Kluwer Arbitration Blog

Ambivalent Russian Arbitration Developments Regarding Hybrid Dispute Resolution Clauses

Daniil Vlasenko (Baker & McKenzie LLP) · Sunday, August 4th, 2019

Overview

At the end of 2018, the Presidium of the Russian Supreme Court published its *"Review of Cases Related to the Functions of Assistance and Control in Relation to Arbitration and International Commercial Arbitration"* (*"Review"*). The 51-page Review was dedicated to issues that the Russian courts have faced while hearing cases arising from domestic and international arbitration and which require consideration by the Supreme Court. Numerous issues were covered, including those connected to the arbitrability of certain types of disputes, the enforceability of arbitral awards and the validity of arbitration agreements.

This post focuses on Sections 6 and 7 of the Review, which considered the legality of certain types of hybrid dispute resolution agreements. On this issue, the Review described cases anonymously, two of which are discussed below. However, in order to appreciate completely the issues discussed, the legal background has been set out as well.

So far, the reaction of the Russian legal community has been divisive; some specialists believe that Russian courts have taken another step towards development of a stable and predictable judicial system. Others allege that in terms of asymmetrical clauses, outdated findings were reaffirmed, and the judicial system is not making any progress.

Background

Until June 2012, Russian commercial courts had treated both asymmetrical and hybrid clauses as valid and legal. Despite this, the Supreme Commercial Court of the Russian Federation (*"Supreme Commercial Court"*) reversed established case law in Russia and found in *RTK v. Sony Ericsson* (No. 1831/12 dated June 19, 2012) that a dispute resolution clause, consisting of both the right to resolve a dispute through arbitration or litigation before the domestic court is valid when both parties have access to both dispute resolution mechanisms. However, if the dispute resolution clause deprived one of the parties from referring the dispute to the court, that asymmetry would result in the invalidity of the whole dispute resolution clause. In its reasoning, the Supreme Commercial Court predominantly followed an *"equality of arms"* concept, which originated in European human rights law in the context of the right to a fair trial. The *"equality of arms"*

concept mainly focuses on the fair balance of procedural rights granted to both parties of a dispute.

In December 2015, the Russian Arbitration Association (RAA) and the International Chamber of Commerce (ICC) had organized a joint conference, titled *"Russia as a Place for Dispute Resolution"*. Professor Georges Affaki, Chairman of the Banking Commission of ICC France, pointed out that the milestone decision of the Supreme Commercial Court in *RTK v. Sony Ericsson*, *"shook the business [community]"* and introduced *"a serious element of legal uncertainty"*. According to Professor Affaki, the Russian decision created a precedent affecting court practice in both Belarus and Kazakhstan.

Since then, Federal Law No. 382-FZ *"On Arbitration (Arbitral Proceedings) in the Russian Federation"* dated December 29, 2015 (*"Arbitration Law"*) was adopted with an expectation to gradually transform Russia into a more favorable jurisdiction for arbitration. So far, though, neither Russian legislators, nor Russian courts have made any feasible attempts to change their objectively *"anti-arbitration"* approach to asymmetrical clauses. Let's examine whether the Review provided a different approach to the explored question.

Discussion on Section 6 of the Review

Section 6 of the Review describes a case where the arbitration agreement provided the undesignated claimant with a right to refer the dispute to either arbitration or a court.

Two companies had concluded a contract for the supply and delivery of goods, according to which all disputes arising out of that contract could be referred to either arbitration or court at the *"claimant's choice"*. Eventually there was a dispute and the claimant elected to commence arbitration proceedings, in which it was successful on the merits.

At the stage of enforcement before the Russian courts, the court of first instance found that the unilateral right of the undesignated claimant to refer the dispute to either arbitration or court put the interests of that claimant over the interests of the respondent, which would be in conflict with the 'balance of interest' principle.

The Supreme Court reversed previous decision and sent the case back to the court of first instance, with the following justification: the provision of an arbitration agreement granting the claimant the right to choose between arbitration or court is not disproportionate as an arbitration agreement does not designate a specific party (particular person) to the contract. A mere indication that the claimant holds this right will not breach the balance of interest principle or equal treatment because both the seller and the buyer could potentially be a claimant in a dispute.

However, it remains unanswered how to interpret the contract, which by its nature carries a higher likelihood that one party will act as a claimant. In a typical loan agreement between a sophisticated commercial party (for example, a bank) and an individual, the borrower usually has more contractual obligations than the lender. Therefore, the borrower is likely to be a respondent and can raise the argument that even though the bank was not literally designated as a party bearing the right to choose the forum, in accordance with common commercial practice, it is likely that the lender will be the claimant and enjoy its superior position.

Specialists from common law jurisdictions might be critical of that position because the concept of

equality of treatment was placed over the principle of freedom of contract. Moreover, in common law jurisdictions, asymmetrical clauses often proved to be an effective risk management technique. Using the previous hypothetical, it is natural for a bank to be interested in having several dispute resolution options if the borrower has assets in different jurisdictions. However, it may not come as a surprise if the scenario outlined above were to raise substantial difficulties before the Russian courts.

Discussion on Section 7 of the Review

Section 7 of the Review describes a case where the arbitration agreement provided the designated party with a right to refer the dispute to either arbitration or the court.

The court of first instance did not examine the dispute resolution agreement properly, leaving the case without consideration because it missed the fact that the contract consisted not just of an arbitration agreement, but also an asymmetrical right in favor of one of the parties, the right to choose between arbitration and domestic court proceedings.

Later, the court of cassation noticed that mistake and sent the case back to the court of first instance. It found that an arbitration agreement is void in part because a right to choose between court and arbitration is available to one designated party and that deprives the other party from referring the dispute to court. In this case, the court of cassation submitted that both parties to the contract should have the right to bring the dispute to either a court or arbitration.

The deprivation described put the interest of one party in the dominant position over the other that eventually breached the principle of balance of interest. The court of cassation also underlined that in the adversarial system, in order to defend rights and legitimate interests, the principle of equal treatment of parties requires equality of procedural rights as well. The mentioned standard is definitely fair but not flexible, because dispute resolution is not a mathematical equation. In certain cases, the party that bears the burden of proof requires significantly more time to present its case. Should time to present a case in hearings also be equal?

Moreover, in order to provide equal treatment, the court is adapting or curing the contract in a way to give the supposedly deprived party the same amount of rights. To this extent, the positive outcome is that the asymmetrical dispute resolution clause will no longer be per se invalid. Unfortunately, at the same time, the court appears likely to override the commercial relations of the parties and will definitely influence their initial will at the time of the conclusion of the contract. Furthermore, by adapting the dispute resolution clause the court may raise the risk of parallel proceedings, which will slow down not just dispute resolution of the particular controversy, but also bring extra uncertainty to the court system.

Conclusion

In conclusion, the Review has left the Russian arbitration community divided. On the one hand, it provided courts with pro-arbitration guidance regarding the validity of certain types of dispute resolution clauses. On the other hand, the Review did not uphold a more favorable treatment regime of the asymmetrical dispute resolution clause. Instead of solving the problem, the Review

described a situation in which an asymmetrical clause may be found void in part, but the court's right of adaptation could cure the irregularity. However, after that adaptation, the clause would cease to be asymmetrical and the whole aim of a carefully balanced dispute resolution mechanism would likely be undermined.

See also on the same issue, the Post authored by Alexander Gridasov, Maria Dolotova

The views expressed in this post are the author's personal views and do not necessarily reflect those of Baker & McKenzie LLP.

This entry was posted on Sunday, August 4th, 2019 at 6:04 am and is filed under Arbitration clause, Russia, Unilateral Clauses
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a

response, or trackback from your own site.