and Entrepreneurs)

Please refer to this post as: Daria Astakhova, 'Russian Arbitration Reform: A Leap into the Unknown?', Kluwer Arbitration Blog, August 14 2015, http://arbitrationblog.kluwerarbitration.com/2015/08/14/russian-arbitration-reform-a-leap-into-the-unknown/

In 2013 the President of the Russian Federation Vladimir Putin announced in his annual message to the Council of the Federation:

> "I would like to attract your attention to one more problem – the mechanisms of commercial dispute resolution are still not as good as the global practice is, and it is necessary to raise the prestige of arbitration".

In the same message, the President appointed the Russian Government, together with the Russian Union of Industrialists and Entrepreneurs and the Chamber of Commerce and Industry of the Russian Federation, to devise a new arbitration law. This call re-affirmed the Russian Arbitration Reform which was started in 2011 by the Ministry of Justice of the Russian Federation, and which was supposed to bring the Russian Law on International Commercial Arbitration of 1993 in conformity with the UNCITRAL Model Law on International Commercial Arbitration as amended in 2006. This led to a large-scale reform which provided for substantial changes in the Russian arbitration legislation. In the course of this reform two draft laws were proposed: the Draft Law on Arbitration in the Russian Federation and the Draft Law on Amendments to Certain Laws ("Draft Laws"). On July 1, 2015, these Draft Laws were approved by the Duma in their first reading.

In this post the key points of the Russian Arbitration Reform will be presented. Some of them were rejected in the course of the reform, while others still form a part of the Draft Laws.

Dualism in the regulation of international and domestic arbitration remains

Russian arbitration legislation is characterized by differentiation between the regulation of international and domestic arbitration. Arbitration is, therefore, regulated by two laws: the Law on International Commercial Arbitration of 1993, which is based on the UNCITRAL Model Law on International Commercial Arbitration 1985, and the Law on Domestic Arbitration in the Russian Federation of 2002. Some of the actors of the Russian Arbitration Reform proposed to adopt a uniform law on arbitration. However, in the course of the debate, it was decided to maintain the dualism of regulation of arbitration.

Criminal liability of the arbitrators

The proposal to extend the application of the provisions on corruption contained in the Criminal Code of the Russian Federation to arbitrators was initiated in order to deter illegal practices in arbitration. One of the suggestions was also an introduction of a special article in the Criminal Code which would govern bribery in arbitration. The proposal was praised as being useful to protect the principle of fairness. Nevertheless, a mechanism of protection of arbitrators from unfounded accusations needed to be established. In the end, the final version of the Draft Laws does not contain this proposal, but a separate reform regarding this proposal is going to be introduced.

The establishment of arbitral institutions

One of the purposes of the Russian Arbitration Reform was the prevention of so-called "pocket arbitrations": namely, a practice in which disputes are resolved between the parties by an arbitral institution which is established by one of the parties, or its parent company, developed in the Russian Federation. This type of dispute resolution violated the principle of neutrality and fair treatment. For that reason, the Draft Law on Arbitration in the Russian Federation has toughened the requirements for the establishment of arbitral institutions. In conformity with the Draft Law, arbitral institutions can be established only by non-commercial organizations. The procedure of establishment of an arbitral institution will include filing a request and the receipt of the permission from the Government of the Russian Federation. Special attention is given to the conformity of the rules of the arbitral institution with Russian law, the existence of a list of arbitrators and the purposes of the establishment of the arbitral institution.

These amendments shall be welcomed because they deter and prevent illegal practices in domestic arbitration. Nevertheless, in international arbitration, they are doubtful when it comes to their implementation. In fact, the Draft Law provides that in order to administer cases seated in the Russian Federation, a foreign arbitral institution must also receive permission from the Russian Government. This provision could create an obstacle for conducting international arbitration in Russia.

Broadening the scope of arbitrability

The issue of arbitrability is one of the most vital arbitration issues in the Russian Federation. Even though Russian arbitration law provides that any dispute arising out of civil and commercial matters can be subject to arbitration, the Russian courts have been narrowly interpreting this provision and they showed certain hostility towards arbitration by constantly trying to remove, for example, corporate issues and disputes arising from state contracts, from the jurisdiction of arbitral tribunals.

The aim of the reform is to improve the current legislation by explicitly establishing that corporate disputes can be subject to arbitration. However, in conformity with the Draft law, corporate disputes can be resolved only in institutional arbitrations. Furthermore, in order to arbitrate this type of disputes, institutions must adopt special rules for the resolution of corporate disputes. These additional requirements, stipulated in order to protect third parties' rights, complicate the issue of arbitrability. In addition, the adoption of a special provision devoted to commercial disputes will not help to solve the problem of arbitrability until the Russian courts become less restrictive in their interpretation of legislative provisions governing arbitrability.

Assistance of national judges to arbitrators

Arbitration, due to its contractual nature, cannot function without the support of the state courts. This is why the UNCITRAL Model Law in article 6 provides for "*a court or other authority for certain functions of arbitration assistance and supervision*". So far the functions of assistance to arbitration were not sufficiently assured in Russian arbitration law. In the field of international arbitration, the functions of the "supporting judge" are assumed by the President of the Chamber of Commerce and

Industry of the Russian Federation. In domestic arbitration, the court assistance does not exist at all. This means that if the parties cannot agree on the arbitrator, or a party does not appoint its arbitrator and no mechanism for the appointment is provided in the institutional rules, the arbitration cannot proceed. According to the Draft Laws, the court assistance in international as well as in domestic arbitration shall be conducted by courts of the Russian Federation. This proposal should be welcomed. However, some problems can arise at the stage of implementation of these provisions. For example, the following question should be answered: how will the state courts decide on the candidate for an arbitrator?

In France, for instance, in the field of international arbitration, the President of the Tribunal de Grande Instance of Paris is competent to act as a "supporting judge", which means that all the questions related to international commercial arbitration are resolved by one person having a substantial experience in this field. Using this example, it may be reasonable to give the powers of assistance not to every judge of the commercial courts of the Russian Federation, but only to their presidents.

Conclusion

Overall, the Russian Arbitration Reform shall considerably change the basis of regulation of arbitration in Russia and help to promote this type of dispute settlement mechanism with a re-established principle of fairness. The reform shall considerably contribute to the development of domestic arbitration in the Russian Federation. However, some proposals introduced in the course of the reform seem to create obstacles for making Russia an attractive place of international arbitration. The above-stated key points of the reform are subject to amendments that can be introduced within 30 days from the approval of the Draft Laws. The second reading is expected this autumn: until then the debate is still open.