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A. Legislation and rules

A.1 Legislation

International arbitration in Russia continues to be governed by the Law on International Commercial Arbitration.³ Certain issues relating to international commercial arbitration, such as requirements on arbitral institutions for administering disputes in Russia and resolving corporate disputes, are governed by the Law on Arbitration in Russia (the “Law on Domestic Arbitration”).⁴ The end of 2018 saw certain important changes introduced to the Law on Domestic Arbitration and these also apply to international commercial arbitration proceedings seated in Russia.⁵ The changes will take effect on 29 March 2019. As per the changes, the rules for arbitral institutions wishing to obtain a license in order to administer arbitrations in Russia and the procedure for the arbitration of certain types of corporate disputes, were simplified. Thus, the license shall be issued by the Ministry of Justice and not by the Russian Government, as is currently the case. There is also greater certainty with regard to the application process. The changes provide, *inter alia*, for a list of documents that a foreign arbitral institution must submit with a license application. Among those documents are: (i) a note detailing the background and activities of the institution; b) an excerpt from the register or a similar document

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³ Law N 5338-1 dated 07.07.1993 (as amended on 29 December 2015).

⁴ Federal Law No382-FZ on Arbitration (Arbitration Proceedings) in the Russian Federation dated 29 December 2015.

⁵ Federal Law No 531-FZ dated 27 December 2018.

confirming the legal status of the institution or its founding organization; and c) rules for administering corporate disputes (if the organization wants to administer Russian corporate disputes that require special rules). If a foreign arbitral institution intends to administer Russian domestic disputes, it will need to establish a presence in Russia, via a branch office of the institution or its founding organization.

A significant change has been introduced with regard to the arbitrability of corporate disputes. After the 2016 arbitration reform, disputes under shareholder agreements have been arbitrable only under the conditions that:

- (a) **all** shareholders of the company and **the company itself** are parties to the arbitration agreement (emphasis added);
- (b) the arbitration is administered by a “licensed” arbitration institution;
- (c) the arbitration is administered under special Rules for administration of corporate disputes (which means that information about the dispute is to be published at the website of the arbitration institution); and
- (d) the seat is in Russia.

As from 29 March 2019, the requirements under (i) and (ii) will be abolished.⁶

Further changes to the Law on Domestic Arbitration concern arbitrability of disputes arising out of or in connection with contracts entered into in accordance with the Law on Procurement by State Legal Entities⁷ that have been subject of several court cases in 2018.⁸

⁶ part 71 of article 7 and part 71 of article 45 of the Law on Domestic Arbitration (as amended by Federal Law No531-FZ dated 27 December 2018, in effect as from 29 March 2019).

⁷ Federal No 223-FZ dated 18.07.2011 “On procurement of goods, works and services by certain types of legal entities.”



Such disputes, having their seat in Russia, are to be administered by a licensed arbitral institution.⁹

Among recent arbitration-related developments is the issuance by Russia's Supreme Court on 26 December 2018 of a review of court practice on arbitration-related matters (the "Review").¹⁰ Though not binding, the Review expresses the position of the Supreme Court on applying relevant legal rules to disputes related to arbitration. Among the key points of the Review are the following:

- (a) Upholding the enforceability of standard arbitration clauses recommended by arbitral institutions;¹¹
- (b) Alternative dispute resolution clauses (i.e. which enable a claimant to choose between arbitration and state courts) are valid;¹²
- (c) Asymmetrical dispute resolution clauses (i.e. those enabling only one party to choose between arbitration and state courts) are invalid because every party is to have the same scope of rights to refer the dispute both to arbitration and state courts;¹³
- (d) Any restrictions on the arbitrability of civil-law disputes are to be expressly provided for in the law and not inferred by other means;¹⁴

⁸ E.g. *Mosteplostroy JSC v. Mosinzhprojekt JSC*, A40-165680/2016, case file at: <http://kad.arbitr.ru/Card/692507fe-d800-4152-b90f-77af1b4a9444>.

⁹ part 10 of article 45 of the Law on Domestic Arbitration (as amended by Federal Law No531-FZ dated 27 December 2018, in effect as from 29 March 2019).

¹⁰ Review of Court Practice in Connection with Performing Functions of Assistance and Control with regard to Arbitration Courts, approved by the Supreme Court's Presidium on 26 December 2018, available at: <http://www.supcourt.ru/documents/all/27518/>

¹¹ Item 5 of the Review.

¹² Item 6 of the Review.

¹³ Item 7 of the Review.

¹⁴ Item 16 of the Review.

- (e) (v) Where a creditor submits a claim based on an award in bankruptcy proceedings, the other creditors are entitled to object thereto on the same grounds that are provided by the law for refusing enforcement of the award. As regards the public policy ground, the Supreme Court found that the public law purpose of bankruptcy proceedings is to ensure the balance of rights and legal interests of all creditors. Therefore, creating an appearance of a private law dispute resolved by an arbitration court to enable the inclusion of a baseless debt into the register of creditors in order to influence the bankruptcy case shall be considered as a violation of public policy.¹⁵ This provision is aimed at preventing claims confirmed by fictitious arbitrations from being submitted to the bankruptcy estate.

A.2 Institutions, rules and infrastructure

The 2016 reform of Russian arbitration laws introduced licensing of arbitral institutions and those arbitral institutions that failed to obtain the license¹⁶ are, as of 1 November 2017, not authorized to administer disputes in Russia. As of January 2019, the following Russian arbitral institutions are operational: the ICAC¹⁷ and the MAC¹⁸ at the Russian Chamber of Commerce and Industry, Arbitration Center at the Russian Union of Industrialists and Entrepreneurs¹⁹ and the Russian Arbitration Center at the Russian Institute of Modern Arbitration.²⁰ As regards foreign arbitral institutions, so far only HKIAC has applied for the license, however, its application has not yet been considered on its merits. The decision is expected to be taken at the beginning of 2019.

¹⁵ Item 25 of the Review.

¹⁶ The law calls it “the right to administer disputes in Russia.”

¹⁷ International Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, <https://mkas.tpprf.ru/en/>

¹⁸ Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation, <https://mac.tpprf.ru/en/>

¹⁹ <https://arbitration-rspp.ru/>

²⁰ <https://centerarbitr.ru/en/main-page/>



B. Cases

B.1 Disputes relating to procurement of goods, works and services by state legal entities are arbitrable²¹

We reported on this case in last year's edition of this Yearbook.²² In the case, a private company - a subcontractor under a construction works contract - applied for issuance of a writ of execution for an award²³ against a general contractor that was 100% owned by the City of Moscow. The respondent argued the relations were of a public law nature, involved public (budgetary) funds, and required public control and therefore the dispute was non-arbitrable. Lower courts granted the claims and dismissed non-arbitrability arguments.²⁴ However, in the course of cassation review, the Supreme Court referred the issue of objective and subjective arbitrability of disputes out of contracts under the Law on Procurement by State Legal Entities to the Constitutional Court.²⁵ In substantiating the referral, the Supreme Court argued that provisions of Russian laws on arbitrability were ambiguous. In the court's view, there was a contradiction between the legal provisions that enabled it to refer to arbitration only civil law disputes and those provisions that contained a list of non-arbitrable disputes covering both civil law²⁶ and public law²⁷ disputes, as well as civil law disputes with a public element.²⁸ The Constitutional court did not find any

²¹ *Mosteplostroy JSC v. Mosinzhprojekt JSC*, A40-165680/2016, case file at: <http://kad.arbitr.ru/Card/692507fe-d800-4152-b90f-77af1b4a9444>

²² *Mosteplostroy JSC v. Mosinzhprojekt JSC* in, "The Baker McKenzie International Arbitration Yearbook," 2017-2018 edition, p.261.

²³ The arbitration clause provided for disputes to be resolved by Arbitration Court of City's Construction Organizations at Autonomous Non-Commercial Organization "Legal Support Centre of the City's Construction Organizations."

²⁴ Ruling of Arbitrazh Court of Moscow dated 13 December 2016; decision of Arbitrazh Court of Moscow Circuit dated 27 February 2017.

²⁵ Supreme Court Ruling dated 25 September 2017.

²⁶ For example, disputes in connection with privatization of property, paragraph 5, article 33(2) of Arbitrazh Procedure Code.

²⁷ For example, disputes out of administrative and other public law relationships, paragraph 2, article 33(2) of Arbitrazh Procedure Code.

²⁸ For example, insolvency disputes, disputes out of damage to the environment, paras. 1 and 7, article 33(2) of Arbitrazh Procedure Code.

legal uncertainty in the provisions dealing with arbitrability of disputes and refused to accept the request for consideration. After resuming the proceedings, the Supreme Court held that the relevant relationships are regulated as civil law ones, that is, based on the equality, autonomy of will and material independence of the participants.²⁹ Therefore, the disputes are also of a civil-law nature and unless expressly provided for in the federal law, such disputes are arbitrable. In making these findings, the Supreme Court clarified the position regarding civil-law relationships with a public element. The Court reasoned that such relationships are characterized by a lesser degree of parties' independence in establishing their rights and obligations and determining the conditions of their contract, which can also lead to restrictions on the dispute resolution methods used for such disputes. Such restrictions are established in the law in the form of non-arbitrability or conditional arbitrability of certain disputes due to the existence of the public element. However, any such restrictions should be clear to the parties due to the dispositive nature of the civil law relationship, expressly stated in the law and are not to be inferred by other means.³⁰ At the same time, the court added that courts also have a right to ensure the balance between private and public interests “for the purposes of public policy protection” and one such example would be the excessive spending of public funds.³¹ With the latter right of courts, there is always a possibility that they would find that the existence of a certain public element in a particular case results in the violation of public policy. For example, in a recent case,³² an award debtor argued in the enforcement proceedings that the dispute was non-arbitrable as it arose out of a subcontractor agreement concluded in furtherance of a state procurement contract governed by

²⁹ Supreme Court Ruling dated 11 July 2018.

³⁰ As stated above, the case was included into the Overview and the conclusion found its expression in Item 16 of the Overview.

³¹ Supreme Court Ruling dated 11 July 2018.

³² *Stroytransgaz JSC v. Strategiya Construction Company LLC*, case A12-39725/2017; case file at: <http://kad.arbitr.ru/Kad/Card?number=%D0%9012-39725%2F2017>



Federal Law on State and Municipal Procurement.³³ The applicant alleged a public policy violation on this basis. The Supreme Court upheld the findings of lower courts and enforced the award, holding that the applicant failed to substantiate the public policy violation.³⁴ At the same time, the court also held that the contractor has discharged its obligations towards the state customer in full. As stated above, in accordance with the changes that will take effect on 29 March 2019,³⁵ arbitration disputes arising out of, or in connection with, contracts entered into in accordance with Law on Procurement by State Legal Entities and having their seat in Russia are arbitrable but are to be administered by a licensed arbitral institution.

B.2 An ICC Clause providing for international arbitration under Arbitration Rules of the ICC found unenforceable³⁶

In this case, an award creditor, Dredging and Maritime Management SA (“DMM”) sought to recognize and enforce an ICC award issued on 15 September 2014 in a Geneva-seated arbitration. In addition to arguments on violation of public policy due to enabling a material breach of the rights of other creditors³⁷ the court accepted the respondent’s argument that the ICC arbitration court lacked competence to resolve the dispute. The arbitration clause was as follows:

Any dispute that failed to be settled amicably was to be finally resolved in international arbitration. Unless otherwise agreed by the parties, the dispute is to be finally resolved in

³³ Federal Law dated 21 June 2005 № 94-FZ “On placing orders for Supplies of Goods, performance of works and the rendering of services for state and municipal needs.”

³⁴ Supreme Court Ruling dated 10 December 2018.

³⁵ Part 10 of article 45 of the Law on Domestic Arbitration (as amended by Federal Law No531-FZ dated 27 December 2018, in effect as from 29 March 2019).

³⁶ *Dredging and Maritime Management SA v. Inzhtransstroy JSC*, A40-176466/2017, case file at: <http://kad.arbitr.ru/Card/e14833d5-67ca-48a9-adff-78c46640dabe>

³⁷ Award debtor was in bankruptcy proceedings, and an application for enforcement was considered in separate proceedings after the conclusion of an amicable settlement with other creditors.

accordance with the Rules of Arbitration of the International Chamber of Commerce ...

According to the court, an arbitration clause is capable of being performed once it clearly specifies the name of the arbitral institution entrusted to resolve the dispute, with sufficient detail to identify the particular institution. In this case, the parties failed to clearly state that the disputes are to be referred to the International Arbitration Court at the ICC thus the wording of the clause is ambiguous.³⁸ The court held:

the reference to international arbitration or to the rules of arbitration of the International Chamber of Commerce per se does not represent an agreement of the parties to refer a dispute to a particular arbitration court.

The Cassation court upheld the ruling³⁹ and the Supreme Court refused to consider the appeal on the merits in the course of second-tier cassation review.⁴⁰ The appeal to the Chairman of the Supreme Court's cassation panel for considerations on the merits was not accepted.⁴¹

In what represents a rare development, on 12 November 2018 the president of the ICC Court Alexis Mourre sent a letter to the Chairman of the Russian Supreme Court Vyacheslav Lebedev expressing “serious concern” over the ruling and asking for clarification.

The findings in the case demonstrate that Russian courts sometimes do not interpret arbitration agreements in favor of their validity and enforceability. However, it should be noted that in earlier cases, the courts found arbitration clauses referring to the rules of arbitration of

³⁸ Ruling of Moscow Arbitrazh Court dated 08 February 2018 in case A40-176466/2017.

³⁹ Decision of Arbitrazh Court of Moscow Circuit dated 25 April 2018 in case A40-176466/2017.

⁴⁰ Supreme Court Ruling dated 26 September 2018 in case A40-176466/2017.

⁴¹ Letter of the Supreme Court dated 22 November 2018 305-ES18-11934.



the ICC to be enforceable,⁴² as the rules stipulate in detail the way the tribunal is formed, as well as the dispute resolution procedure at a particular arbitral institution. This is the reasoning that was used in Item 5 of the Overview, upholding the enforceability of arbitration agreements recommended by arbitral institutions.

B.3 As the transaction was structured to enable the seller to avoid paying taxes in Russia, the enforcement of the resulting award is contrary to Russian public policy

The case concerns the enforcement in Russia of an award issued by the Swiss Chambers' Arbitration Institution on 15 June 2018 in case No. 300389-2016 under a suretyship agreement.⁴³ The award creditor, Protasn Capital Limited was a seller under a sale and purchase agreement of shares in a Cypriot company. The main asset of the Cypriot company and the actual subject matter of the transaction were 59.94% shares of a Russian LLC. The award debtor was surety that had guaranteed the obligations of the buyer (a Belize company) under

⁴² *Bosch Termotechnik v. AVTOSPED Internationale Speditions GmbH* case in, "The Baker McKenzie International Arbitration Yearbook," 2013-2014 edition: Resolution of the Supreme Arbitrazh Court's Presidium dated 16 July 2013 № 2572/13 in the case provides the following reasoning:

In such circumstances the reference to the rules of arbitration of the International Chamber of Commerce clearly testifies to the agreement of the parties to have their dispute resolved by international commercial arbitration in accordance with Arbitration Rules of the International Chamber of Commerce with seat in Russia or in Germany (depending on who was the respondent).

Resolution of the Arbitrazh Court of West-Siberian Circuit dated 19 January 2018 in case No. A81-4101/2016:

In accordance with Clause 18.3 of the contract any dispute that has not been finally settled as per Clause 18.2 of the contract is to be finally resolved in accordance with Arbitration Rules of the International Chamber of Commerce (ICC) by three arbitrators appointed in accordance with these rules. The seat of arbitration is Vienna, and the language of arbitral proceedings is English. ... courts of the first and appeal instances were right in finding that the parties have agreed to refer all disputes arising out of agreement to be resolved by International Chamber of Commerce, with seat in Vienna and the language of arbitral proceedings.

⁴³ *Protasn Capital Limited v. Morton-RSO LLC*, A40-169104/2018, case file at: <http://kad.arbitr.ru/Card/751ba19c-239b-4d41-ab4b-ccb265280dd7>

the sale and purchase agreement and was sued due to the buyer defaulting on its obligations. The tribunal established in its award that the purpose of structuring the transaction was to reduce the tax burden, referring to an email stating that the transaction's structure was to optimize a tax of approximately USD 460,000, otherwise payable by the seller in Russia. The first level court held, *inter alia*, that the enforcement of the award was contrary to Russia's public policy because the transaction was aimed at evading the payment of taxes in the course of selling property located in Russia.⁴⁴ The court referred to the position of the Supreme Arbitrazh Court,⁴⁵ an obligation to pay legally imposed taxes stipulated in Russian tax laws and the prohibition on acting in order to circumvent the law with an illegal purpose.⁴⁶ On 5 December 2018, the Cassation Court upheld the ruling.⁴⁷

B.4 Disputes not involving issues of the shares ownership are not corporate disputes

The case concerned the issues of subject-matter jurisdiction, that is, whether the dispute was to be considered by arbitrazh (state commercial) courts or courts of general jurisdiction.⁴⁸ The claimant, Lotteks Oil S.A. (a buyer under a sales and purchase agreement of shares in a Russian CJSC, "SPA"), initiated proceedings in the court of general jurisdiction in a dispute against two individuals, who were sellers under the SPA. The claims filed were for reduction of the purchase price and recovery of excessively paid monies. The courts of two levels held that the dispute was a corporate dispute as it involved amending the provisions of and performance of an SPA as well as the exercise of rights out of the ownership of shares. The courts, therefore,

⁴⁴ Ruling of Moscow Arbitrazh Court dated 26 September 2018 in case A40-169104/2018.

⁴⁵ Information Letter of the Supreme Arbitrazh Court No156 dated 26 February 2013.

⁴⁶ Article 10(1) of the Russian Civil Code.

⁴⁷ Decision of Arbitrazh Court of Moscow Circuit dated 05 December 2018 in case A40-169104/2018.

⁴⁸ *Lotteks Oil S.A. v. Yu.A. Uryumtsev and I.A. Aletschenko*, general jurisdiction case N 5-KF17-218.



terminated the proceedings and referred the claimant to arbitrazh courts competent to hear corporate disputes. The Supreme Court, however, reversed the decisions and sent the case for re-trial by the first level court.⁴⁹ The Supreme Court held that the dispute with an individual arising out of an SPA is corporate and subject to the jurisdiction of arbitrazh courts only if the subject matter of the dispute involves establishing the ownership of the shares, encumbrances thereon or exercise of rights based on shares. As the company sought a reduction of the purchase price and recovery of monies and there were no claims regarding the ownership etc, then the dispute is not a corporate one.

The Supreme Court's findings in this case are noteworthy for arbitration, since the 2016 arbitration reform introduced conditional arbitrability of corporate disputes and determined the categories of corporate disputes (non-arbitrable, conditionally arbitrable) in article 225.1 of the Code of Arbitrazh Procedure. At that, if a dispute is not corporate, then no conditions on arbitrability are imposed as in case of ordinary commercial disputes. For the purposes of the case above, the disputes listed in paragraph 2, part 1, article 225.1 of the Code, namely, disputes in connection with the ownership of shares, stakes in charter capital etc including those arising out of SPA agreements, are relevant.⁵⁰ Therefore, not all disputes arising out of SPAs are corporate, but only those that involve issues of share ownership etc. In the case above, the court came to the same conclusion, based on the fact that no such issues were involved in the case. Though the court's findings in this case were accepted by courts in other cases, generally court practice on the issue of categorizing corporate disputes is far

⁴⁹ Supreme Court Ruling dated 6 February 2018 in case N 5-KГ17-218.

... disputes connected with the ownership of shares, stakes in share (stake) capital of companies and partnerships, ... in particular disputes arising out of share sale and purchase agreements, stakes in share (charter) capital of companies, partnerships, disputes, connected with the levying of execution on shares and stakes in the share (stake) capital of companies, partnerships, disputes ...

from uniform, and will undoubtedly complicate the resolution of corporate disputes in arbitration.

B.5 Arbitration agreements in respect of corporate disputes concluded before 1 February 2017 are incapable of being performed⁵¹

In this case, an individual sought invalidation of an SPA that it had concluded with the respondent. The courts of two levels terminated proceedings based on an arbitration clause in the contract. The cassation court reversed the decisions and sent the case for re-trial.⁵² The court supported the arguments that the dispute was a corporate one as it was a dispute out of an SPA and involved issues of share ownership etc.

During the re-trial, the first level court resolved the dispute on the merits, dismissing the respondent's arguments for terminating the proceedings based on the arbitration clause, although no reasoning was provided by the court. However, the claimant's claims on the merits for invalidation of an SPA as a sham transaction were also dismissed. The Supreme Court in the course of second-tier cassation review, refused to terminate proceedings based on the arbitration clause. At that, the court specified that the arbitration agreement was incapable of being performed as it was entered into prior to 1 February 2017 (the SPA was dated 22 November 2014). The Supreme Court referred to article 13 of the Federal Law dated 29 December 2015 that contained an express provision to that effect. At the same time, the above law entered into force on 1 September 2016 and did not stipulate that it had a retroactive effect. Without such a stipulation, the law is not usually retroactive, and only applies from its entry into force, which, in this case meant it applies only to arbitration agreements entered into from 1 September 2016 onwards, and not

⁵¹ *S.I. Siushov v. Eurocement Group JSC*, A40-222661/17, case file at: <http://kad.arbitr.ru/Card/bbc01ee4-1224-431f-add0-b38ca97fcd6>

⁵² Decision of Arbitrazh Court of Moscow Circuit dated 18 May 2018 in case A40-222661/17.



those entered into prior to that date. Before the enactment of the above law, there was no express statutory prohibition on referring corporate disputes to arbitration, even though court practice on the issue was far from uniform.

B.6 Enforcement of an award against a company owned by the Russian Federation is contrary to public policy

The claimant filed for enforcement of an LCIA award in a dispute out of an agreement for the pledge of shares dated 24 April 2008, securing the obligations under the SPA concluded on the same date.⁵³ The tribunal held that the claimant was entitled to levy execution on the subject of the pledge. The first level court granted the claims and enforced the award.⁵⁴ The Cassation Court reversed the decision and sent the case for re-trial,⁵⁵ and the Supreme court refused to reconsider the decision.⁵⁶ The court reasoned that the trial court failed to examine the defense of a public policy violation based on the fact that the ultimate beneficiary of the respondent was the Russian Federation and the subject of the pledge were shares of Lotos Shipbuilding Plant JSC, which was part of the OSK state corporation that is also beneficially owned by the Russian Federation. The OSK state corporation is also included in the list of strategic enterprises. In the course of the re-trial, the first level court refused enforcement of the award.⁵⁷ The court accepted the above arguments and held that enforcement of an award issued by a foreign arbitration court against a respondent who is beneficially owned by the Russian Federation and which awards the levy of execution upon the property of an entity beneficially owned by

⁵³ *Banwell International Limited v. Roshelf LLC*, A40-117331/18-141-835, case file at: <http://kad.arbitr.ru/Card/cb5d8210-8a8c-4ae2-8314-44200784b236>

⁵⁴ Decision of Arbitrazh Court of Moscow dated 17 July 2018 in case A40-117331/18-141-835.

⁵⁵ Resolution of Arbitrazh Court of Moscow Circuit dated 4 October 2018 in case A40-117331/18-141-835.

⁵⁶ Ruling of the Supreme Court dated 21 December 2018 in case A40-117331/18-141-835.

⁵⁷ Decision of Arbitrazh Court of Moscow dated 21 November 2018 in case A40-117331/18-141-835.

the Russian Federation, may cause damage to the budget of the Russian Federation as a result of transferring monies to accounts of foreign companies. The cassation court agreed with the lower court and upheld the refusal to enforce.⁵⁸ The case demonstrates that Russian courts continue to interpret public policy violation very broadly. Given the reasoning in this case, business entities are to be aware of the risks involved where the state can have ownership of their counterparty or its beneficiary.

⁵⁸ Resolution of Arbitrazh Court of Moscow Circuit dated 16 January 2019.