Kluwer Arbitration Blog

The Russian Arbitration Reform – a Road to More Certainty?

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1 September 2016 marks the key date in the long-awaited Russian arbitration law reform, publicly announced by the President of the Russian Federation already in 2013. Since then, the Russian arbitration law reform has been in the public eye attracting significant publicity (previous blog posts on this can be read: here, here, here, and here). As of 1 September 2016, two laws signed on 25 December 2015 have come into force:

- The Federal Law on Arbitration (Arbitral Proceedings) in the Russian Federation ("Arbitration Law"), governing domestic arbitration as well as the issues concerning foreign arbitral institutions on the territory of Russia; and
- The Federal Law on Amendments to Certain Legislative Acts of the Russian Federation ("Amendment Law"), relating to both domestic and international arbitration.

The legislator has kept the original framework, regulating international and domestic arbitration separately, i.e. while domestic arbitration is now governed by the newly adopted Arbitration Law, international commercial arbitration continues to be governed by the Law on International Commercial Arbitration ("ICAL") adopted based on the Model Law and as amended by the recent Amendment Law. Below, we summarize the key developments introduced by the Reform (both new laws together), taking into account almost a year-long discussion on this topic.

Mandatory licensing

As in most Eastern European countries, one of the main challenges of arbitration in Russia has been the widespread practice of submitting disputes to private arbitral institutions established by one of the parties or affiliated companies (so called "pocket arbitrations"). The Reform introduced the requirement of mandatory licensing of arbitral institutions administering arbitral proceedings on the territory of the Russian Federation (both Russian and foreign), starting from 1 November 2016 (Article 44 of the Arbitration Law), with the aim of eliminating these "pocket arbitrations" (thereby increasing the acceptance of arbitration among its users as well as the courts).

Russian arbitral institutions (with notable exception of the International Commercial Arbitration Court and Maritime Arbitration Commission at the Chamber of Commerce of the Russian Federation) are now required to (a) show that they are established by non-commercial organisations, (b) submit their institutional arbitration rules which have to comply with the new Arbitration law, (c) submit a recommended list of arbitrators, and (d) show a reputation ensuring a high standard of arbitration.

For foreign arbitral institutions, the sole prerequisite for obtaining a license is, as discussed in a previous post, that such institutions have a "*widely recognized international reputation*" (Article 44 (12) of the Arbitration Law). So far, no details as how to interpret the term "*recognized international reputation*" are available (the Government Resolution No. 577, dated 25 June 2016 concerning issuance of mandatory licenses, does not address the issue). It can, however, be assumed that the leading international arbitral institutions will meet the standard. Uncertainty remains with regard to the status of foreign arbitral institutions less well known in Russia and/or internationally.

Awards of international institutions operating without a license will be treated as *ad hoc* awards. As a consequence, several restrictions introduced by the Reform with regard to *ad hoc* awards apply, *inter alia*, that the Parties cannot (a) ask for state court assistance regarding the taking of evidence, (b) arbitrate corporate disputes, (c) exclude recourse to state courts against the award, (d) exclude state court assistance regarding appointment and removal of arbitrators.
In addition to that, after 1 November 2017, arbitral institutions that have not obtained the license (here, interestingly, the Arbitration Law makes no distinction between domestic and foreign arbitral institutions) will not be allowed to administer arbitration proceedings anymore and the awards rendered under the auspices of such institutions will be deemed to be "*rendered in breach of arbitration procedure*" (Article 52(15) of the Arbitration Law). While this will have no consequences on enforceability of foreign arbitral awards in Russia, it may however, become the ground for setting aside of an award rendered on the territory of Russia (whether domestic or international). As a result, this sole article may backlash development of international arbitration in Russia, as the Parties will avoid choosing Russia as their seat in order to guarantee enforceability of their awards.

Arbitrability and arbitrability of corporate disputes

As Ms. Daria Astakhova has already observed in her earlier post, one of the most important changes introduced by the Reform relates to arbitrability. Historically, Russian courts have taken a sceptical stance towards arbitration and have adopted a rather narrow interpretation of arbitrability. After the Reform, the courts now have to operate on the presumption that except for the disputes explicitly listed in the Commercial Procedure Code and the Civil Procedure Code, all other disputes are arbitrable.

The legislator took the notion of arbitrability even further and declared corporate disputes to be arbitrable in principle, thereby de facto overruling the existing practice of Russian courts as, e.g., expressed in the infamous decision in *Novolipetsk Still Mill (NLMK) v. Nikolay Maksimov*. With the Reform, the Russian legislation now distinguishes between: (a) non-arbitrable corporate disputes, (b) arbitrable corporate disputes without specific requirements and (c) arbitrable corporate disputes with special requirements. For the purposes of this blog, we will concentrate on the latter, which relate to shares and shareholder's rights in a company. Such corporate disputes may only be resolved in arbitration proceedings based on an arbitration agreement signed by all the shareholders, the company itself, and other parties, which may participate in the proceedings. The arbitration agreement can be contained in corporate (shareholders') agreements or in the articles of incorporation (the latter of course only unless a third party needs to become a member of such an arbitration agreement, who may express consent to join such an arbitration agreement). If contained in the articles of incorporation, the arbitration agreement must be adopted by a unanimous decision of its supreme governing body (shareholders meeting), provided that a company is not a joint stock company with 1,000 or more shareholders of voting shares or a public

joint stock company.

Furthermore, in order to be arbitrable, the arbitration must be seated in Russia and must be administered by arbitral institutions which have adopted special rules for the resolution of corporate disputes (since *ad hoc* arbitrations of corporate disputes are not admissible). The requirement of "special rules" is, at least at the current stage, impracticable in the international context, considering that only few institutions offer such rules (e.g. the DIS-Supplementary Rules for Corporate Law Disputes of the German Arbitration Institution in force as of 2009). Notably, none of the foreign arbitral institutions particularly popular with Russian parties (such as LCIA, SCC, VIAC) or the Russian institutions have made any announcement on introducing sets of rules for corporate disputes. Consequently, it seems rather unlikely that many corporate disputes will be arbitrated in the near future.

State court assistance and supervision

The Reform has also extended the possibility of court assistance and supervision related to both domestic and international arbitration. Namely, it introduced the state court assistance in the taking of evidence and the appointment of arbitrators, coming closer to the Model Law in this regard. The Reform further extended the possibility of state court involvement in the challenge of arbitrators also to domestic arbitration (previously, this option only existed with regard to international arbitrations).

As under the Model Law, courts shall, when deciding on the appointment of arbitrators, have regard to any qualifications or requirements stipulated by the parties in their agreement and any considerations which could assist in the appointment of an independent and impartial arbitrator. It remains to be seen how these stipulations will be applied in practice, *e.g.* in situations where the parties have not agreed on a list of arbitrators or where the courts have to assess the impartiality and independence of arbitrators, or agree on arbitrators' fees. Notably, the courts' decision on the appointment and challenge of arbitrators and the termination of the arbitrator's mandate are final and binding without the possibility of any appeal.

It is, in this context, worth mentioning that the Arbitration Reform extended restrictions regarding the eligibility of arbitrators developed in the domestic context to international arbitration. Based on the Arbitration Law, an arbitrator must be over 25 years of age, must have legal capacity, must have no criminal or disciplinary record incompatible with his/her professional activities and must not be a government official (besides a retired judge). Moreover, a sole arbitrator or a president of an arbitral tribunal must have a law degree from the Russian Federation or a foreign law degree recognized in the Russian Federation, unless the parties waive the requirement for sole arbitrators or the president (only if another arbitrator in the tribunal has such a degree). It is unclear what requirements apply to the recognition of foreign law degrees and it is at least conceivable that this may lead to setting aside proceedings (or problems at the enforcement stage, respectively) in cases where such recognition is doubtful. The requirement certainly constitutes an impediment for non-Russian arbitrators taking up a mandate in an arbitration seated in Russia.

Finally, Russian courts also are empowered to assist in obtaining evidence. While similar to the Model Law, an arbitral tribunal or a party to the arbitration with the tribunal's approval, may make an application for assistance in obtaining evidence, this relates solely to documents and/or physical evidence, excluding assistance in obtaining witness evidence, expert evidence or on-site investigations. Court decisions allowing or denying the request for assistance in obtaining evidence

are also final and cannot be appealed.

Conclusion

In summary, the Russian Arbitration Reform is a step forward in regulating arbitration in Russia and will benefit the development of domestic arbitration. However, several of the changes introduced with regard to international arbitrations, such as the requirement of obtaining licensing and the unclear prerequisites regarding the same, have, at the current stage, introduced legal uncertainty and may, also in the long run, have an adverse effect on the popularity of Russia as a venue for international arbitrations. As always, it remains to be seen how the Russian state courts and authorities interpret and apply the new rules.

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