Kluwer Arbitration Blog

Legal Challenges that the ICC and SIAC May Face in Russia

Maria Dolotova, Alexander Gridasov (Herbert Smith Freehills LLP) · Friday, June 11th, 2021 · Herbert Smith Freehills

The Russian 2016 Arbitration Reform (the "Reform") was a game-changer for both arbitration practitioners and the arbitral institutions. One of the major implications of the Reform was that so-called "corporate" disputes (which definition covers a large number of post-M&A disputes, including those arising out of share purchase agreements and shareholders' agreements) could now only be referred to arbitral institutions which obtained the status of "Permanent Arbitral Institution" ("PAI") from the Russian Ministry of Justice.

The newcomers to Russia

For a number of years, PAI status was only held by Russian arbitral institutions. However, the situation seems to be improving gradually and in 2019, the Hong Kong International Arbitration Centre (HKIAC) and the Vienna International Arbitration Centre (VIAC) were the first foreign arbitral institutions to secure PAI licences in Russia.

This list has expanded just recently. On 18 May 2021, the Russian Ministry of Justice granted the status of PAI to the ICC International Court of Arbitration (ICC) and the Singapore International Arbitration Centre (SIAC). This is a major development for users of international arbitration in Russia who will now have access to three of the "top-five most preferred arbitral institutions" in the world, according to the respondents of the 2021 International Arbitration Survey prepared by Queen Mary University of London.

The status of PAI provides the ICC and SIAC with the possibility to administer institutional international arbitration proceedings (a) with the seat of arbitration in Russia; and (b) arising out of certain "corporate" disputes (in particular, out of share purchase agreements). Accordingly, a large portion of post-M&A disputes with Russian parties may now be referred to the ICC and SIAC without a risk of being declared unenforceable at a later stage.

Conflicting Russian arbitration laws

However, there is still an open question as to whether these institutions may administer disputes arising out of shareholders' agreements with respect to Russian joint ventures (the "SHA"), which

form another big slice of post-M&A disputes.

The confusion is caused primarily by the existing discrepancy between the provisions of the Russian Arbitrazh Procedure Code (the "APC") and Federal Law No. 382-FZ dated 29 December 2015 "On Arbitration (Arbitration Proceedings) in Russia" (as amended) (the "Russian Arbitration Law").

The earlier law, being the APC, provides that for an institution to administer disputes out of SHAs, (a) such institution would have to adopt special rules for the arbitration of corporate disputes (the "Special Rules"); and (b) the arbitration clause in the SHA would have to be signed by all shareholders and the Russian joint venture company itself. The amendments to the Russian Arbitration Law introduced in 2018 were aimed at elimination of such requirements. However, what these amendments led to in practice were two conflicting laws and uncertainty as to what rules shall prevail.

Theoretically, this conflict should not be an issue. The general Russian law rules of interpretation being applied, the provisions of the Russian Arbitration Law as the later and more specific law should prevail over the rules of the APC (under both *Lex posterior derogat legi priori* and *Lex specialis derogat generali* rules).

However, practitioners are still concerned about the risks which may arise if the Russian state courts resolve this conflict in favour of the APC. For existing arbitrations arising out of SHAs and administered by the ICC, SIAC, HKIAC or VIAC (none of which have adopted the Special Rules), if the APC requirements prevail, this may make it difficult to enforce awards in such arbitration proceedings in Russia.

To date, the Russian courts have not yet revealed their position on the issue. We have been able to identify only one judgment of a first instance court[1)] which has briefly touched upon this question.

In that case the court has rejected a challenge on alleged lack of jurisdiction, basing this *inter alia* on the fact that the arbitration clause was not signed by / did not apply to the shareholders of the Russian company (which is the abovementioned requirement (b) under the APC). Surprisingly, no reference was made in the decision to the Russian Arbitration Law, which eliminated the APC requirement.

It would be fair to say that the issue of conflict between the Russian arbitration provisions has not been the main concern in this case (the position of the first instance court on the issue has not even found its way into the resolution of the appeal court which has upheld this judgment) and therefore it is far too early to draw any conclusions. However, this judgment should be sufficient to confirm that the existing concerns of practitioners are more than just theoretical.

Clarifications from the Russian Ministry of Justice

The Russian Ministry of Justice has tried to address these concerns, publishing in February 2020 clarifications on the application of Russian arbitration legislation in response to the joint request of the HKIAC and VIAC (the "Clarifications").

In these Clarifications, the Ministry of Justice has confirmed that the provisions of the Russian

Arbitration Law have priority over the earlier rules of the APC. According to the Ministry's logic, the ICC, SIAC, HKIAC and IAC should generally be eligible to consider corporate disputes out of SHAs, notwithstanding the absence of the Special Rules and even if the arbitration clause in the SHA is signed only by the parties to the SHA (and not the related Russian company – a target of the SHA).

At the same time, the Ministry clarified that corporate disputes relating to the appointment, election, termination, suspension and liability of a Russian company's management can only be resolved by a PAI which has adopted the Special Rules. Given that such management-related issues can be closely connected with other disputes arising under SHAs, it is not clear how the Ministry's position regarding SHAs may be implemented in practice.

Furthermore, the Clarifications stated clearly that they are not legally binding, which means that the Russian courts may adopt different approaches to the issues raised. The judgment of the first instance Russian court referred to above was issued after the Clarifications and is therefore strong evidence that the risk of conflicting views cannot be excluded.

In that context, it seems that the right of newcomers to Russia, being the ICC and SIAC (and also the HKIAC and VIAC), to consider disputes out of SHAs relating to Russian companies will largely depend on the direction which Russian court practice will take and, in particular, on whether the Russian courts will consistently take into account the conclusions of the Clarifications.

References

?1 Judgment of the Arbitrazh Court of Murmansk Region in the case No. ?42-574/2020 dated 5 November 2020.

This entry was posted on Friday, June 11th, 2021 at 8:08 am and is filed under Arbitration Institutions and Rules, Permanent Arbitral Institution, Russia
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.