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Some Findings of the Russian Constitutional Court on International Arbitration

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Under the Russian legal system, the last resort a party has with respect to challanging a court decision is to apply to the Constitutional Court of the Russian Federation with a claim to review the decision's compliance with the Russian Constitution in terms of the provisions of laws and/or regulations applied by lower courts. There are very few cases in which the Constitutional Court opined on matters related to international arbitration.

Since the adoption of the Law "On International Commercial Arbitration" founded on the UNCITRAL Model Law, the compliance of its provisions with the Russian Constitution has been challenged four times. Three times the subject of the challenge was Article 34 ("Application for setting aside as exclusive recourse against an arbitral award") and/or Article 35 ("Recognition and enforcement") in 1999, 2000 and 2001. The applicants, in particular, alleged that the limited range of grounds for setting aside an arbitral award or for refusal to recognize and enforce an award established by the said articles infringed upon the party's right to judicial protection, which includes the right of recourse against any judgment or award rendered against a party. In each claim, the Constitutional Court refused to review the constitutionality of these provisions finding that the applications were inadmissible as the said provisions nowise violated the constitutional rights of the applicants. The rationale of the court contributed to the development of making the jurisprudence more favorable to international commercial arbitration. Thus, in its decision of October 26 2000 No. 214-? the court stated that "the applicants while entering into the contract failed to exercise their right to provide for resolution of the arising disputes by commercial court procedure, but instead signed an arbitration agreement (clause) on submission of them to arbitration under the Law of the Russian Federation "On International Commercial Arbitration". Thus, having exercised their right of freedom of contract, they voluntarily chose this particular dispute resolution technique and agreed to comply with the rules established for international commercial arbitration court".

Furthermore, in May 2009 the Constitutional Court ruled on international arbitration in its decision of May 28, 2009 No. 623-O-O. This time it examined an application challenging the constitutionality of the Article 16(3) "Competence of the arbitral tribunal to rule on its jurisdiction" of the Law "On International Commercial Arbitration". In my opinion, the case is interesting and even in some way bizarre, thus it deserves a closer look.

A foreign company Mellain LLC filed a claim before the International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry (ICAC) to recover contractual debts

from a Russian company. The ICAC ruled on its jurisdiction to hear the dispute. The Russian state courts of the first and cassation tiers set aside the ruling on the ground that the arbitration agreement was made by the claimant with another Russian company which did not act on behalf of the respondent. The courts rejected the arguments of Mellain LLC about the respondent having missed the time limit for submitting his application to the state court for setting aside the ruling of the arbitral tribunal on its jurisdiction.

Mellain LLC applied to the Constitutional Court of the Russian Federation challenging, in particular, the constitutionality of the provision of Article 16(3) of the Law "On International Commercial Arbitration" which provides that "the arbitral tribunal may rule on a plea referred to in paragraph (2) of this article [on the absence of jurisdiction] either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal. While such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award".

The applicant argued that the wordings "within thirty days after having received notice of that ruling" lacked clarity as it failed to specify the moment of commencement of the period for filing the application to set aside the ruling of the arbitral tribunal as a preliminary question on its competence. On this ground the claimant alleged that it is contrary to Article 46 of the Constitution which provides that "everyone is guaranteed judicial protection of his rights and liberties".

Furthermore, the applicant requested the Constitutional Court to review the ICAC ruling and to compel the ICAC and the Russian specialized professional periodical "International Commercial Arbitration" to publish a research paper on the competence of ICAC. Unsurprisingly, the Constitutional Court rejected these requests noting that resolving such matters falls beyond the competence of the Constitutional Court.

The Constitutional Court found that the ICAC Rules clearly specify the procedure for mailing and delivering the documents by the ICAC Secretariat. The court noted that the Rules in force as of the time of the dispute in question provided in Paragraph 12(2) that "the statements of claim, statements of defence, notices of the hearing, arbitral awards, rulings and orders shall be sent by registered mail with return receipt requested, or otherwise, provided that a record is made of the attempt to deliver the mail". (The ICAC Rules that are currently in force have practically the same wordings of Article 16(3)). The Constitutional Court concluded that Article 16(3) considering its application together with the Arbitration Rules of the ICAC cannot be interpreted as lacking clarity.

Indeed, Article 16(3) of the Law on International Commercial Arbitration does not need to provide details on how to prove the exact time a notice of the ruling was received by each party. However, such details should be specified elsewhere, namely in the applicable arbitration rules.

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