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Russian Courts Hold an ICC Arbitration Clause to Be Unenforceable

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In February 2018, the Arbitrazh (Commercial) Court of the City of Moscow issued a ruling[1)] denying the recognition and enforcement of an ICC award issued in favor of Dredging and Maritime Management SA (Luxembourg) against JSC Inzhtransstroy (Russia), on grounds that included an alleged unenforceability of the ICC arbitration clause in the contract.[2)] The arbitration clause in question provided that the disputes shall be finally "resolved in international arbitration" in accordance with the ICC Arbitration Rules. The Moscow court found such an arbitration agreement to be unenforceable, on the basis that the referral to "international arbitration" was too vague. The court also found that the arbitration clause defined the arbitration rules without determining a specific arbitral institution to administer the dispute.

The award creditor appealed the ruling to higher courts, but the ruling was upheld, first by the Arbitrazh (Commercial) Court of the Moscow District[3)] and most recently by a single judge deciding for the Supreme Court, who agreed with the lower courts' reasoning and refused to transfer the case for further review before the Economic Panel of the Supreme Court.[4)] The Supreme Court judge's ruling may be overturned by the Chairman or Deputy Chairman of the Supreme Court, who may order a panel review.[5)] We understand that a complaint has been lodged with the Supreme Court, and further that the ICC wrote to the Supreme Court to review the situation. However it remains unclear at the time of writing whether a further panel review will be allowed.

Significance

Russian court rulings concerning defective or "pathological" arbitration clauses are nothing new. There have been numerous cases in which courts refused to enforce vague or contradictory arbitration clauses. However, the arbitration clauses in those cases often appeared to be inadequately drafted, custom-made arbitration clauses that failed to convey the parties' actual choice of the dispute resolution mechanism. In contrast, the DMM v Inzhtranstroy case appears to be the first in which a standard recommended ICC clause, or a very close derivative from it,[6)] was declared unenforceable in Russia. The significance of this case is further amplified by the wide use in Russia of standard arbitration clauses that stipulate the applicable arbitration rules without stating explicitly which arbitral institution shall administer the dispute. For example, the model

SCC and LCIA arbitration clauses refer to the resolution of disputes by arbitration under the respective arbitration rules without specifying the administering institution. In contrast, the model clauses of SIAC and HKIAC define both the rules and the administering institution.

It is noted that the rulings in DMM v Inzhtranstroy do not represent a binding precedent. At the same time, the fact that the rulings were supported by the entire hierarchy of courts up to the Supreme Court suggests that other courts dealing with similar arbitration clauses may follow the same rationale in future, refusing to uphold arbitration clauses that do not spell out the name of the administering arbitral institution. There are two principal ways in which courts may refuse to uphold arbitration clauses in Russia. The first is the refusal to recognize the arbitral award in Russia. The second is the court's refusal to dismiss without prejudice (???????? ??? ????????????) a claim that a party may try to file before a Russian arbitrazh (commercial) court in breach of the arbitration agreement. The default rule under Article 148 of the Arbitrazh Procedural Code is that, where the dispute is covered by an arbitration agreement, the court shall dismiss the case upon a jurisdictional objection made by a party before its first submission on merits. However, the court shall not dismiss the case where it finds the arbitration agreement to be unenforceable.

Analysis

The courts' reasoning in respect of the arbitration clause does not appear to be analytically correct. First, the ICC Rules clearly designate the ICC Court as the only body that is entitled to administer disputes under the ICC Rules. The reference to the ICC Rules is, therefore, sufficient to stipulate the dispute resolution procedure without any ambiguity. Furthermore, there is no explicit general requirement in Russian law to identify an arbitral institution in the arbitration clause.[7)] There is also a provision in the recently amended Law on International Commercial Arbitration[8)] to the effect that all doubts must be resolved in favor of the validity and enforceability of the arbitration clause. However, none of this prevented the courts from refusing to enforce the arbitration clause in DMM v Inzhtranstroy.

Recommendations

Given that the DMM v Inzhtranstroy rulings do not constitute a binding precedent (and may still be subject to further review), it is probably too early to change the approach to drafting arbitration clauses on this basis alone. However, it will be important to monitor the situation in this case and observe how Russian courts deal with similar arbitration clauses in other cases. In the meantime, to be on the safe side, parties negotiating new arbitration clauses for Russia-related contracts may wish to revisit their approach. For example, parties using the ICC, SCC and LCIA model clauses or their derivatives may consider supplementing them by specifying the body that will administer the arbitrations (i.e., the ICC Court in respect of the arbitration under the ICC Rules, the LCIA in respect of LCIA arbitration and the Arbitration Institute of the Stockholm Chamber of Commerce for SCC Arbitrations). This requires very accurate drafting to avoid creating arbitration clauses that might be deemed "pathological".

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References

?1 Ruling of the Arbitrazh (Commercial) Court of the City of Moscow dated 8 February 2018, case No. A40-176466/17-83-1232.

?2 The court also found that the recognition and enforcement of the award would violate the public policy, because the award debtor had become insolvent and the insolvency proceedings had been concluded by a settlement with creditors; the court found that enforcement of the award, out of the framework of the insolvency case, might result in preferential treatment of the award creditor. For more details on the impact of a Russian insolvency and other issues related to "Russian" arbitrations, see our overviews here and here.

?3 Ruling of the Arbitrazh (Commercial) Court of the Moscow District dated 25 April 2018, Case No. A40-176466/17.

?4 Ruling of the Supreme Court of the Russian Federation dated 26 September 2018 No. 305-??18-11934.

?5 Article 291.6(8) of the Arbitrazh Procedural Code of the Russian Federation.

?6 The arbitration clause in the parties' contract is very similar to a standard ICC clause recommended on the ICC's web site , but not completely identical to it.

?7 *Ad hoc* arbitrations are permitted, except in respect of *corporate disputes* as defined in Article 225.1 of the Arbitrazh Procedural Code. See a more detailed analysis by Freshfields here.

?8 Article 7(9) of the Law on International Commercial Arbitration.

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