

DEVELOPMENTS IN RUSSIAN ARBITRATION LAW

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A. LEGISLATION, TRENDS AND TENDENCIES

The Law On International Commercial Arbitration, enacted on 7 July 1993, is based on (indeed almost identical to) the UNCITRAL Model Law provisions. Russia is also a party to the European Convention on International Commercial Arbitration of 1961 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention). Domestic arbitration is governed by the 2002 Law on Arbitration Courts in the Russian Federation and it is also based on the principles of the UNCITRAL Model Law. No amendments were made to the abovementioned laws in 2008.

B. CASES

Details are given below of recent judgments handed down by the Russian courts in cases related to arbitration involving foreign companies. There are also references to cases which do not involve foreign companies, because it is safe to assume that the Russian courts would adopt a similar approach to cases whether or not a foreign company is a party. These decisions below are mainly the judgments of the first level arbitrazh¹ courts and the third level courts

¹ The Russian word arbitrazh is not related to arbitration but originates from an old Soviet tradition, whereby disputes between state enterprises were heard before the so-called 'State Arbitrazh.' In the USSR, it was assumed that under a planned economy no real disputes could arise between socialist enterprises (since all enterprises ultimately had the same owner), and any differences which did arise could be settled by an intermediary, the State Arbitrazh, which was a quasi-judicial governmental institution (in fact it was part of the government).

(the Federal Arbitrazh Court or so called “cassation courts”). This is because any application to set aside an arbitral award or to issue a writ of execution in respect of awards made by domestic arbitration courts, as well as applications for recognition and enforcement of foreign arbitral awards, must be filed in the first level court, while an appeal against the judgment of a court of first instance in such cases is to be filed directly in the third level court, *i.e.*, with the Federal Arbitrazh Court.

B.1 An Agreement to Arbitrate is Not Concluded if the Parties did not Agree as to What Particular Arbitration Institution Shall Consider the Dispute and Only One Party is Entitled to Select an Arbitral Institution at its Discretion

On 24 August 2007, OOO Rosich and businessman Turlakov, Victor Ivanovich, entered into an agreement according to which any disputes arising under or in connection with such agreement shall be resolved by an arbitration institution to be determined at the claimant’s discretion, provided that the institution is within the confines of the Tomsk Oblast.

Turlakov having failed to perform duly under the agreement, OOO Rosich filed a claim under the Rules of the Arbitration Court at the Limited Liability Company “Yuristy Sibiri” (Siberian Lawyers) (hereinafter referred to as the “Siberian Lawyers Ltd. Arbitration Court”), which on 15 January 2008 rendered an award in favor of OOO Rosich for 5,625 rubles of lost profit, 4,500 rubles of arbitration fees and expenses, and 30,000 rubles of legal fees.

On 28 February 2008, the Arbitrazh Court of the Tomsk Oblast refused an application for the issuance of a writ of execution for enforcement of the arbitral award. The Federal Arbitrazh Court of the Western Siberian Region confirmed the judgment of the court of first instance.

OOO Rosich appealed to the Supreme Arbitrazh Court of the Russian Federation, insisting that the aforesaid decisions be re-

versed, but the Supreme Arbitrazh Court of the Russian Federation saw no reasons for so doing.²

In particular, the Supreme Arbitrazh Court of the Russian Federation pointed out the following:

The wording used by the parties expressly admits the claimant's sole discretion in selecting any arbitration institution within the confines of the Tomsk Oblast to review a specific dispute arising out of the agreement concluded by and between the parties. However, a dispute may only be referred to arbitration if the parties to the dispute have entered into an agreement in respect thereof on the basis of which it can be determined what particular arbitration tribunal the dispute shall be referred to.

This conclusion confirms the earlier view of the Supreme Arbitrazh Court of the Russian Federation according to which an agreement to arbitrate may not be deemed concluded if the parties did not specify the arbitration institution or procedure under which an *ad hoc* tribunal is to be appointed.

For example, in its Resolution No. 5278/95 of 27 February 1996, the Supreme Arbitrazh Court of the Russian Federation said, in part: "According to Articles 2 and 8 of the Provisional Regulation on the Court of Arbitration for Resolution of Economic Disputes in the Russian Federation,³ an agreement to refer disputes to arbitration must incorporate some information on what particular arbitration institution shall be entrusted with arbitration or that information making it evident that the parties will establish an *ad hoc* arbitral tribunal to review a specific dispute pursuant to the applicable procedure."⁴

² Ruling No. 8711/08, dated 28 August 2008, by the Supreme Arbitrazh Court of the Russian Federation.

³ Approved by the RF Supreme Soviet's Resolution No. 3115-1 of 24 June 1992 "On Approval of the Provisional Regulation on the Court of Arbitration for Resolution of Economic Disputes" — author's note.

⁴ Apropos, neither Article 2 ("Arbitration Courts"), nor Article 8 ("Decision by Arbitral Tribunal on the Possibility of Reviewing a Dispute") contained any provisions making it possible to arrive at the conclusion that an agreement to refer a dispute to arbi-

In its letter of 16 February 1998, the Supreme Arbitrazh Court of the Russian Federation said that the arbitration clause in the contract, according to which all differences arising out of the contract shall be referred to the “Paris Institute,” would be deemed unenforceable.⁵

Meanwhile, it would be worthwhile to mention here the dispute between the state-owned company “Optika No. 1” and OOO Expotrans referred to the Court of Arbitration for Resolution of Economic Disputes under the Chamber of Commerce and Industry of the Ulyanovsk Oblast. The contract concluded by and between the aforesaid entities did provide for referral of disputes to the Private Court of Arbitration of the Ulyanovsk Oblast. In this case, however, the Supreme Arbitrazh Court of the Russian Federation saw no reasons for setting aside the arbitral award.⁶ In the opinion of the supreme judicial instance, in the aforesaid case, “an agreement to arbitrate as concluded by the parties did provide that relevant disputes shall be referred to the Arbitration Court of the Ulyanovsk Oblast and, consequently, did not expressly give right to only one of the parties sole discretion in selecting an arbitration institution for reviewing such disputes.”⁷

B.2 Disputes Regarding Extension of the Lease of Real Estate Property are not Arbitrable

As reported in the 2007 edition of this yearbook, disputes related to registrable rights over immovable property are not arbitrable. In 2008, the arbitrazh courts decided several cases which illustrate this principle, including cases involving long terms lease agreements.

tration shall specify the permanent arbitration institution or that the dispute will be considered by *ad hoc* tribunal.

⁵ See Section 13 of News Letter No. 29, dated 16 February 1998, by the Presidium of the Supreme Arbitrazh Court of the Russian Federation “Review of Arbitrazh Court Practice to Resolve Disputes in Cases Involving Foreign Persons.”

⁶ Resolution No. 1120/07, dated 24 July 2007, by Presidium of the Supreme Arbitrazh Court of the Russian Federation.

⁷ Determination No. 8711/08, dated 28 August 2008, of the Supreme Arbitrazh Court of the Russian Federation.

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In 1997, Kalinka-Stockmann as tenant entered into a 10-year agreement for lease of premises in the business complex “Smolensky Passazh” in downtown Moscow. The lease provided for the tenant’s right to extend the lease term for another 10-year period on the terms and conditions applicable within the past five years of the effective term of the original lease. In 2007, the landlord refused to extend the lease on the agreed-upon terms and conditions and was therefore sued by Kalinka-Stockmann which referred the dispute to the International Commercial Arbitration Court under the Chamber of Commerce and Industry of the Russian Federation (“ICAC”) in accordance with the arbitration clause contained in the lease.

On 29 April 2008, the tribunal acting under ICAC Rules rendered an award in favor of the claimant. The award supported the claimant’s right to extend the lease term for another 10-year period on the earlier agreed terms and conditions. The arbitration court obliged the respondent to enter into an extension by executing and registering an addendum to the original lease of 1997. On 14 August 2008, the Arbitrazh Court of the City of Moscow set aside the ICAC award. One of the reasons for this decision was the fact that the dispute could not be the subject matter of arbitration. On 13 October 2008, the Federal Arbitrazh Court of the Moscow Region upheld the position of the Moscow City Arbitrazh Court.⁸

The cassation court said that by recognizing Kalinka-Stockmann’s right to have the lease extended and by compelling the respondent to extend the effective term thereof and enter into and register an addendum to the original lease, the ICAC had effectively extended the contractual relationship under the lease on definite terms and conditions for ten years. The original lease agreement, as well as the 2000 addendum thereto, had been duly registered, so an agreement to alter the lease subject to state registration should also be subject to state registration.

The legal relationships associated with the state registration of rights are of a public nature and questions regarding rights to immovable property fall within the exclusive competence of state courts.

⁸ Ruling No. KG-A40/9294-08-1,2 of 13 October 2008 by the Federal Arbitrazh Court of the Moscow Region.

Therefore, the conclusion by the court of first instance to set aside the arbitral award rendered in respect to a non-arbitrable dispute was, in the opinion of the Federal Arbitrazh Court of the Moscow Region, correctly decided.

A similar conclusion regarding non-arbitrability of the subject matter of the dispute was drawn by the Arbitrazh Court of the City of Moscow and the Federal Arbitrazh Court of the Moscow Region when they set aside an award rendered by the ICAC on 29 April 2008 with respect to Kalinka-Stockmann's claim against another landlord attempting to compel the latter to extend a 2005 lease agreement for a new term on the same terms and conditions.⁹

B.3 Litigant Failing to Make an Objection to the Jurisdiction of the State Court With Reference to the Arbitration Clause Prior to the First Hearing on the Merits Waives its Right to Arbitration

OOO Ponate ARD sued Hochtief Aktiengesellschaft in the Arbitrazh Court of the City of Moscow despite the arbitration clause in the agreement.¹⁰ In the court of first instance, the respondent did not object to the jurisdiction of the Arbitrazh Court of the City of Moscow to consider the dispute and the court proceeded with examination of the case on its merits, refusing to satisfy the claims in its judgment of 12 March 2007. On 10 April 2007, the cassation court reversed the judgment of the trial court, ordering that the case be re-examined.

During re-examination of the case by the Arbitrazh Court of the City of Moscow, the respondent filed an objection to the case being tried by the arbitrazh court, referring to the arbitration clause in the agreement. On 24 December 2007, the court granted the motion, referring to Article 148, Clause 5, of the Code of Arbitrazh Procedure of the Russian Federation (reflecting Article II(3) of the New York Convention) in accordance with which an arbitrazh court shall leave a statement of claim unheard upon establishing that:

⁹ Ruling No. KG-A40/9254-08 of 13 October 2008 by the Federal Arbitrazh Court of the Moscow Region.

¹⁰ Ruling No. KG-A40/3239-08 of 4 May 2008 by the Federal Arbitrazh Court of the Moscow Region.

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- there is an agreement between the litigants to submit the dispute to a private arbitration and
- if either litigant objects to the jurisdiction of the state court on or before its submission on the merits of the case,

unless the court determines that the agreement is null and void, has become inoperative or incapable of being performed.

On 31 January 2008, an appellate court reversed the aforesaid decision because of incorrect use of procedural law norms and ordered that the case be retried by the court of first instance. On 4 May 2008, the Federal Arbitrazh Court of the Moscow Region confirmed the correctness of the appellate court's position, stating the following:

Filing a motion to refer the dispute to arbitration... if made when the cassation court already has reversed the decisions [of the lower courts] in the case and ordered retrial of the case, shall not entail those consequences provided under Article 148, Clause 5, of the Code of Arbitrazh Procedure of the Russian Federation, because the arbitration clause in such case shall be deemed terminated.

B.4 Party Failing to Object to the Arbitral Tribunal's Jurisdiction in a Timely Manner Waives Its Right to File Any Such Objection in the Future

On 10 January 2008, the Court of Arbitration under the Moscow Chamber of Commerce and Industry made an award on Case No. A-2007/7 in favor of Berlin-Chemie that had sued Vedant Ltd. and OOO Intercare.

The losing party (OOO Intercare) applied to the Arbitrazh Court of the City of Moscow for setting aside the award, arguing that there had been no arbitration agreement between the parties. While explaining its position, the applicant told the court that the general director executing the contract with an arbitration clause therein on the applicant's behalf no longer held the position of general director at the time of the execution of the contract with the result that the arbitration clause was not binding.

On 19 May 2008, the Arbitrazh Court of the City of Moscow found the above arguments to be reasonable and set aside the award. On

31 July 2008, the Federal Arbitrazh Court of the Moscow Region reversed the decision of the Arbitrazh Court of the City of Moscow.¹¹

In substantiation of its decision, the cassation court explained as follows:

[I]n accordance with Article 4 of the RF Law ‘On International Commercial Arbitration,’ a party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating its objection to such non-compliance without undue delay or, if a time limit is provided therefor, within such period of time, shall be deemed to have waived its right to object.

According to Article 16, Paragraph 2, of the aforesaid Law, a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

Meanwhile, OOO Intercare took part in the arbitration proceedings of the Court of Arbitration under the Chamber of Commerce and Industry, submitted its statement of defense and provided supporting evidence.

The cassation instance also pointed out that no statement had been made to the effect that the arbitral tribunal had no jurisdiction, so that the Court of Arbitration under the Moscow Chamber of Commerce and Industry had no reason to decide that it did not have such jurisdiction.

¹¹ Resolution No. KG-A40/6468-08, dated 31 July 2008, of the Federal Arbitrazh Court of the Moscow Region.