Practice of International Construction Arbitration in Russia

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Unlike some Western arbitration institutions which enacted institutional arbitration rules dedicated to construction disputes, such as the 2015 American Arbitration Association (AAA) Construction Industry Arbitration Rules, to date, the leading Russian arbitration providers have not developed any specific rules for construction-related disputes. However, such disputes hold rather high positions in the caseload, with a peak of 16.4% in 2010, of all the cases before the Moscow-based International Commercial Arbitration Court at the RF Chamber of Commerce and Industry (ICAC). Insofar, arbitration is the preferred method of dispute resolution for construction disputes regarding international infrastructure projects or involving foreign companies, in Russia.

To provide a practical mini guide to international construction arbitration law in Russia, we consider the following issues herein: the use of ADR at pre-arbitration stage; arbitral costs; challenge of arbitrators, tribunal secretary and expert witnesses; consolidation and joinder of an additional party; and interim measures.

ADR and Prevention

Negotiation or, less often, mediation clauses are added to dispute resolution provisions of construction contracts. If the Russian law governs the dispute, the parties must negotiate, within thirty calendar days before filing a claim before a local commercial [*Arbitrazh*] court (see Article 4(5) of the RF *Arbitrazh* Procedure Code). While it is true that even where the parties cannot settle a technically complex dispute in advance of arbitration, efficient contract administration can only help in presenting evidence before the arbitral tribunal.

At the enforcement stage, the Russian courts would verify whether a Russian or foreign arbitral tribunal had properly considered pre-arbitration settlement procedure. If it was disregarded, an award may be set aside or its enforcement denied (see Articles 34(2)(1)(3) and 36(1)(1)(4) of the RF Law of 07 July 1993 No. 5338-1 "On International Commercial Arbitration"). In a recent decision, the *Arbitrazh* Court of Moscow ruled that failure to comply with contractual duty to assign an independent expert at pre-arbitration stage was a ground for non-enforcement of the Swiss award in Russia (*No. A40-169104/2018 dated 5 December 2018*).

Payment of Arbitral Costs

On filing of a statement of claim with the ICAC, the claimant should pay registration and arbitration fees. The payment of the registration fee of USD 1,000 shall suspend the running of the limitation period. The failure to pay the arbitration fee has an impact on the progress of the proceedings. The ICAC Secretariat will not transmit the statement of claim to respondent until the advance payment of the arbitration fee has been made. In a 2017 dispute, a Russian contractor withheld its arbitration fee payment for 42 days. Referring to equality principle, the foreign subcontractor convinced the administrator to grant it additional 42 days to prepare its counterclaims (Case No. 31/2017).

The ICAC Schedule of Arbitration Costs 2017 does not address calculation of arbitration fees for non-monetary claims, such as a claim for terminating a construction contract by an arbitral tribunal or a claim for release of an advance payment bond by a bank. However, the claimant should justify its calculation and pay the respective arbitration fee. In case of delay, the non-monetary claim would be left undecided.

Challenge of Arbitrators, Tribunal Secretary and Expert Witnesses

Pursuant to Section 17(1) of ICAC International Commercial Rules, arbitrators, tribunal secretary and expert witnesses should be impartial and independent. In the ICAC practice, this rule applies to tribunal-appointed experts only. However, where a party-appointed expert testimony is involved, the party is free to claim for its exclusion as improper evidence based on general evidence rules. Generally, the tribunal is free to decide whether to appoint or not an expert witness, for e.g., as to detect defective work or to determine the volume and value of the work performed (*Decree of the RF Supreme Court No. 60pv-01 of 19 June 2001*). It is understood that, if the tribunal does not possess the necessary expertise to determine the claim before it, it will often appoint an expert (see, *ICAC Award No. 31/2010 of 29 June 2010*).

Consolidation and Reconsolidation of Proceedings

Construction projects invariably involve many contracts and many parties. One of the first ICAC consolidations involved a large project for the construction of a rail road in Africa. The foreign subcontractor was assigned to build two different sections of the rail road based on two contracts, which textually duplicated an ICAC arbitration clause. Immediately upon obtaining the statement of claim, the subcontractor sought consolidation of two parallel proceedings. In follow-up to claimant's objections, the ICAC Presidium initially denied the request. However, after the subcontractor filed its counterclaims and the tribunal consisting of the same three arbitrators was formed, the consolidation request was admitted (Case No. 31/2017).

In another construction dispute, the general contractor filed two consolidated claims for recovery of advance payment in one statement of claim under two contracts for construction and design of corresponding working documentation, with different arbitration clauses. (Case No. 118/2017) Under the first contract, the presiding arbitrator was selected by the two party-appointed arbitrators. Under the second arbitration clause, the ICAC Nomination Committee was bound to appoint the presiding arbitrator. Due to incompatibility of the arbitration clauses, the ICAC Secretariat offered the claimant to re-consolidate its claims. After the claimant filed two statements of claims separately, he applied for consolidation of two proceedings, which ICAC being satisfied of the respondent's consent.

Joinder of an Additional Party

A Russian customer and a French provider entered into a service contract, under which the customer paid an advance payment. Since the services were not rendered in full, the customer terminated the contract and sought to recover 50% of the installment of the advance payment. He sought for relief not only against the French party to an arbitration agreement, but also against its partner from Malta. The seal of the Maltese partner was used in the contract and its directors simultaneously acted for the French provider on signing the contract and the additional acts and contacting the customer in the course of the contract implementation. The tribunal agreed with the joinder of the Maltese co-respondent and adjudged recovery from both respondents (*ICAC Award of 02.11.2017 No. 21/2017*).

Interim Measures

Section 34 of the ICAC International Commercial Rules allow for the parties to a construction dispute to seek interim relief from the ICAC or from a judicial authority.

For instance, a subcontractor might be interested to freeze the *status quo* until the tribunal renders an award. In one interesting case, the District Court Vienna (*Einstweilige Verfügung des Bezirksgerichts Innere Stadt Wien vom 15.07.2014 in Sachen 55 C 630/14a–4*) prohibited a Russian general contractor to claim for immediate payment under the bank guarantee, whereas the Austrian guarantor bank was prohibited to make the payment. Through this interim relief, the Austrian subcontractor, which filed a statement of claim with ICAC for the payment of the works performed, had blocked immediate payment of advance payment bond issued by the bank in favor of the general contractor.