THE RUSSIAN ARBITRATION REFORM: BETWEEN LIGHTS AND SHADOWS

LORENZO SASSO,
Moscow State Institute of International Relations (Moscow, Russia)

https://doi.org/10.17589/2309-8678-2020-8-2-79-103

Russian system of alternative disputes resolution has experienced relevant development over the last few years. On December 2015, the Russian President signed two laws, which entered into force on 1 September 2016 and substantially reshaped the legal framework for arbitration in the Russian Federation. These are the Federal Law on Arbitration and the Federal Law on Amending Certain Legislative Acts, which introduced amendments to various laws including International Commercial Arbitration Law, Arbitrazh (Commercial) Procedural Code and Civil Procedural Code. The present article provides a comment on the key changes introduced by the said reform, compared to the previous state-of-play. Special attention has been given to the validity of the arbitration agreement, the arbitrability of international disputes and the denial of enforcement of an arbitral award for matters of public policy. Starting from the evolution of the Russian Supreme Court's approach to the ground for refusal of enforcement of an international award, the article discusses the recent judgments of the Russian courts in relation to the enforcement of an arbitral award to identify the lights and shadows of the international arbitration system in Russia.

Keywords: arbitration agreement; arbitrability; enforcement; public policy clause; international arbitration; Russian arbitration reform; permanent arbitral court; Federal Law on Amending Certain Legislative Acts (2016); Article V of the New York Convention of 1958; annulment of an arbitral award; denial of an arbitral award.

Recommended citation: Lorenzo Sasso, *The Russian Arbitration Reform: Between Lights and Shadows*, 8(2) Russian Law Journal 79–103 (2019).

Table of Contents

Introduction

An alternative way of resolving commercial disputes available in Russia is through a private dispute resolution mechanism.[1] This kind of practice has been very popular in the country for international commercial disputes since arbitration is fully recognised as an instrument of civil rights protection, and its courts perform the same function of justice as the State *Arbitrazh* Courts.[2] The Arbitral tribunals in comparison with the state courts have several advantages such as a higher degree of credibility by the parties in favor of appointed arbitrators, which gives a perception of better quality of adjudication, and the relative confidentiality of arbitration.[3] However, the duration and cost of proceedings[4] and the limited rights of appeal against arbitral awards are seen as disadvantages of arbitration compared

---

1 For a comment of the Russian law on arbitration, *see* Alexey Kostin & Dmitry Davydenko, *Russia* in *Law and Practice of International Arbitration in the CIS Region* 259 (K. Hobér & Y. Kryvoi (eds.), Alphen aan den Rijn: Kluwer Law International, 2017); *Гальперин М.Л.* Третейские итоги // Закон. 2017. № 9. С. 34–40 [Mikhail L. Galperin, *Arbitration Results*, 9 Law 34 (2017)]; Roman Khodykin, *Arbitration Law of Russia: Practice and Procedure* (New York: Juris, 2013); Glenn P. Hendrix & Ilya V. Nikiforov, *International Commercial Arbitration Practice in the Russian Federation* in *International Commercial Arbitration Practice: 21st Century Perspectives* Ch. 12 (H.A. Grigera Naón & P.E. Mason (eds.), London: Lexis Nexis, 2010).

2 The term "*Arbitrazh*," used to characterize the state courts, has nothing to see with arbitration. In fact, it stands for "commercial." State *Arbitrazh* Courts are the state courts dealing with commercial disputes. They also have jurisdiction to deal with arbitration – for issues related to business – by means of granting interim reliefs in support of arbitral proceedings, recognizing and enforcing arbitral awards and setting them aside.

3 In Russia, all hearings and judgments of the commercial courts are public and anybody can access the information regarding a dispute, its final decision and terms.

4 Arbitration rules usually set out that an arbitral tribunal shall render its final award within 120–180 days for international arbitration and within 60–90 days for domestic arbitration. The whole hearing in three instances in State *Arbitrazh* Courts takes on average 10 months. Article 152 of the Commercial Procedural Code establishes a period of 3 months for consideration of the case in the first instance; Article 259 – 1 month to file an appeal; Article 267 allows 2 months for consideration of the appeal; Article 276 – 2 months to file a cassation appeal and Article 285 – 2 months for consideration of the cassation appeal.

to the quick and inexpensive proceedings of Russian state courts.[5] In Russia, there are two types of commercial arbitration: international and domestic arbitration. Separate laws have been developed with respect to each of them. The Federal Law on International Commercial Arbitration (hereinafter the ICA Law) of 1993 (as amended in 2013, 2015 and 2017) governs international commercial arbitration within the entire territory of Russia.[6] The ICA Law, which has largely harmonized legal practice in Russia, mirrors the UNCITRAL Model Law on International Commercial Arbitration (1985). Instead, domestic arbitration was regulated, until recently, by the Private Arbitral Tribunal Law of the Russian Federation (hereinafter the PAT Law).[7]

Russian system of alternative disputes resolution has experienced relevant development over the last few years. On December 2015, the Russian President signed two laws, which entered into force on 1 September 2016 and substantially reshaped the legal framework for arbitration – including international commercial arbitration – in the Russian Federation. These are: the Federal Law on Arbitration (hereinafter the FLA), which superseded the previously introduced PAT Law and concerns primarily domestic arbitration;[8] and the Federal Law on Amending Certain Legislative Acts (hereinafter the ACLA) that introduced amendments to various laws including the ICA Law, the *Arbitrazh* (or Commercial) Procedural Code (hereinafter the APC) and the Civil Procedural Code (hereinafter the CPC).[9]

---

5 Reportedly, less than one percent of domestic disputes are resolved through arbitration; *see* Ilya Nikiforov et al., *Russia* in *Arbitration Guide*, International Bar Association (2018) (Apr. 15, 2020), available at http://epam.ru/storage/files/documents/insights/Russian%20chapter%20for%20IBA%20Arbitration%20Guide-2.pdf. The situation regarding the market for arbitration seems to be completely reversed from that of 25 years ago, *see* Katharina Pistor, *Supply and Demand for Contract Enforcement in Russia: Courts, Arbitration, and Private Enforcement*, 22(1) Review of Central and East European Law 55 (1996).

6 Закон Российской Федерации от 7 июля 1993 г. № 5338-1 «О международном коммерческом арбитраже» // Российская газета. 1993. 14 августа [Law of the Russian Federation No. 5338-1 of 7 July 1993. On International Commercial Arbitration, Rossiyskaya Gazeta, 14 August 1993] as amended on 3 December 2008, 29 December 2015.

7 Федеральный закон от 24 июля 2002 г. № 102-ФЗ «О третейских судах в Российской Федерации» // Собрание законодательства РФ. 2002. № 30. Ст. 3019 [Federal Law No. 102-FZ of 24 July 2002. On Private Arbitral (*Treteiski*) Tribunals of the Russian Federation, Legislation Bulletin of the Russian Federation, 2002, No. 30, Art. 3019].

8 Федеральный закон от 29 декабря 2015 г. № 382-ФЗ «Об арбитраже (третейском разбирательстве) в Российской Федерации» // Собрание законодательства РФ. 2016. № 1 (ч. 1). Ст. 2 [Federal Law No. 382-FZ of 29 December 2015. On Arbitration (*Treteiski* Proceedings) in the Russian Federation, Legislation Bulletin of the Russian Federation, 2016, No. 1 (Part 1), Art. 2].

9 Федеральный закон от 29 декабря 2015 г. № 409-ФЗ «О внесении изменений в отдельные законодательные акты Российской Федерации и признании утратившим силу пункта 3 части 1 статьи 6 Федерального закона «О саморегулируемых организациях» в связи с принятием Федерального закона «Об арбитраже (третейском разбирательстве) в Российской Федерации»» // Собрание законодательства РФ. 2016. № 1 (ч. 1). Ст. 29 [Federal Law No. 409-FZ of 29 December 2015. On Amending Certain Legislative Acts of the Russian Federation and Recognition of Article 6(1)(3) of the Federal Law "On Self-Regulating Organisations" to Have Lost Force in Connection with Enactment of the Federal Law "On Arbitration in the Russian Federation," Legislation Bulletin of the Russian Federation, 2016, No. 1 (Part 1), Art. 29].

This paper provides a comment of the key changes introduced by the last arbitration reform, in comparison with the state-of-play before it. The discussion shows that the arbitration reform has contributed to bringing Russian arbitration system more closely into line with international benchmarks although this process is still on going and may require an evolution of the Russian Supreme Court's approach to the ground for refusal of enforcement of an international award. The analysis also shows that there is still lots of scope for improvement in several dimensions of the Russian legal framework for international arbitration. In what follows, Section 1 discusses the rationale for the arbitration reform. Section 2 identifies the substantive distinction made in Russian arbitration law between permanent and ad hoc arbitral courts. Section 3 comments on the recognition and enforcement procedure of arbitral awards in Russia in light of that distinction and focusing on three main critical issues for denial enforcement: the validity of the arbitration agreement, the arbitrability of an international dispute and the grounds of public policy.

1. The Rationale for the Arbitration Reform

The rationale of this reform is twofold. First, to modernize the arbitration regime in Russia and align the Russian law on international standards of international commercial arbitration. This step is necessary to bolster Russia's image as a reliable trading partner and help promote the use of arbitration in the country. Ideally, a more efficient market for alternative dispute resolutions would be able to attract more international disputes for resolutions – at least those Russian-related – since the costs of arbitration proceedings is lower if the award is obtained in the country where the assets under dispute are located. Despite of it, in the past years many businesses have departed from domestic arbitration tribunals often eluding the loose parameters provided by the law to define an international dispute. According to precedent law on ICA, any disputes of commercial nature involving a foreign party as well as commercial disputes where at least one party is a Russian company with foreign investments could be referred to international commercial arbitration. The law did not specify the required level of shareholding that a Russian company has to hold to be eligible for international arbitration. As a consequence, the practice of the markets has seen this requirement be satisfied with Russian companies even holding a nominal foreign investment in order to avoid the more stringent rules governing domestic private arbitrations. The revised version of ICA closes this gap aligning the law to the UNICITRAL Model Law, Article 1(3)(b)(ii) as amended in 2006, providing that a dispute can be referred to international commercial arbitration if "any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected" is situated outside Russia. At the same time, the proposed amendments remove the entitlement of Russian enterprises with foreign investments or their

foreign shareholders to refer internal disputes to international arbitration, leaving place only for "disputes arising out of foreign investments on the territory of the Russian Federation or Russian investments abroad."[10]

The second aim is to strengthen the impartiality of the Russian arbitration tribunals and the reliability of the arbitration in Russia, which has so far been based on occasional arbitration centres created for convenience and then become permanent mostly for the settlement of intra-group disputes. In the past decades, the practice of domestic arbitration in Russia has experienced the fueling of more than 1.000 such tribunals – also called "pocket" (*karmannyi*) arbitration institutions – formed especially by large state-owned companies to resolve their own disputes with third parties. Some examples of it are the Court of Arbitration at Public JSC "Gazprom,"[11] or the Court of Arbitration at the Autonomos Non-Commercial Organization "Centre of Arbitration Proceedings," one of the founders of which is the Public JSC "Sberbank of Russia."[12] At the aim of ensuring the independence and impartiality of arbitrators, lacking in many "pocket" arbitrations, the law prohibited the creation of arbitration institutions by state and quasi-state actors, including state-owned companies and corporations.[13] In particular, the legislator introduced a new concept of "permanent arbitral institution" that becomes a "subdivision of a non-profit organisation, performing the function of administering arbitration on a permanent basis."[14] These non-profit organizations must be authorized by the Russian Government to develop their activity.[15] However, the Government has delegated its functions of assessment to a self-regulatory organization: the Council for the improvement of arbitration. Accordingly, the authorization will be released only on the recommendation of the Council for the improvement of arbitration, whose members include also representatives of government agencies, but especially, of business associations

---

[10] *See* Art. 1(3) of the ICA Law as amended. For a comment, *see* Mikhail Ivanov & Inna Manassyan, *Russia* in *International Arbitration Review* 431, 432 (J.H. Carter (ed.), 7th ed., London: Law Business Research Ltd., 2016).

[11] Gazprom established its own arbitration in 1993.

[12] A recent list published by the State *Arbitrazh* Court of Moscow counted 500 arbitration institutions (Apr. 15, 2020), available at www.msk.arbitr.ru/help_info/tret_su.

[13] *See* Постановление Президиума Высшего Арбитражного Суда Российской Федерации от 29 октября 2013 г. № 8445/13 // СПС «Гарант» [Resolution of the Presidium of the Supreme *Arbitrazh* Court of the Russian Federation of 29 October 2013 No. 8445/13 on *Neftgazproject v. Yamalgazinvest*, SPS "Garant"] (Apr. 15, 2020), available at http://www.garant.ru, where a state court reversed an award issued by the Arbitration Court at OJSC Gazprom based on the fact that Yamalgazinvest is Gazprom's subsidiary. *See also* ООО «Коммон Лигал Проперти» *v.* ООО «Техно-Арт», дело № А40-219464/2016 [*LLC Kommon Ligal Properti (Russia) v. LLC Tekhno-Art (Russia)*, Case No. A40-219464/2016] (Apr. 15, 2020), available at http://kad.arbitr.ru/.

[14] Art. 1 of the FLA.

[15] *Id.* Art. 52(10).

and legal community.[16] The Council for the improvement of arbitration will perform a quality assessment of the list of arbitrators and their reputation as well as of the scale and character of the activities carried out by the non-profit organisation to decide whether the arbitral institution established can function effectively.[17] As a rule, foreign arbitral institutions are not obliged to obtain the requisite approval. However, if they have their seat in Russia and are administered by a non-approved foreign arbitration institution they will be considered as *ad hoc* arbitration tribunals with all the resulting consequences.[18] Foreign arbitral institutions can receive the required Russian government approval based on their widely acknowledged international reputation.[19]

One of the intended consequences of the arbitration reform is that it has become considerably more difficult to form arbitration institutions in Russia. In order to obtain the authorization, an arbitral institution must ensure a full compliance with the requirements provided by the law on arbitration. The deadline for submitting a request for recognition was 1 November 2017. However, there may be some flexibility considering that several arbitral institutions complained that the procedures imposed by the state authorities were overly formalistic and not in accordance with the law and blamed the Council for the improvement of arbitration for delaying the process of authorization. For these reasons, many of them appealed the authorization refusal to state courts. As of today, only four institutions have obtain the authorization to administer institutional proceedings. Two of them – the International Commercial Arbitration Court (ICAC) and the Maritime Arbitration Commission (MAC) at the Chamber of Commerce and Industry (CCI) – have been exempted to apply for this entitlement,[20] while the others are the Arbitration Centre at the Russian Union of Industrialists and Entrepreneurs (RSSP) and the Arbitration Centre of the Autonomous Non-Profit Organisation "Institute of Modern Arbitration" (IMA).

---

[16] *See* Постановление Правительства Российской Федерации от 25 июня 2016 г. № 577 «Об утверждении Положения о депонировании правил постоянно действующего арбитражного учреждения» // СПС «КонсультантПлюс» [Resolution of the Government of the Russian Federation No. 577 of 25 June 2016. On Approval of the Regulation on Depositing of the Rules of a Permanent Arbitral Institution, SPS "ConsultantPlus"] (Apr. 15, 2020), available at http://www.consultant.ru.

[17] The recommended list of arbitrators must include at least 30 people, at least a third of the arbitrators must possess a degree in their area of specialisation, and at least half must have at least 10 years' experience as judges or arbitrators in civil law disputes (Art. 47(1) & (3) of the FLA).

[18] *See also* Article 52(13) & (15) of the FLA under which, arbitration institutions having no approvals, may be prohibited from administering arbitrations as from 1 November 2017.

[19] Приказ Министерства юстиции Российской Федерации от 13 июля 2016 г. № 165 «О Совете по совершенствованию третейского разбирательства» // СПС «КонсультантПлюс» [Order of the Ministry of Justice of the Russian Federation No. 165 of 13 July 2016. On the Council for the Advancement of Arbitration, SPS "ConsultantPlus"] (Apr. 15, 2020), available at http://www.consultant.ru.

[20] The ICAC is the major arbitration institution in Russia and Eurasia and has already established three branches at the regional chambers of commerce and industry of Rostov-on-Don, Ufa and Irkutsk. The Statutes and Rules of the ICAC and the MAC have been annexed to the ICA Law.

2. Permanent and *Ad Hoc* Arbitral Courts

An arbitral tribunal may be constituted as a permanent arbitral court or as an *ad hoc* arbitral court, set up for the settlement of a specific dispute. The proceedings in permanent arbitral court are led in accordance with the regulations of the given court, if parties have not agreed otherwise, while an *ad hoc* arbitral court leads the proceedings according to the rules agreed upon by the disputing parties.[21] The distinction is not trivial since the recently introduced reform on arbitration tribunals, which took effect on September 2016, allocates several important advantages to the permanent arbitral courts *vis-à-vis* the *ad hoc* arbitral tribunals. Only these permanent arbitration tribunals (i.e. panels of arbitrators) constituted as non-profit organizations – and not the *ad hoc* tribunals – have jurisdiction over corporate disputes. In addition, only the parties submitting their disputes to permanent arbitration tribunals can avoid the intervention of Russian state courts, whose role in several critical phases of arbitration proceedings has been strengthened by the new arbitration reform. The Russian legislator assigned to state courts the power to appoint arbitrators or judge on their recusal in case of deadlock or to judge on the question of arbitrability of a dispute at the time of assistance. However, the impact of the reform is not limited to domestic arbitration but has strong implications for international disputes since, essentially, an arbitral award is of little value unless it can be effectively enforced. According to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (hereinafter the New York Convention), to which Russia is a party, the recognition and enforcement of an award may be refused where the subject matter of the dispute is not capable of settlement by arbitration under the law of the country where enforcement is sough.[22] The parties can freely choose the *lex loci arbitrates*. Therefore, for example, a London or a Stockholm seated tribunal might have jurisdiction to hear a Russian corporate dispute as a matter of English or Swedish law. However, if then the award has to be enforced in Russia where the assets in disputes are, parties should proceed with caution, in order not to be left with a Pyrrhic victory.[23]

---

[21] Elena Manasyan, *Litigation, Arbitration and Other Means of Legal Protection* in *Russian Business Law: The Essentials* 339 (E. Gubin & A. Molotnikov (eds.), Moscow: Startup, 2016).

[22] *See* Art. V(2)(a) of the New York Convention.

[23] *See* Locknie Hsu, *Public Policy Considerations in International Arbitration: Costs and Other Issues A View from Singapore*, 26(1) Journal of International Arbitration 101 (2009); Ilya Nikiforov, *Interpretation of Article V of the New York Convention by Russian Courts (Due Process, Arbitrability, and Public Policy Grounds for Non-Enforcement)*, 25(6) Journal of International Arbitration 787 (2008).

3. Limits on the Recognition and Enforcement of International Arbitral Awards

Chapter 31 of the APC and Chapter 45 of the CPC regulate the enforcement of foreign arbitral awards in Russia for juridical persons involved in economic commercial disputes and for physical persons in civil law disputes respectively. The application for the enforcement of the award is filed to the arbitration court of the subject of the Russian Federation at the debtor's place of stay or of residence or, if those addresses are unknown, at the location of the debtor's property. Recognition itself is not automatic and entails a special enforcement procedure called *exequatur*. Once a final arbitral award is rendered, a party has three years to apply to a competent Russian court for *exequatur*.[24] Generally, state courts cannot examine a case on its merits or oversee the reasoning of arbitral awards. For that reason, the majority of grounds for setting aside an award is based on procedural breaches occurring during the course of the arbitral proceedings and must be proven by a party. The only exception to this rule is the public policy clause which means that a Russian court can refuse to recognize and enforce an arbitral award if it is contrary to Russian public policy (*ordre public*). The ICA Law provides for an exhaustive list of grounds on which an arbitral award may be set aside, basically reproducing the language of Article V of the New York Convention.[25]

Similar requirements for annulment of arbitral awards are contained in both (commercial and civil) procedural codes. First of all, an arbitral award can be annulled for the invalidity of the arbitration agreement, as for instance, if one of the parties was under some incapacity. Given that all parties shall be able to present their case and their defense, an arbitral award can be set aside if proper notice of the appointment of an arbitrator or of the arbitral proceedings was not given to both parties. An award can be cancelled if a party proves that it was made regarding a dispute not contemplated by, or not falling within, the terms of submission to arbitration, or that contains decisions on matters beyond the scope of submission to arbitration – if these decisions can be separated from the others. A court can also reject the enforcement of an arbitral award in which the party proved that the composition

---

[24] Art. 246 of the APC. Постановление Пленума Верховного Суда Российской Федерации от 10 декабря 2019 г. № 53 «О выполнении судами Российской Федерации функций содействия и контроля в отношении третейского разбирательства, международного коммерческого арбитража» [Resolution of the Plenum of the Supreme Court of the Russian Federation No. 53 of 10 December 2019. On the Fulfilment by the Courts of the Russian Federation of the Functions of Assistance and Control in Relation to Arbitration, International Commercial Arbitration] (Apr. 15, 2020), available at http://vsrf.ru/documents/own/28587/, clarifies court jurisdiction in relation to specific types of disputes. For example, an application for the issuance of an order of execution or recognition and enforcement of an arbitral award against individuals and legal entities is to be submitted to the court of general jurisdiction in respect to all debtors (if separate claims are not possible).

[25] *See* Art. 34(2) of the ICA Law also corresponding to the UNCITRAL Model Law.

of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such an agreement were in conflict with a provision of the ICA Law from which the parties cannot derogate.[26]

For the very similar reasons, a state court can reject or refuse recognition of an arbitral award. In addition, a decision is rejected if it does not meet the requirements set by Russian law; if it has not entered into force or if it is not submitted to the exclusive competence of a local court in the Russian Federation. An award is refused recognition, if there is a proceeding or an enforced decision of a Russian court passed on a dispute between the same persons, on the same object and on the same grounds. Alternatively, an award is refused recognition if the term of limitation for the execution of the decision of the foreign court for a forcible execution has expired and this term was not restored by the arbitration tribunals.[27] Finally, Russian courts cannot give execution to the decision of an arbitral tribunal that would contradict the public order in the Russian Federation.[28]

Under the amended rules, a court has one month, instead of three months, as before, to review an *exequatur* request.[29] During this time, state courts are entitled to obtain explanations from the tribunal that rendered the respective award.[30] One of the parties to the arbitration may have not been properly notified, an abuse of authority may have been committed, or the procedure may have been contradictory to the agreement between the parties or the law. In all those cases, if a state court realizes that procedural violations were committed, it has the right to suspend proceedings for up to three months upon a party's request in order to allow the arbitral tribunal to remedy the violations.[31] The decision of the first instance court is immediately enforceable, unless the cassation court decides to stay the enforcement of an application of the respondent. When a Russian court renders a ruling recognizing and enforcing an arbitral award, it issues a writ of execution (*ispolnitelnyi list*). This writ must be filed with the Russian Bailiffs Service within three years following the recognition and enforcement ruling. Failure to meet the stated deadlines – three years for requesting *exequatur* and three years for filing the writ with Russian bailiffs – can make impossible the enforcement of an otherwise valid

---

26 *See* Art. 233 of the APC and Art. 421 of the CPC.

27 *See* Art. 244(1) of the APC and Art. 412(1) of the CPC.

28 *See* Art. 244(2) of the APC and Art. 412(2) of the CPC.

29 Art. 243 of the APC and Art. 411 of the CPC. Although in practice, the enforcement proceedings at the court of first instance take about four to six months because of high volumes of caseloads in the commercial courts and potential adjournments, *see* Artem Antonov et al., *Arbitration Procedures and Practice in the Russian Federation: Overview*, Practical Law, 1 October 2016 (Apr. 15, 2020), available at https://uk.practicallaw.thomsonreuters.com/8-385-8113?__lrTS=20190802153702839&transitionType=Default&contextData=%28sc.Default%29.

30 Art. 243(3) of the APC, as amended by the ACLA.

31 Art. 34(4) of the ICA Law, Art. 232(5) of the APC and Art. 420(5) of the CPC, as amended by the ACLA.

arbitral award. Importantly, if a writ is returned to a party where a judgment debtor has no assets, this party has three years to re-file the writ with the bailiffs; otherwise, it becomes unenforceable.[32]

The arbitration reform has also appended the procedural codes with new provisions relating to the enforcement of foreign arbitral awards and judicial decisions in the Russian Federation, which do not require enforcement.[33] The Russian Federation recognizes awards or decisions without any further proceedings according to international treaties signed, if no interested party has initiated legal action in Russian court opposing it within one month from the moment that party became aware of the award or decision.[34] A party can ask for the annulment of an arbitral award, or a court can reject or refuse recognition and enforcement of an arbitral award, if it can be proved that the arbitration agreement was not valid, the matter in dispute could not be settled by arbitration or for reasons of public policy. These particular issues are analyzed separately in the following paragraphs in light of the new rules introduced by the arbitration reform.

3.1. The Validity of an Arbitration Agreement

The parties willing to settle a dispute in arbitration, as an alternative mechanism of dispute resolution, must have included an arbitration clause in their contract or signed an arbitration agreement. The arbitration clause in the main contract is always considered to be independent from the rest of the contract and is not affected by its invalidity.[35] In any case, the parties' consent to settle disputes in an arbitration tribunal must be expressed in writing.[36] Generally, this requirement is met if the content is recorded in any form that makes it accessible in the future. Therefore, an arbitration agreement can be concluded by way of an exchange of electronic communications – provided the messages meet the requirements of Russian law and contain the necessary conditions of such an agreement.[37]

Defects in arbitration agreements are often used as grounds for challenging an arbitral award in state courts. For instance, the Russian courts have frequently refused enforcement of the arbitration clauses on the ground that they have not referred to

---

[32] Ilya Kokorin & Wim A. Timmermans, *Arbitration Reform in Russia: Will Russia Become More Arbitration-Friendly?*, 22 Tijdschrift voor Arbitrage 50, 55–56 (2017); Ilya Nikiforov, *Litigating in Europe: Is the System of Enforcing Judgments Effective? – Enforcement of Judgments in Russia*, 1(2) Dispute Resolution International 233 (2007).

[33] These questions are currently regulated by the Order of the Presidium of the Supreme Council of the USSR of 21 June 1998 No. 9131-XI.

[34] *See* Art. 245(1) of the APC, Art. 413 of the CPC and Art. 35(3) of the ICA Law.

[35] *See* Art. 17 of the FLA.

[36] Art. 7 of the ICA Law adopting 2006 UNICITRAL Model Law Option 1.

[37] Art. 7(3) of the ICA Law, as amended by the ACLA.

the correct official name of an arbitration institution. Therefore, a careful drafting of international arbitration clauses is imperative in Russia as is true for many other jurisdictions. The arbitration agreement between the parties must clearly mention where the arbitration is to take place, the law applicable to the dispute (*lex fori*), and the establishment of an International Arbitration Court. As recently stated by the Russian Supreme Court, if an arbitration agreement does not respect the principles of legal certainty and enforceability it does not really establish the true will of the parties and therefore must be considered void.[38] In case of doubts as to the validity or enforceability of an arbitration agreement, the State courts must assess all the evidence that could establish the actual will of the parties including the negotiations and correspondence before the conclusion of the agreement and the parties' subsequent conduct.[39]

In international arbitration, parties may determine applicable law.[40] If no choice is made, a tribunal will apply the law, which it considers applicable in accordance with the conflict of law rules. However, this was not entirely true in the case Pressindustria SpA where the Supreme *Arbitrazh* Court denied confirmation of a Swedish arbitral award in favour of an Italian company against its Russian joint venture partner on the ground that the dispute was not covered by the arbitration clause in the joint venture agreement. In particular, the Court held that the arbitral tribunal was not authorized to apply Swedish law with respect to the termination of the agreement, notwithstanding a choice of law provision in the contract in favour of Swedish law, because the result was incompatible with mandatory provisions of Russian law regulating the creation and activities of joint ventures (public policy).[41]

At the same time, the adhesion to the arbitration clause must be expressed clearly by the parties in a dispute and cannot be presumed. Two Russian members

---

[38] *See* Определение Верховного Суда Российской Федерации от 26 сентября 2018 г. № 305-ЭС18-11934 по делу № А40-176466/2017 // СПС «Гарант» [Ruling of the Supreme Court of the Russian Federation of 26 September 2018 305-ES18-11934 in case No. A40-176466/2017, SPS "Garant"] (Apr. 15, 2020), available at http://www.garant.ru. As a consequence, the praxis has developed a new standard of Model Arbitration Clause: "Any *dispute*, controversy or claim arising out of or relating to this contract, including the validity, invalidity, breach, or termination thereof, *shall be resolved by arbitration in accordance with* [choice of law] Rules of International Arbitration of the [choice of arbitral tribunal] Chambers' Arbitration Institution in force on the date on which the Notice of Arbitration is submitted in accordance with these Rules. The number of arbitrators shall be […]; The seat of the arbitration shall be […]; The arbitral proceedings shall be concluded in […]." The Italics complete the previous Model Arbitration Clause.

[39] *See* Resolution of the Plenum of the Supreme Court of the Russian Federation of 10 December 2019 No. 53, *supra* note 24.

[40] In domestic arbitration, Russian law applies by default and application of foreign law is allowed under Russian conflict of law rules. In addition, if an applicable international treaty establishes rules, which are different from those contained in Russian law, such treaty will prevail.

[41] *See* Постановление Президиума Высшего Арбитражного Суда Российской Федерации от 14 января 2003 г. № 2853/00 // СПС «Гарант» [Resolution of the Supreme *Arbitrazh* Court of the Russian Federation of 14 January 2003 No. 2853/00 on *Pressindustria SpA v. Tobol'skii Neftekhimicheskii Kombinat*, SPS "Garant"] (Apr. 15, 2020), available at http://www.garant.ru. The Court claimed the result was incompatible with mandatory provisions of Russian law regulating the creation and activities of joint ventures.

of a Dutch company initiated litigation in arbitration on the base of an arbitration agreement signed between the company and its members. However, the Russian Supreme Court evidenced the limits of the arbitration agreement confirming the previous judgements of the lower courts. In fact, the agreement to arbitrate the disputes between the company and its members cannot extend to all disputes between the members themselves.[42]

When the parties indicated that the dispute to be finally settled under the Rules for Arbitration of the ICC, the arbitration agreement was considered defective by the court as it did not define the specific institution that would judge the dispute. A broad definition of the institution is not acceptable. One of the parties raised jurisdictional objections in arbitration proceedings that were rejected by the arbitral tribunal. However, as the arbitration agreement resulted defective, the ICC lacked authority to consider the dispute. On this ground, the Russian Supreme Court concluded that the award violated the principle of legality and, thus, was against public policy.[43]

Russian law requires parties to an arbitration agreement to expressly agree on certain terms and conditions. These include the right of recourse to state courts and the right to challenge the award in set aside proceedings. The right of recourse allows a party to ask a state court to appoint an arbitrator in case that the agreed procedure for the appointment fails to challenge and/or dismiss an arbitrator or the tribunal's decision on jurisdiction. The latter right gives the parties the possibility to challenge the arbitral award issued by the tribunal in a state court (the finality of the award). The parties concluding an arbitration agreement could deprive *ex ante* state courts of both the power to appoint arbitrators and consider applications to challenge them,[44] and stipulate in the arbitration agreement that the arbitral award will be final and not subject to reversal.[45] However, this possibility exists only if they agree to settle their dispute in arbitrations administered by an approved arbitral institution. In such a case, the arbitral award would be automatically enforceable as a judgment of a state court. An arbitration tribunal constituted *ad hoc* or Russia-seated arbitrations

---

42 *See* Определение Судебной коллегии по экономическим спорам Верховного Суда Российской Федерации от 30 мая 2017 г. по делу № 309-ЭС16-20465, А60-12039/2016 // СПС «Гарант» [Ruling of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation of 30 May 2017 in case No. 309-ES16-20465, A60-12039/2016 on *LLC Digital Service v. LLC Yekaterinburg-2000*, SPS "Garant"] (Apr. 15, 2020), available at http://www.garant.ru.

43 *See* Определение Арбитражного суда г. Москвы от 8 февраля 2018 г. по делу № А40-176466/17 // СПС «Гарант» [Ruling of the Moscow *Arbitrazh* Court in case No. A40-176466/17 on *Dredging and Maritime Management SA v. Engineering Corporation "Transstroy,"* SPS "Garant"] (Apr. 15, 2020), available at http://www.garant.ru.

44 *See* Определение Верховного Суда Российской Федерации от 25 марта 2016 г. № 305-ЭС16-1103 по делу № А40-66296/2015 // СПС «Гарант» [Ruling of the Supreme Court of the Russian Federation of 25 March 2016 No. 305-ES16-1103 in case No. A40-66296/2015, SPS "Garant"] (Apr. 15, 2020), available at http://www.garant.ru.

45 Previously this was only possible for awards rendered by Russian arbitral tribunals.

administered by an institution not having received the appropriate approval from the Russian Government cannot avoid the intervention of the state courts with all the consequences that this entails. In fact, the new arbitration reform largely strengthens the role of the state courts in several critical phases of arbitration proceedings. For instance, the new reform vests state courts with the authority to appoint arbitrators and consider motions on recusal, in case of a deadlock – a function that before has always been performed by the president of the Chamber of Commerce of the Russian Federation. An aggrieved party has the right to file a motion with the state courts challenging an arbitrator within one month from the date of notification on the initial decision rejecting its challenge.[46] The fact that there are proceedings determining the validity of the arbitration agreement in a local state court does not prevent the commencing of arbitration and the rendering of an arbitral award.[47] However, it may create problems for a subsequent recognition of the arbitral award.

3.2. The Arbitrability of an International Dispute

Recent amendments to the legislation on arbitration also shed some light on the matter of arbitrability in Russia and, in particular, regarding corporate disputes.[48] Since 2012, disputes concerning Russian companies were regarded as non-arbitrable.[49] As a result of the new arbitration reform, while certain corporate disputes have remained non-arbitrable,[50] most of them have become arbitrable subject to a number of detailed conditions such as having the seat of arbitration in Russia and being administered by an approved (permanent) arbitral institution.[51] Accordingly, the new Article 225.1 of the APC distinguishes three categories of corporate disputes and the extent to which each category is arbitrable. The first category includes the non-arbitrable disputes, which now need to be clearly prescribed by a federal law and should be submitted only to state courts. The corporate disputes declared non-arbitrable are those related to:

– the refusal to register a legal entity;

– the right to challenge shareholders general meetings' resolutions;

---

46 *See* Arts. 11, 12 & 13 of the ICA Law and Arts. 11 & 13 of the FLA.

47 According to Art. 8(2) of the ICA Law.

48 For other sectors please *see* Kokorin & Timmermans 2017, at 50–57, in particular 52.

49 *See* Определение Высшего Арбитражного Суда Российской Федерации от 30 января 2012 г. № ВАС-15384/11 // СПС «Гарант» [Ruling of the Supreme *Arbitrazh* Court of the Russian Federation of 30 January 2012 No. VAS-15384/11 on *Novolipetskii Metallurgicheskii Kombinat v. Maksimov*, SPS "Garant"] (Apr. 15, 2020), available at http://www.garant.ru, that annulled and reversed the arbitral award issued by the ICAC arbitration court because the matter was declared non-arbitrable. In doctrine *see* Dmitry Davydenko, *Arbitrability of Real Estate and Corporate Disputes Under Russian Law: The Problem and its Context* in *Arbitration in CIS Countries: Current Issues* 87 (Antwerp; Apeldoorn; Portland: Maklu, 2012).

50 These disputes are indicated in Articles 33(2) and 248 of the APC and Article 22.1(2) of the CPC.

51 *See* Federal Law of 29 December 2015 No. 409-FZ.

– disputes related to the acquisition and purchase of shares by a joint stock company and the acquisition of more than 30 percent of the shares of a public joint stock company (mandatory bid);

– exclusion of participants from legal entities; the activities of notaries to certify transactions involving participatory interests;[52]

– actions and decisions of public authorities (and quasi-public bodies that have certain authorities);

– all types of disputes involving business entities of strategic importance for national defence and state security.[53]

The Supreme Court of the Russian Federation has recently clarified that non-arbitrable disputes include those arising from agreements between professional operators of the financial market and individuals, who are not entrepreneurs. This also applies to disputes arising from consumer credit agreements, if the arbitration clause is included in the agreement prior to the emergence of grounds for filing the claim, and disputes arising from public-law relations (e.g. relating to tax, customs, public finance).[54]

Other non-arbitrable matters – among others – are those that relate to:

– personal injury or disputes arising out of family, inheritance or employment relations;

– environment damage disputes;[55]

– privatization;

– cases related to contract serving state and municipal needs;[56]

---

[52] Art. 33 of the APC and Art. 22.1 of the CPC, as amended by the Federal Law of 29 December 2015 No. 409-FZ.

[53] In accordance with Федеральный закон от 29 апреля 2008 г. № 57-ФЗ «О порядке осуществления иностранных инвестиций в хозяйственные общества, имеющие стратегическое значение для обеспечения обороны страны и безопасности государства» // Собрание законодательства РФ. 2008. № 18. Ст. 1940 [Federal Law No. 57-FZ of 29 April 2008. On the Procedure for Making Foreign Investments in Business Entities of Strategic Importance for National Defence and State Security, Legislation Bulletin of the Russian Federation, 2008, No. 18, Art. 1940].

[54] *See* Resolution of the Plenum of the Supreme Court of the Russian Federation of 10 December 2019 No. 53, *supra* note 24.

[55] Постановление Президиума Высшего Арбитражного Суда Российской Федерации от 11 февраля 2014 г. № 11059/13 // СПС «Гарант» [Resolution of the Presidium of the Supreme *Arbitrazh* Court of the Russian Federation of 11 February 2014 No. 11059/13 on *LLC Forest Group v. Ministry of Ecology of Karelia*, SPS "Garant"] (Apr. 15, 2020), available at http://www.garant.ru.

[56] *See* Определение Судебной коллегии по экономическим спорам Верховного Суда Российской Федерации от 16 августа 2016 г. № 305-ЭС16-4051 по делу № А40-117039/2015 // СПС «Гарант» [Ruling of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation of 16 August 2016 No. 305-ES16-4051 in case No. A40-117039/2015 on *National Bank Trust v. Phosint Ltd.*, SPS "Garant"] (Apr. 15, 2020), available at http://www.garant.ru, where the protection of individual bank depositors was considered of public interest in the restructuring procedure of the bank. However, if the public interest remained futile the case could be decided by arbitration *see* Решение Верховного Суда Российской Федерации от 4 февраля 2016 г. № 307-ЭС15-16697 // СПС «Гарант» [Decision of

– public procurements.[57]

The second category includes corporate disputes that must be administered by a permanent arbitral institution seated in Russia in accordance with special rules on resolution of such disputes adopted by that institution and subject to the condition that the legal entity and any participant or other person acting as claimant or respondent have entered into the arbitration agreement.[58] These disputes concern:

– the establishment, reorganisation and liquidation of legal entities (with the exception of disputes concerning challenging non-normative acts, decisions and actions of government authorities);

– the legal action brought by participants of a legal entity seeking compensation of losses, invalidation of transactions performed by the legal entity and application of the consequences of their invalidity;

– the constitution of a legal entity's management bodies and their liability;

– the shareholder agreements relating to the management of a legal entity, including disputes arising out of corporate agreements;

– the issuance of securities (with the exception of disputes associated with challenging non-normative acts, decisions and actions of government agencies).

Finally, the third category is represented by corporate disputes, the only requirement applicable to which is that they must be administered by a permanent arbitral institution. This category of disputes includes disputes associated with the ownership of shares or participation interests in Russian companies, the establishment of encumbrances over them and the exercise of the rights conferred by them (including, among others, disputes associated with agreements on sale and purchase of shares or participation interests and enforced recovery against them), with the exception of disputes associated with the recording of shares and other securities by registrars.[59]

---

the Supreme Court of the Russian Federation of 4 February 2016 No. 307-ES15-16697 on *JSC Federal Grid Company v. CJSC Limb*, SPS "Garant"] (Apr. 15, 2020), available at http://www.garant.ru; *contra see* Определение Верховного Суда Российской Федерации от 9 февраля 2016 г. № 306-ЭС15-15685 по делу № А72-5089/2015 // СПС «Гарант» [Ruling of the Supreme Court of the Russian Federation of 9 February 2016 No. 306-ES15-15685 in case No. A72-5089/2015 on *Kazan Federal University v. LLC Fifth Element*, SPS "Garant"] (Apr. 15, 2020), available at http://www.garant.ru.

[57] *See* Постановление Президиума Высшего Арбитражного Суда Российской Федерации от 28 января 2014 г. № 11535/13 // СПС «Гарант» [Resolution of the Supreme *Arbitrazh* Court of the Russian Federation of 28 January 2014 No. 11535/13 on *LLC ArbatStroy v. Public Establishment of the Moscow Health Department*, SPS "Garant"] (Apr. 15, 2020), available at http://www.garant.ru.

[58] Arbitration agreements relating to corporate disputes may be included in a legal entity's charter (with the exception of public joint stock companies and joint stock companies in which there are 1,000 or more holders of voting shares). The inclusion of an arbitration agreement in a legal entity's charter must be approved by unanimous vote of all its participants (Art. 7(7) of the FLA, Art. 7(8) of the ICA Law and Art. 225.1(3) of the APC, as amended by the ACLA).

[59] Mikhail Ivanov & Inna Manassyan, *Russia* in *International Arbitration Review* 406 (J.H. Carter (ed.), 9th ed., London: Law Business Research Ltd., 2018).

The matter of deciding over the arbitrability of a dispute can arise at the time an arbitration tribunal requires support from a local court. For instance, the state courts normally provide assistance to arbitration tribunals in taking evidence.[60] According to the new arbitration reform, only arbitration tribunals seated in Russia and constituted under a permanent arbitral institution are able to be assisted by state courts in obtaining evidence. A new section regulates in detail the scope and procedure for state court assistance in matters of taking evidence, which compared to its precedent regime has become more efficient in many respects.[61] The evidence should fall within one of the following three categories: written documents, physical evidence or other documents and materials. The law does not provide for judicial assistance with respect to witness evidence, depositions or on-site inspections. The time limit for acting upon a motion for judicial assistance is set at 30 days after the receipt thereof by a competent court. In order to determine whether the motion for assistance to obtain evidence can be granted, the court needs to evaluate if the dispute is arbitrable or not. Therefore, the issue of arbitrability is legally determined at the stage of filing the motion for judicial assistance and in theory has the force of *res judicata*. The denial by a court to render assistance is not appealable. This approach has been criticized by local practitioners because it applies to Russian-seated institutional arbitrations, let alone an arbitration having its seat outside the territory of the Russian Federation or an *ad hoc* arbitration. In such cases court assistance may be blocked.[62]

With the new rules on arbitration, the issue of arbitrability can also arise in all situations in which an arbitral tribunal examines the question of whether it has jurisdiction before considering the case on its merits such as in a "preliminary issue," if this question is raised by a party. In fact, a preliminary issue can be disputed in a competent state court within one month of the party's receipt of such decision. The filing with the state court of an application to rule on the arbitral tribunal's lack of jurisdiction does not prevent the arbitral tribunal from continuing the arbitration and making an award. According to the amended law, the parties to an arbitration agreement providing the settlement of their dispute in a permanent arbitration institution can expressly exclude challenges to the jurisdiction of an arbitral tribunal in court.[63]

The new rules concerning the arbitrability of corporate disputes are applicable only to the arbitration agreements concluded after 1 February 2017.[64] All previous arbitration agreements remain valid and submitted to the previous legislation in

---

60 Art. 27 of the ICA Law.

61 *See* Art. 74.1 of the APC.

62 Kokorin & Timmermans 2017, at 54.

63 *See* Art. 16(3) of the ICA Law.

64 *See* Art. 13(7), (10) & (11) of the Federal Law of 29 December 2015 No. 409-FZ.

force at the date the parties signed the agreement.[65] The awards rendered on those arbitrations cannot be set aside if the dispute in question has become non-arbitrable as a result of the entry into force of the new law.[66] This hypothesis is remote since the new rules have expanded the range of arbitrable commercial disputes. However, such awards may be set aside if the dispute in question was non-arbitrable under the law in effect as of the date when the arbitration commenced.[67]

3.3. The Public Policy Clause

One of the most common reasons for refusing the recognition or enforcement of a foreign arbitral award, which has also been one of issue of the debate, is the argument that the award's subject matter contradicts public policy of the Russian Federation.[68] In this respect, the arbitration reform leaves the situation unchanged. In Russia, public policy is used in the APC as the equivalent of fundamental principles of Russian law. This concept is not only legal but includes also political aspects. The notion of public policy is very broad and seems to embrace morality, core religious, economic and cultural traditions – whether or not they are expressly established by law.[69] The only limit seems to be the wording of Article 1193 of the RF Civil Code, which implies that an arbitral award issued by an arbitrators' panel judging according to Russian law can never account for a violation of public policy.[70] This does not mean, of course, that any difference between a foreign and Russian law provides the ground for invoking the public policy clause.[71] However, the evolution of the state courts'

---

65 Art. 52(4) & (5) of the FLA.

66 Art. 13(10) & (11) of the Federal Law of 29 December 2015 No. 409-FZ.

67 *Id*. Art. 13(12).

68 Dmitry Davydenko & Eugenia Kurzynsky-Singer, *Substantive Ordre Public in Russian Case Law on the Recognition, Enforcement and Setting Aside of International Arbitral Awards*, 20(2) American Review of International Arbitration 209 (2009); Boris Karabelnikov & Dominic Pellew, *Enforcement of International Arbitral Awards in Russia – Still a Mixed Picture*, 19(1) ICC International Court of Arbitration Bulletin 65 (2008); Diana V. Tapola, *Enforcement of Foreign Arbitral Awards: Application of the Public Policy Rule in Russia*, 22(1) Arbitration International 151, 151–153 (2006).

69 *Нешатаева Т.Н.* Международное частное право и международный гражданский процесс [Tatyana N. Neshataeva, *Private International Law and International Civil Procedure*] 560 (Moscow: Gorodets, 2004).

70 The Article recites "A rule of foreign law shall in exceptional cases not be applied when the consequences of its application would manifestly contradict the bases of public policy of the Russian Federation." A resembling provision was adopted in Article 244 of the APC.

71 *See* Определение Верховного Суда Российской Федерации от 25 сентября 1998 г. № 5-Г98-60 [Ruling of the Supreme Court of the Russian Federation of 25 September 1998 No. 5-Г98-60] recently reaffirmed by Постановление Пленума Верховного Суда Российской Федерации от 9 июля 2019 г. № 24 «О применении норм международного частного права судами Российской Федерации» // СПС «Гарант» [Resolution of the Plenum of the Supreme Court of the Russian Federation No. 24 of 9 July 2019. On the Application of International Private Law by the Courts of the Russian Federation, SPS "Garant"] (Apr. 15, 2020), available at http://www.supcourt.ru/files/28073/.

judgments regarding the use of the public policy clause shows a divergence from the ground for refusing enforcement as formulated in the New York Convention.[72]

The mixed approach of the state courts regarding the public policy clause was evident in the Information Letter of the Presidium of the Supreme *Arbitrazh* Court No. 96 redacted in 2005. In paragraphs 12 and 20, the court pointed out that public policy was never meant to use as a means of re-examining the substance of awards.[73] However, in paragraphs 29 and 30, the court provided two cases in both of which the enforcement was refused, sending the exact opposite signal, although in one of these cases, the Court had good reasons not to enforce.[74] The court describes public policy as being "based on principles of equality of parties to civil-legal relationships, on good faith in their conduct, on the proportionality of civil liability with the consequences of the breaches, taking into account the fault of the parties."[75]

Public policy has sometimes coincided with the interest of the Russian nation, as in the case of *United World Ltd. v. CJSC Krasnyi Iakor.*[76] The cassation court refused the enforcement of an ICC award as this could, among other things, lead to the insolvency of the defendant, which being a municipal entity would have impacted negatively the social and economic stability of the city of Nizhny Novgorod. Furthermore, the defendant Krasnyi Iakor manufactured products of strategic value for the security and national safety of the State. However, the extension of the concept of public policy in Russia goes much beyond the violation of the Russian mandatory rules and

---

[72] The court may on its own motion refuse enforcement for reasons of public policy as provided in Article V(2).

[73] And these cases are going to that direction, *see* Определение Высшего Арбитражного Суда Российской Федерации от 26 мая 2006 г. № 4438/06 // СПС «Гарант» [Ruling of the Supreme *Arbitrazh* Court of the Russian Federation of 26 May 2006 No. 4438/06, SPS "Garant"] (Apr. 15, 2020), available at http://www.garant.ru; Постановление Президиума Высшего Арбитражного Суда Российской Федерации от 13 сентября 2011 г. № 9899/09 по делу № А56-60007/2008 // СПС «Гарант» [Resolution of the Presidium of the Supreme *Arbitrazh* Court of the Russian Federation of 13 September 2011 No. 9899/09 in case No. A56-60007/2008 on *Stena RoRo AB v. OJSC Baltic Plant*, SPS "Garant"] (Apr. 15, 2020), available at http://www.garant.ru.

[74] *See* Karabelnikov & Pellew 2008, at 72.

[75] *See* Информационное письмо Президиума Высшего Арбитражного Суда Российской Федерации от 22 декабря 2005 г. № 96 «Обзор практики рассмотрения арбитражными судами дел о признании и приведении в исполнение решений иностранных судов, об оспаривании решений третейских судов и о выдаче исполнительных листов на принудительное исполнение решений третейских судов» // СПС «КонсультантПлюс» [Information Letter of the Presidium of the Supreme *Arbitrazh* Court of the Russian Federation No. 96 of 22 December 2005. Review of *Arbitrazh* Court Practice in Respect of the Recognition and Enforcement of Foreign Court Judgments, Challenge to Arbitral Awards and Issuance of Writs of Execution for the Enforcement of Arbitral Awards, SPS "ConsultantPlus"] (Apr. 15, 2020), available at http://www.consultant.ru.

[76] *See* Постановление Федерального арбитражного суда Волго-Вятского округа от 17 февраля 2003 г. № А43-10716/02-27-10исп // СПС «Гарант» [Resolution of the Federal *Arbitrazh* Court of the Volga-Vyatka Region of 17 February 2003 No. A43-10716/02-27-10isp, SPS "Garant"] (Apr. 15, 2020), available at http://www.garant.ru.

the protection of the public interest. In practice, compliance of an arbitral award with the Russian public order includes compliance with "the fundamental principles of law, its core bases which are universal, peremptory to the highest extent and are of particular general importance."[77] This is, for instance, the principle of lawfulness, which is established in the RF Constitution.[78] Accordingly, the arbitral tribunal may not compel a party to execute a transaction knowingly made with a purpose contrary to the foundations of the legal order and morality or to be held liable for the failure to execute such a transaction.[79] One general principle of the Russian law is that payment for work depends on its actual result. Therefore, an award compelling payment for an unfulfilled portion of work was considered contrary to Russian public policy.[80]

Several times,[81] the invalidity of the underling transaction on the grounds provided in Article 169 of the RF Civil Code has been invoked as an example of public policy violation. In a notable case, the state court for the Moscow Region declared that an award ordering payment of damages to the claimant on an equitable basis following the invalidation of the underlying contract was contrary to the fundamental principle of "equality of the parties," which required that each party should bear its own losses.[82] In this line of reasoning, the state court for the Moscow Region set aside an arbitral award compelling the defendant to enter into a contract on substantially nonmarket

---

77 *See* Постановление Федерального арбитражного суда Московского округа от 14 февраля 2006 г. по делу № КГ-А40/247-06 // СПС «Гарант» [Resolution of the Federal *Arbitrazh* Court of the Moscow Region of 14 February 2006 in case No. KG-A40/247-06, SPS "Garant"] (Apr. 15, 2020), available at http://www.garant.ru.

78 *See* Art. 15(2) of the Constitution of the Russian Federation.

79 *See* Постановление Федерального арбитражного суда Московского округа от 29 сентября 2004 г. по делу № КГ-А40/7948-04 // СПС «Гарант» [Resolution of the Federal *Arbitrazh* Court of the Moscow Region of 29 September 2004 in case No. KG-A40/7948-04, SPS "Garant"] (Apr. 15, 2020), available at http://www.garant.ru, and Resolution of the Federal *Arbitrazh* Court of the Moscow Region in case No. KG-A40/247-06, *supra* note 77.

80 *See* Постановление Президиума Верховного Суда Российской Федерации от 19 июня 2001 г. № 60пв-02 // СПС «Гарант» [Resolution of the Presidium of the Supreme Court of the Russian Federation of 19 June 2002 No. 60pv-02, SPS "Garant"] (Apr. 15, 2020), available at http://www.garant.ru.

81 *See* Постановление Федерального арбитражного суда Московского округа от 3 апреля 2003 г. по делу № КГ-А40/1672 // СПС «Гарант» [Resolution of the Federal *Arbitrazh* Court of the Moscow Region of 3 April 2003 in case No. KG-A40/1672, SPS "Garant"] (Apr. 15, 2020), available at http://www.garant.ru, where the contract was erroneously interpreted by the arbitral tribunal which misapplied the RF Civil Code provisions on remedies for breach of contract; *see also* Постановление Федерального арбитражного суда Московского округа от 29 сентября 2005 г. по делу № КГ-А40/9192-05 // СПС «Гарант» [Resolution of the Federal *Arbitrazh* Court of the Moscow Region of 29 September 2005 in case No. KG-A40/9192-05, SPS "Garant"] (Apr. 15, 2020), available at http://www.garant.ru, of a German company enforcing a German monetary award against a Russian previously state-owned and then privatized after the dissolution of the URSS.

82 Постановление Федерального арбитражного суда Московского округа от 15 августа 2003 г. по делу № КГ-А40/5470-03П // СПС «Гарант» [Resolution of the Federal *Arbitrazh* Court of the Moscow Region of 15 August 2003 in case No. KG-A40/5470-03P on *MMK v. Banka Polska*, SPS "Garant"] (Apr. 15, 2020), available at http://www.garant.ru.

and disadvantageous terms.[83] In another occasion, the refusal to enforce was due to an abuse of right and "an arbitral award granting damages is unenforceable if bad faith (abuse of right) on the part of the claimant alleging damages is discovered."[84]

At the end of 2007, the Supreme *Arbitrazh* Court tried to put together a definition by stating that an international arbitral award may violate Russian public policy if

> … its enforcement would result in actions expressly forbidden by law or causing damage to the sovereignty or security of the state, affecting interests of large social groups, being incompatible with the fundamental principles of various states' economic, political and legal systems, disturbing citizens' rights and liberties, as well as being contrary to basic principles of civil legislation, such as equality of the participants, inviolability of property and freedom of contract.[85]

Nevertheless – as some authors observed – in Russia, the public policy exception has been adopted by state courts more frequently to restore the balance between private interests than to guarantee protection of public interests.[86] Not surprisingly, the public policy exception is applied fairly frequently in Russian case law where the arbitral tribunal awards an excessive penalty – a "punitive penalty" similar to punitive damage in common law. The Supreme *Arbitrazh* Court formulated a notion which is not expressly provided in the law but is part of Russian public policy that "the principle of remedies proportional to the consequences of the misdeed, considering fault."[87] Although Russian civil law admits punitive penalty as a possible remedy for breach of contractual obligations, the key criterion for compliance with public policy is the proportionality of the remedy awarded by arbitral tribunal to the consequences

---

[83] *See* Постановление Федерального арбитражного суда Московского округа от 13 октября 2008 г. по делу № КГ-А40/9254-08 // СПС «Гарант» [Resolution of the Federal *Arbitrazh* Court of the Moscow Region of 13 October 2008 in case No. KG-A40/9254-08, SPS "Garant"] (Apr. 15, 2020), available at http://www.garant.ru.

[84] *See* Постановление Президиума Высшего Арбитражного Суда Российской Федерации от 26 октября 2004 г. № 3351/04 // СПС «Гарант» [Resolution of the Presidium of the Supreme *Arbitrazh* Court of the Russian Federation of 26 October 2004 No. 3351/04, SPS "Garant"] (Apr. 15, 2020), available at http://www.garant.ru.

[85] *See* Определение Высшего Арбитражного Суда Российской Федерации от 6 декабря 2007 г. № 13452/07 // СПС «Гарант» [Resolution of the Supreme *Arbitrazh* Court of the Russian Federation of 6 December 2007 No. 13452/07, SPS "Garant"] (Apr. 15, 2020), available at http://www.garant.ru, which enforced a claim of a Ukrainian company against a Russian company to have paid damages for breach of a repair work contract.

[86] *See* Davydenko & Kurzynsky-Singer 2009, at 214.

[87] *See* Информационное письмо Президиума Высшего Арбитражного Суда Российской Федерации от 22 декабря 2005 г. № 96 // СПС «Гарант» [Information Letter of the Presidium of the Supreme *Arbitrazh* Court of the Russian Federation of 22 December 2005 No. 96, SPS "Garant"], para. 29 (Apr. 15, 2020), available at http://www.garant.ru.

of the breach of contract.[88] Therefore, the public policy exception may be applied when the debtor proves manifest lack of proportionality of such penalty to the consequences of his breach.[89] In one eminent case, the state court for the Volga-Vyatka Region refused to enforce an award in favor of a company from the British Virgin Islands, Unimpex Enterprises Ltd. ordering the defendant, a Russian company, to pay the claimant $21.5 million as contractual damages for failure to transfer shares on the grounds that, among other things, the damages greatly exceeded the value of the shares and were punitive in nature. So doing the arbitral tribunal did not take into account Article 333 of the RF Civil Code.[90] Some doctrine considered too harsh the public policy exception applied by the state courts to refuse to enforce the entire award while they could recognize the part of the award that complied with Russian public policy by analogy of Article 333 of the RF Civil Code, which allows a reduction in the amount of such penalty instead.[91]

In 2013, the Supreme *Arbitrazh* Court issued several guidelines limiting the application of the public policy exception.[92] Since then, there has been a decrease in the number of arbitral awards refused by state courts because of public policy matters.[93] The Supreme *Arbitrazh* Court's guidelines were based on the assumption that refusal of recognition and enforcement of a foreign arbitral award on the ground of public policy should be allowed only in exceptional cases, and that public policy should not become the excuse for denying a motion for recognition and

---

88 *See* Постановление Федерального арбитражного суда Волго-Вятского округа от 25 мая 2006 г. по делу А82-10555/2005-2-2 // СПС «Гарант» [Resolution of the Federal *Arbitrazh* Court of the Volga-Vyatka Region of 25 May 2006 in case No. A82-10555/2005-2-2, SPS "Garant"] (Apr. 15, 2020), available at http://www.garant.ru.

89 Such as Постановление Федерального арбитражного суда Дальневосточного округа от 14 сентября 2009 г. № Ф03-4594/2009 по делу № А73-1288/2009 // СПС «Гарант» [Resolution of the Federal *Arbitrazh* Court of the Far Eastern Region of 14 September 2009 No. F03-4594/2009 in case No. A73-1288/2009 on *Oil & Natural Gas Corporation v. OJSC Amur*, SPS "Garant"] (Apr. 15, 2020), available at http://www.garant.ru, and Постановление Федерального арбитражного суда Северо-Западного округа от 3 октября 2011 г. по делу № А05-10560/2010 // СПС «Гарант» [Resolution of the Federal *Arbitrazh* Court of the Northwestern Region of 3 October 2011 in case No. A05-10560/2010 on *Odfjell SE v. OJSC Sevmash*, SPS "Garant"] (Apr. 15, 2020), available at http://www.garant.ru.

90 Постановление Федерального арбитражного суда Волго-Вятского округа от 25 мая 2006 г. по делу № А82-10555/2005-2-2 // СПС «Гарант» [Resolution of the Federal *Arbitrazh* Court of the Volga-Vyatka Region of 25 May 2006 in case No. A82-10555/2005-2-2 on *Unimpex Enterprises Ltd. v. OJSC NPO Saturn*, SPS "Garant"] (Apr. 15, 2020), available at http://www.garant.ru.

91 Davydenko & Kurzynsky-Singer 2009, at 229.

92 Информационное письмо Президиума Высшего Арбитражного Суда Российской Федерации от 26 февраля 2013 г. № 156 // СПС «Гарант» [Information Letter of the Presidium of the Supreme *Arbitrazh* Court of the Russian Federation of 26 February 2013 No. 156, SPS "Garant"] (Apr. 15, 2020), available at http://www.garant.ru.

93 *See* data in Anton V. Asoskov & Alena N. Kucher, *Are Russian Courts Able to Keep Control over the Unruly Horse? The Long-Awaited Guidance of the Russia's Highest Commercial Court on the Concept of Public Policy*, 30(5) Journal of International Arbitration 581 (2013).

enforcement. Likewise, the absence in Russia of legal concepts, which are known in foreign jurisdictions, should not serve as a ground for refusing recognition and enforcement on public policy grounds. The Court narrowed the concept of public policy to situations where enforcement would violate fundamental legal principles of supreme mandatory effect and universality, imperative norms or the sovereignty or security of the state, affecting the interests of major social groups, and breach the constitutional rights and freedoms of private parties.[94]

In spite of the good will to strengthen and promote the arbitration in Russia, the Supreme Court appears to wish to retain residual jurisdiction to assess the proportionality of all awards against Russian parties on the basis of Russian criteria.[95] In a recent case, the Russian Supreme Court denied recognition of an arbitral award in which a Russian company claimed a credit to its affiliated company in winding up, because it violated the constitutionally protected principle of good faith between the parties.[96] A third party – PAO Bank "FK Otkritie" – claiming to be a pre-insolvency creditor asserted that the claimant and respondent in arbitration proceedings conspired to create a fictitious indebtedness in order to forestall the bank's claims. The bank noted that the writ of execution was issued on October 2015, but the claimant did not apply for execution until July 2016, when the bank notified its intention to initiate insolvency proceedings against the debtor company. In such a case, the Supreme Court reasoned that the protection of the rights of the third parties falls within the state's public policy domain. In fact, the demonstrated bad faith of the parties to arbitration proceedings breached the fundamental principles of Russian law and, in particular, that of good faith between the parties.[97] In a precedent case, in 2014, the Supreme *Arbitrazh* Court reversed the Cassation Court ruling rejecting the enforcement of a foreign arbitral award when a third party creditor to an insolvency proceedings argued that the claimant and respondent in arbitration proceedings used the arbitration to document a non-existing claim for insolvency purposes and that the award was backdated. The Supreme *Arbitrazh* Court remanding the matter for reconsideration to the lower court stated that a person seeking inclusion into the insolvency register based on an arbitral award should have no difficulties presenting evidence of the debt to rebut such doubts.[98] To confirm that,

---

94 *See* this doctrine in Sergey Gorbylev, *Arbitration in Russia: Are There Any Local Differences?*, 5 International Business Law Journal 463, 471–475 (2015).

95 *See* Karabelnikov & Pellew 2008, at 75.

96 Art. 17(3) of the Constitution of the Russian Federation.

97 Определение Судебной коллегии по экономическим спорам Верховного Суда Российской Федерации от 28 апреля 2017 г. по делу № 305-ЭС16-19572, А40-147645/2015 // СПС «Гарант» [Ruling of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation of 28 April 2017 in case No. 305-ES16-19572, A40-147645/2015 on *LLC Nordstroy v. CJSC Negoziant*, SPS "Garant"] (Apr. 15, 2020), available at http://www.garant.ru.

98 Постановление Федерального арбитражного суда Московского округа от 13 октября 2014 г. по делу № А42-2358/2013 // СПС «Гарант» [Resolution of the Federal *Arbitrazh* Court of the Moscow Region of 13 October 2014 in case No. A42-2358/2013 on *Gartic Ltd. v. OJSC Murmansk Multiservice Networks*, SPS "Garant"] (Apr. 15, 2020), available at http://www.garant.ru.

in 2017, the Supreme Court stated that if there is evidence of bad faith committed by parties in arbitration proceedings in cases involving the issuance of writs of execution, such parties must prove that their actions are reasonable and in good faith.[99]

On a positive note, the Plenum of the Supreme Court of the Russian Federation very recently reaffirmed the definition of public order stated by the Supreme *Arbitrazh* Court in 2013.[100] Following the reasoning of the Supreme Court, an arbitral awards can be set aside or refused enforcement on the ground of breach of public order only when the following two criteria are met. There is a violation of the fundamental principles that form the basis of the economic, political and legal system of the Russia Federation and such a violation can result in infringing the sovereignty or security of the state or in affecting the interests of a large social group or in violating the constitutional rights and freedoms of individuals or legal entities. Furthermore, the Supreme Court literally specified that no violation of public order can be found where an arbitral tribunal applies foreign law rules that have no equivalent in Russian law; the respondent did not take part in the arbitration proceedings or the debtor does not object to the forced execution of the arbitral award.

Conclusion

The Russian arbitration reform makes a good effort to align the local and international arbitration with the international standards and establishes a narrower scope for the parties in a dispute to refer to international commercial arbitration. It also sheds some light on the obscure matter of arbitrability of the arbitration disputes in Russia and operates to eliminate inefficiencies and conflicts of interest such as the barriers to the recognition and enforcement of an arbitral award and the pocket arbitration centres organized by large public companies.

That been said, some criticisms remain. The Russian arbitration reform recognizes as permanent arbitral courts only those institutions authorized by the Russian Government letting behind all the international well-established arbitral courts worldwide that are accepted as places for disputes resolution. Those arbitral courts will hardly ask for the Government's authorization to operate because their aim is to free themselves from public authorities rather than to be subordinated to them.

Another criticism concerns the formalistic approach to the arbitration agreement. As described above, the Russian Supreme Court developed a new standard of Model Arbitration Clause. This clause must include the choice of law, the choice of arbitral

---

[99] Ruling of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation in case No. 305-ES16-19572, A40-147645/2015, *supra* note 97.

[100] *See* Resolution of the Plenum of the Supreme Court of the Russian Federation of 10 December 2019 No. 53, *supra* note 24. Accordingly, "Public order is understood as fundamental legal principles having the highest imperative and universal character, a unique social and public significance, and forming the basis of the economic, political and legal system of the Russian Federation."

tribunal, the number of arbitrators, the seat of the arbitration and the working language of the arbitral proceedings. The simple reference to the arbitral court and its rules is not enough to fulfil the principles of legal certainty and enforceability, and therefore, to establish the true will of the parties.

Finally, there is the matter of public policy. The Russian state courts have made a wide use of the public policy clause, which has not always been interpreted narrowly, to deny recognition of an international award. However, the concept of public policy is – by its own nature – dynamic and evolves continually to meet the changing needs of society. Russia has surely gone through important political, moral and economic changes over the last 30 years that have impacted the courts' interpretation of public policy. In the attempt to restore justice, the courts need to mediate between the interests of the international business community and those of the State when examining an international commercial contract dispute. The recent clarifications of the Supreme Court bode well for the future of international commercial arbitration in Russia.

References

Asoskov A.V. & Kucher A.N. *Are Russian Courts Able to Keep Control over the Unruly Horse? The Long-Awaited Guidance of the Russia's Highest Commercial Court on the Concept of Public Policy*, 30(5) Journal of International Arbitration 581 (2013).

Davydenko D. & Kurzynsky-Singer E. *Substantive Ordre Public in Russian Case Law on the Recognition, Enforcement and Setting Aside of International Arbitral Awards*, 20(2) American Review of International Arbitration 209 (2009).

Hendrix G. & Nikiforov I. *International Commercial Arbitration Practice in the Russian Federation* in *International Commercial Arbitration Practice: 21st Century Perspectives* Ch. 12 (H.A. Grigera Naón & P.E. Mason (eds.), London: Lexis Nexis, 2010).

Hsu L. *Public Policy Considerations in International Arbitration: Costs and Other Issues A View from Singapore*, 26(1) Journal of International Arbitration 101 (2009).

Ivanov M. & Manassyan I. *Russia* in *International Arbitration Review* 406 (J.H. Carter (ed.), 9th ed., London: Law Business Research Ltd., 2018).

Karabelnikov B. & Pellew D. *Enforcement of International Arbitral Awards in Russia – Still a Mixed Picture*, 19(1) ICC International Court of Arbitration Bulletin 65 (2008).

Khodykin R. *Arbitration Law of Russia: Practice and Procedure* (New York: Juris, 2013).

Kokorin I. & Timmermans W.A. *Arbitration Reform in Russia: Will Russia Become More Arbitration-Friendly?*, 22 Tijdschrift voor Arbitrage 50 (2017).

Kostin A. & Davydenko D. *Russia* in *Law and Practice of International Arbitration in the CIS Region* 259 (K. Hobér & Y. Kryvoi (eds.), Alphen aan den Rijn: Kluwer Law International, 2017).

Nikiforov I. *Interpretation of Article V of the New York Convention by Russian Courts (Due Process, Arbitrability, and Public Policy Grounds for Non-Enforcement)*, 25(6) Journal of International Arbitration 787 (2008).

Nikiforov I. *Litigating in Europe: Is the System of Enforcing Judgments Effective? – Enforcement of Judgments in Russia*, 1(2) Dispute Resolution International 233 (2007).

Pistor K. *Supply and Demand for Contract Enforcement in Russia: Courts, Arbitration, and Private Enforcement*, 22(1) Review of Central and East European Law 55 (1996). https://doi.org/10.1007/bf02743186

Tapola D.V. *Enforcement of Foreign Arbitral Awards: Application of the Public Policy Rule in Russia*, 22(1) Arbitration International 151 (2006). https://doi.org/10.1093/arbitration/22.1.151

Information about the author

Lorenzo Sasso (Moscow, Russia) – Professor of International Commercial Law, School of Governance and Politics, Moscow State Institute of International Relations (76 Vernadskogo Av., Moscow, 119454, Russia; e-mail: l.sasso@odin.mgimo.ru).