

The Evolution of Unilateral Arbitration Clauses in Russia

Kluwer Arbitration Blog

October 1, 2015

Mikhail Samoylov (Egorov Puginsky Afanasiev & Partners)

Please refer to this post as: Mikhail Samoylov, 'The Evolution of Unilateral Arbitration Clauses in Russia', Kluwer Arbitration Blog, October 1 2015, <http://arbitrationblog.kluwerarbitration.com/2015/10/01/the-evolution-of-unilateral-arbitration-clauses-in-russia/>

The issue of a unilateral (optional, alternative, hybrid) arbitration clause is highly controversial in commercial arbitration. The approach to these clauses varies from jurisdiction to jurisdiction. In 2012, the Supreme Arbitration Court of Russia (a state court), in Russian Telephone Company v. Sony Ericsson, declared a unilateral arbitration clause invalid. The decision attracted attention of arbitration participants both in Russia and abroad.

In 2014, the Supreme Arbitration Court of Russia was abolished. The judicial matters which were under its authority were transferred to the Supreme Court of Russia. In 2015, a case regarding a unilateral arbitration clause was considered by the Chamber on Economic Disputes of the Supreme Court of Russia. Since the *Russian Telephone Company case* has been criticized by the Russian commentators, it was likely that the Chamber on Economic Disputes of the Supreme Court would reverse the approach adopted in the *Russian Telephone Company case*. However, this did not happen, but the Supreme Court gave an explicit guidance regarding unilateral arbitration clauses for further drafting.

Factual background and the Court's opinion

Piramida LLC (a supplier) and BOT LLC (a buyer), both Russian entities, entered into a Supply Contract. Afterwards, Piramida LLC and Mr. Babkin entered into a Contract of Guarantee. In accordance with the contracts, the supplier agreed to

deliver goods, while the buyer agreed to pay for the goods. In case the buyer failed to do so, Mr. Babkin agreed to pay pursuant to the terms of the Contract of Guarantee.

The contracts contained the following arbitration agreements:

1) *“Any dispute arising in connection with this contract is to be finally resolved by the Commercial Court of Ulanovsk region (a state court – note of author) or by the arbitration court of the Chamber of Commerce of Ulanovsk region depending on the choice of a claimant.”* (Section 10.3. of the Supplier Contract);

2) *“[...] the dispute should be finally resolved by the Dimitrovogradsky City Court (a state court – note of author) or by the arbitration court of the Chamber of Commerce of Ulanovsk region depending on the choice of a claimant.”* (Section 4.2. of the Contract of Guarantee).

Thus, the parties agreed to refer the disputes either to arbitration or to a state court, with claimant having a right to choose between arbitration and litigation.

The Supplier Contract was breached since the buyer failed to make the payment. Consequently, *Piramida LLC* commenced an arbitration proceeding, and brought the claim against both *BOT LLC* and *Mr. Babkin*. The award was rendered in favour of the claimant. The arbitral award was not fulfilled voluntarily, and the claimant sought enforcement of the arbitral award.

The Arbitration Court of Smolensk region (a state court) rejected the motion for the enforcement of the arbitral award. The court stated that since the claimant had a sole opportunity to choose between arbitration and litigation, the parties concluded a unilateral arbitration clause. However, since the Supreme Arbitration Court of Russia decided that such type of the clause is invalid, the court rejected the motion for the enforcement of the arbitral award (Ruling dated on 09 July 2014). The court of cassation upheld the ruling (Decision dated on 24 September 2014).

The Supreme Court’s approach

On May 21, 2015, the Supreme Court of Russia overturned the previous decisions.

To understand the reasoning of the Supreme Court, first of all, one should take a look at the arbitration clause in the *Russian Telephone Company case*:

“Any dispute arising in connection with this Agreement [...] is to be finally resolved in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. [...] The arbitration clause does not restrict Sony Ericsson’s rights to file with a court of a competent jurisdiction a claim for recovery of debts for supplied Products”.

Although *Piramida LLC* case allegedly involved the same arbitration clause, there was a significant difference, which was noticed by the Supreme Court.

In the *Russian Telephone Company* case, the name of the party which had the right to choose between arbitration and litigation was indicated directly – Sony Ericsson (*“The arbitration clause does not restrict Sony Ericsson’s rights to [...]”*). Due to this reason the Supreme Arbitration Court concluded that there was a violation of the principle of equality of arms. Instead, in the *Piramida LLC* case, a party which had the right to choose between arbitration and litigation was not mentioned by name, but there is just a reference to a procedural status of a claimant (*“depending on the choice of a claimant”*). Thus, in the *Piramida LLC* case, the Supreme Court did not recognize the violation of the principle of equality of arms, but it recognized the undue interpretation of the *Russian Telephone Company* case by the lower courts.

As a result, the decisions of the lower courts were overturned and the Supreme Court ordered to re-examine the case. After re-examining the case, the Arbitration Court of Smolensk region granted the motion for the enforcement of the arbitral award (Ruling dated on 21 July 2015).

Conclusion

The *Piramida LLC* case seems to be a logical step in the evolution of unilateral arbitration clauses in Russia. There is a proposal of the Russian Arbitration Association to amend the law on arbitration in order to make the enforcement of unilateral arbitration clauses possible. This proposal becomes obsolete with the recent developments in the court practice.

Since a unilateral arbitration clause is a controversial issue, the *Piramida LLC* decision has plus and cons. On the one hand, the Supreme Court grants the enforcement of a unilateral arbitration clause. The commercial parties will get an opportunity to draft a unilateral arbitration clause which will be enforceable in

accordance with the Supreme Court's decision. On the other hand, enforceability of unilateral arbitration clauses opens a possibility for the parties, especially for those not acting in good faith, to commence parallel proceedings. Certainly, arbitration-friendly jurisdictions have a mechanism against such conduct, but it is difficult to expect that the Russian judges will have one. Consequently, the issue of a unilateral arbitration clause remains in focus in Russia.