The Validity of an Arbitration Clause Incorporated by Reference: A Step Forward by Russian Courts

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The question of the validity of an arbitration clause incorporated by reference is debatable in international arbitration. The approach of national courts to the issue varies from jurisdiction to jurisdiction (e.g., see here).

The Russian Law on International Arbitration (1993) is based on the UNCITRAL Model Law. In particular, the Law provides in Article 7 that the reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract. In regards to whether there is a valid reference to an arbitration clause, Russian courts, from time to time, face certain legal issues either at a stage when a party to a dispute brings a case in a state court (in violation of the arbitration agreement), or at a stage of the recognition and enforcement of a foreign arbitral award. The attitude to the problem differs among courts.

There was some positive development in the field, and a recent decision in the case A60-12039/2016 promoted a rather pro-arbitration approach to this issue. Prior cases served the opposite approach, under which courts more often than not refused the recognition and enforcement of a foreign arbitral award because they concluded that the arbitration agreement formal requirements were not fulfilled when the arbitration agreement was claimed to be concluded by reference.

For example, in the case A53-15628/2016, a party (a seller) sought the recognition and enforcement of the arbitral award rendered in New York. The dispute arose from a contract for the supply of oil products. The contract had a reference to the seller's General Terms and Conditions ("Terms") which contained an arbitration clause. These Terms were made a part of the contract.

Although arbitrators found that they had jurisdiction over the dispute, and that there was an arbitration agreement incorporated by reference, a Russian state court, the *Arbitrazh* Court of the Rostov region, had an opposite view. The court concluded that the arbitration agreement had not been concluded in writing in the examined case, and hence was invalid.

Despite the fact that the Russian Law on International Arbitration has a provision under which the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement in writing, the court did not recognise that the reference to another document falls under criteria "in writing". The weak argumentation of the ruling deprives us of the possibility to understand

logic of the court. Still, the case A53-15628/2016 is an example of a rather formalistic, and somewhat arbitration unfriendly, approach.

In this context, the case A60-12039/2016 goes far further.

A., a company incorporated in Ukraine, entered into an agreement with **B.**, a company incorporated in Russia. The agreement was related to a transfer of an internet number resource (an IPv4 address).When a dispute arose, **A.** demanded the return of the IPv4 address, and as a claimant brought the case before the *Arbitrazh* court of the Sverdlovsk region (a Russian state court).

B. invoked Article 148(1)(5) of the Russian *Arbitrazh* Procedural Code and objected to the court proceedings. That article, in the vein of Article II (2) of the New York Convention, provides that the court is to leave the claim without consideration. It means that the court terminates the proceedings without prejudice if there is an arbitration agreement between the parties, unless the court finds that the agreement is invalid, inoperative, or incapable of being performed. **B.** invoked the existence of an arbitration clause between the parties. **A.**, *in contra*, argued there was no arbitration agreement between the parties, and that the court had jurisdiction to hear the case.

By its ruling on 30 June 2016, the *Arbitrazh* Court of the Sverdlovsk region has endorsed the defendant's objection, terminated the proceedings, and referred the parties to arbitration. The ruling has been upheld both by an appeal court – the 17th *Arbitrazh* Appeal Court (decision of 1 September 2016), and by a court of cassation – the *Arbitrazh* court of the Ural region (decision of 16 November 2016).

Considerations

The arguments of the *Arbitrazh* court of the Ural region will be considered onwards.

Preliminary, the Court underlines that both **A.** and **B.** are members of the *Réseaux IP Européens Network Coordination Centre* (hereinafter: "RIPE NCC"), which is the regional Internet registry for Europe, the Middle East, and parts of Central Asia.

Each legal entity who plans to obtain services from the RIPE NCC and, therefore, become a member of the RIPE NCC has to enter into the RIPE NCC Standard Service Agreement (hereinafter: "Standard Service Agreement"). Both **A.** and **B.** have entered into the Standard Service Agreement.

The Standard Service Agreement in its Article 6 provides that the members of the RIPE NCC have to comply with the RIPE policies and RIPE NCC procedural documents. The RIPE NCC Conflict Arbitration Procedure and the Transfer of Internet Number Resources (hereinafter: "Policy") are amongst them.

Furthermore, the court examined the question of whether there was an arbitration agreement between the parties. The court noted that the RIPE Standard Service Agreement in Article 11 provides for any disputes which may arise from the Standard Service Agreement to be settled in accordance with the RIPE NCC Conflict Arbitration Procedure. Article 11 is nothing more than an arbitration clause. The Court acknowledged that:

1. **A.** and **B.** are parties to the RIPE NCC Standard Service Agreement,
2. they have known about the arbitration clause as well as a whole policy related to arbitration, and
3. they have undertaken obligations to comply with, *inter alia*, the RIPE NCC Conflict Arbitration Procedure.

Having reached this inference, the court concludes that the dispute which arose between the parties

falls within the aforesaid arbitration clause, which is a valid arbitration clause, and consequently the court terminated the proceedings.

Conclusions

> "Where the document referred to contains an arbitration clause, a question arises as to whether the reference to that document is sufficient for the parties to be bound by the arbitration agreement." (*Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 272).

The two cases mentioned above serve as a good basis to show how broad the specter of the application of this rule is. Of course, the circumstances of each case need to be taken into account, but the cases are similar enough to show how unpredictable the answers to a situation involving the conclusion of an arbitration agreement by reference can be.

In regards to the case A53-15628/2016, one may conclude that the existence of the reference to a document containing an arbitration clause (the seller's General Terms and Conditions) is not enough to make a conclusion that an arbitration agreement is concluded in writing. Perhaps, a judge had in mind that the document containing an arbitration clause should be agreed on by both parties, while the document was set out by one of the parties, leaving no opportunity for the other party to negotiate more favourable terms ("take it or leave it" position).

In contrast, in the case A60-12039/2016, courts consistently decided the issue of the existence of an arbitration agreement under extremely broad terms, which, in fact, happens rarely.

The Policy, along with the agreement, constitutes a contract between the parties. There is no doubt that the contract has been concluded in consideration of services are provided by the association. Having become a member of the association, by entering into the Standard Service Agreement, both parties have agreed to comply with the policies and procedures of the association. One of the procedures is an agreement to arbitrate. It is an explicit provision. The parties knew this and this provision has been accepted. The requirement that an arbitration agreement shall be in writing was met and, therefore, the arbitration agreement was valid under the Russian Law on International Arbitration.

The latter case is a good example of the arbitration-friendly attitude, and worthy of mentioning in order to bring a fresh look onto the validity of arbitration clauses incorporated by reference in Russia.

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