Contemporary Issues in International Arbitration and Mediation

The Fordham Papers

2011

Arthur W. Rovine
Editor

MARTINUS
NIJHOFF
PUBLISHERS

LEIDEN • BOSTON
2012

Arbitration in Russia: Hot Topic in a Cold Winter

Roman Khodykin[1]

In a recent speech, Dr. Julian Lew QC mentioned that the economic power of the US and Western Europe is declining and the focus is shifting to the BRIC countries (Brazil, Russia, India and China). He noted that consequently arbitrations which once would have been held in Europe are increasingly taking place in other regions of the world.[2] So the BRIC countries in general, and Russia in particular, are increasingly on the radar of international arbitration specialists. Although not many arbitration specialists are aware of the fact, the resolution of disputes through arbitration has been used in Russia for ages (including in the USSR during its existence).

The history of arbitration in Russia dates to ancient times. One of the earliest examples can be found in the contractual charter between Grand Duke Dmitry Donskoi and Duke Vladimir the Brave of Serpukhov.[3] References to resolution of business disputes through arbitration can also be found in treaties between princes in the 11th and 12th centuries.[4]

Though some may find it surprising, arbitration was popular even during the Soviet era. Arbitration commissions operating at commodity and stock exchanges were empowered to act as arbitration courts in 1922. The

[1] Ph. D in Law, Partner at Berwin Leighton Paisner LLP (London), associate professor at Moscow State Institute of International Relations (University).

[2] See *Will arbitration keep up with the shift in world power?* at: http://www.globalarbitrationreview.com/news/article/29849/will-arbitration-keep-shift-world-power/ (last visited on 20 October 2011).

[3] For more detail, see Вицын А. *Третейский суд по русскому праву, историко-догматическое рассуждение А. Вицына.* Москва, 1856. С. 4-5 [Vitsyn, A., *The Arbitral Tribunal in Russian Law, Historical and Dogmatic Essay by A. Vitsyn*, Moscow, 1856, pp. 4-5].

[4] For more detail, see Скворцов, О.Ю. *Третейское разбирательство предпринимательских споров в России: Проблемы. Тенденции. Перспективы.*—М.: Волтерс Клувер, 2005. С. 11 [Skvortsov, O. Yu., *Arbitration of Business Disputes in Russia. Problems. Tendencies. Perspectives*, Moscow: Wolters Kluwer, 2005, p. 11].

Maritime Arbitration Commission (the "**MAC**") was established in 1930.[5] The Foreign Trade Arbitration Commission[6] was established in 1932.[7]

The latest stage of the development of arbitration in Russia began with the enactment of the International Commercial Arbitration Act 1993 (the "**Arbitration Act**"), which was based on the UNCITRAL Model Law on International Commercial Arbitration. The Arbitration Act also introduced new Regulations for the International Commercial Arbitration Court (the "**ICAC**")[8] and the Maritime Arbitration Commission (the "**MAC**"). The ICAC and the MAC are the oldest, most respected arbitration institutions operating under the aegis of the Chamber of Commerce and Industry of the Russian Federation (the "**Chamber of Commerce**").

This article presents a brief overview of arbitration in the Russian Federation, with a focus on recent trends and certain regulatory features unique to the country. As such, it is not intended to cover all aspects of arbitration in the Russian Federation.[9]

1. LEGAL FRAMEWORK

The USSR acceded to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**") in 1960 and to the European Convention on International Commercial Arbitration (the "**European Convention**") in 1961. In 1972 the Moscow Convention

[5] Statute on the Maritime Arbitration Commission approved by decree of the Central Executive Committee and Council of People's Commissars of the USSR dated 13 December 1930, in: Collection of Legislative Acts of the USSR, 1930, No. 60, item 637.

[6] The predecessor of the International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry (also known by its English acronym "ICAC" or transliterated Russian acronym "MKAS").

[7] Decree of the Central Executive Committee and Council of People's Commissars of the USSR "On the Foreign Trade Arbitration Commission at the All-Union Chamber of Commerce" dated 17 June 1932, in: Collection of Legislative Acts of the USSR, 1932, No. 48, item 281.

[8] Legal successor of the Foreign Trade Arbitration Commission that was founded in 1932.

[9] For a more comprehensive analysis of Russian law and arbitration rules, see: Roman Khodykin, *International Commercial Arbitration Court (ICAC) and the Maritime Arbitration Commission (MAC) at the Russian Federation Chamber of Commerce and Industry* in: World Arbitration Reporter, vol. 2, pp. ICAC-1—ICAC-62; Ivan Marisin and Roman Khodykin, *Russian Federation* in: World Arbitration Reporter, vol. 1, pp. RUS-1—RUS-136.

on the Settlement by Arbitration of Civil Law Disputes Arising from Relations of Economic, Scientific and Technical Cooperation (the "**1972 Moscow Convention**") was adopted at the initiative of the USSR.

After the collapse of the Soviet Union, the Russian Federation declared that it would continue to honour its obligations and rights arising out of international treaties signed by the USSR. Russia is therefore bound by all international treaties that the USSR was party to, including the New York Convention, the European Convention and the 1972 Moscow Convention.

There were also a number of bilateral treaties between the Russian Federation and other States which contain provisions concerning the enforcement of arbitral awards, including the Treaty on Rendering of Bilateral Legal Assistance between the Union of Soviet Socialist Republics and the People's Democratic Republic of Algeria dated 23 February 1982, the Treaty on Rendering of Legal Assistance in Civil and Criminal Cases between the Union of Soviet Socialist Republics and the People's Democratic Republic of Yemen dated 6 December 1985, the Treaty on Rendering of Bilateral Legal Assistance between the Union of Soviet Socialist Republics and the Republic of Iraq dated 22 June 1973, and the Treaty on Cooperation and Rendering Legal Assistance in Civil, Commercial, Labour and Administrative Matters between the Russian Federation and the Republic of Argentina dated 20 November 2000. The Russian Federation is also a party to more than 50 bilateral investment treaties (BITs) that allow recourse to arbitration. Usually these treaties provide for arbitration in various institutions, at the claimant's discretion. The most common is the Arbitration Institute of the Stockholm Chamber of Commerce (BITs with Spain, Austria, Germany, the United Kingdom, South Africa, Turkey, etc.). Some BITs provide for *ad hoc* arbitration under UNCITRAL Rules (BITs with Argentina, Cuba, Canada, Japan, Spain, Italy, Norway, Greece, Mongolia, Egypt, etc.). There are also BITs with some countries stipulating that disputes may be resolved under the ICSID Additional Facility Rules (in particular, the Czech Republic, Slovakia, Romania, Japan, Yemen, Syria, Ethiopia, Argentina, Algeria and Armenia).

Russia has signed but not ratified the Energy Charter Treaty. On 30 July 2009 the Russian Federation announced its decision not to proceed with ratification of the Energy Charter Treaty.[10]

As far as national legislation governing international arbitration is concerned, it consists of the Arbitration Act, the Private Arbitral Tribunals Act

[10] See Alison Ross, *Russia withdraws from Energy Charter Treaty* at: http://www.globalarbitrationreview.com/news/article/18495/russia-withdraws-energy-charter-treaty/ (last visited on 18 October 2011).

2002 (the "**Private Arbitral Tribunals Act**") and two Russian procedural codes: the Arbitrazh[11] Procedure Code and the Civil Procedure Code.

The Arbitration Act governs international commercial arbitration, whilst domestic arbitration is governed by the Private Arbitral Tribunals Act.

The Arbitration Act is based on the UNCITRAL Model Law on International Commercial Arbitration (the "**UNCITRAL Model Law**"). There are, however, a number of differences between the Arbitration Act and the UNCITRAL Model Law:

(a) When determining whether or not an arbitration is international, the Arbitration Act, unlike the UNCITRAL Model Law, does not take into account:
  (i) the place of arbitration or the place where a substantial part of an obligation is to be performed; and
  (ii) the place with which the subject matter of the dispute is most closely connected.
(b) However, the Arbitration Act does state that where a dispute arises between Russian entities, at least one of which is a company with foreign investment, it can be resolved through international arbitration.
(c) Under the Arbitration Act, the functions of appointing and challenging arbitrators (Art. 11(3)—(4), Art. 13(3) and Art. 14) must be performed by the President of the Chamber of Commerce, while under the UNCITRAL Model Law they must be performed by a competent court.
(d) Art. 28 of the Arbitration Act mirrors Art. 28 of the UNCITRAL Model Law, save for one minor difference. Clause 3 of the Arbitration Act does not provide for any possibility of deciding cases *ex aequo et bono*. Consequently, tribunals seated in Russia cannot decide on such basis or act as *amiable compositeur*.

Russian legislators are currently preparing amendments to the Arbitration Act in order to reflect the amendments that were made to the UNCITRAL Model Law in 2006. Amendments currently contemplated to be made to the Arbitration Act relate to the form of the arbitration agreement and to interim measures. The current wording of the Arbitration Act provision on the form of an arbitration agreement (Art. 7) reflects the 1985 version of

[11] The Russian term "*arbitrazh*" denotes Russian state commercial courts and must be distinguished from the English term "*arbitration*", which is an independent tribunal whose jurisdiction requires the consent of the parties. Arbitrazh courts are, in essence, commercial courts.

the UNCITRAL Model Law. The revision of Art. 7 is intended to address evolving practice in international trade and technological developments. The provisions of the Arbitration Act relating to interim measures are to undergo extensive revision, as such measures are increasingly relied upon in practice in international commercial arbitration. This will also include a regime for the enforcement of interim measures, as the effectiveness of arbitration often depends on the ability to enforce them.[12]

2. DISTINCTION BETWEEN DOMESTIC AND INTERNATIONAL ARBITRATION

As mentioned above, international arbitration in Russia is governed by the Arbitration Act, whereas domestic arbitration is regulated by the Private Arbitral Tribunals Act. There are a number of differences between the two acts, the most important of which are outlined below.

First, under the Arbitration Act the arbitral tribunal is to decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Failing any designation by the parties, the arbitral tribunal is to apply the law based on the conflict of laws rules it considers applicable. In contrast, the Private Arbitral Tribunals Act makes no reference to any right on the part of the parties to choose foreign law.

Second, in international commercial arbitration with its seat in Russia there are no special requirements regarding the arbitrators' qualifications, whereas in domestic arbitration the sole arbitrator or the chairman of the tribunal is required to hold a relevant degree in law.

Third, in domestic arbitration, an arbitration agreement in a contract, the terms of which are defined by one of the parties in a template or other standard form and which may be accepted by the other party by way of acceding to the proposed contract on the whole (accession to the contract), is invalid. In such cases, where a contract is acceded to, the arbitration agreement may only be concluded after the grounds arose on which the claim is based. The Arbitration Act does not contain any such provision.

[12] Интернет-интервью с Комаровым А.С., Председателем Международного коммерческого арбитражного суда в 1993-2010: *Международный коммерческий арбитраж в России: актуальные вопросы практики разрешения споров*. [Internet interview with Alexander S. Komarov (the President of the ICAC from 1993 to 2010): *International Commercial Arbitration in the Russian Federation: Current Issues of Dispute Resolution* (http://www.consultant.ru/law/interview/komarov.html)].

Fourth, if the parties to domestic arbitration have agreed that disputes are to be resolved by a sole arbitrator without stipulating any default procedure and they then fail to agree on an arbitrator, the dispute is heard by a court. Also, unless otherwise agreed by the parties, a domestic dispute will be heard by a court if the arbitrators appointed by the parties fail to appoint the chairman of the tribunal. This is not the case with international commercial arbitration.

Fifth, a party to international arbitration who is aware that any provision of the Arbitration Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and who (i) proceeds with the arbitration without stating its objection to such non-compliance without undue delay or, (ii) if a time limit is stipulated, fails to object within such period of time, is deemed to have waived his right to object. The Private Arbitral Tribunals Act does not contain any such provision.

Sixth, there is a strong view that only business and economic disputes may be referred to international commercial arbitration whilst disputes between a company and a consumer may not[13] (the latter may nonetheless be resolved by domestic arbitration).

Finally, under the Arbitration Act the arbitral tribunal or a party with the approval of the arbitral tribunal may request assistance from a competent court of the Russian Federation in taking evidence. The court may grant such a request within its competence and according to its rules on taking evidence. The Private Arbitral Tribunals Act does not contain any such provision.

3. ARBITRATION AGREEMENT: RUSSIAN LAW PERSPECTIVE

As far as arbitration agreements are concerned, Art. 7 of the Arbitration Act is similar to the UNCITRAL Model Law and provides that an arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes that have arisen or may arise between them in respect of a

[13] Комаров А.С., *Комментарий Положения о Международном коммерческом арбитражном суде при Торгово-промышленной палате Российской Федерации (Приложение 1 к Закону РФ "О международном коммерческом арбитраже")* // Третейский суд. 2006, № 2. С. 60. [Komarov, A.S., *Commentary on the Regulation on the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (Schedule 1 to the International Commercial Arbitration Act of the RF)* in: Arbitral Tribunal, 2006, issue 2, p. 60].

defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or a separate agreement.

It is clear from the wording of the definition that it covers both arbitration clauses and submission agreements, unlike in some countries where only submission agreements are valid.[14]

However, there are some features of Russian law which deserve a more detailed explanation.

3.1 Name of the Arbitration Institution in an Arbitration Agreement

The arbitration agreement must specify the arbitration institution that should resolve the disputes or refer to *ad hoc* arbitration. From a Russian law perspective it is very important that the name of the arbitration institution be indicated correctly. Russian courts sometimes refuse to enforce arbitration agreements on the grounds that the arbitration institution has not been named precisely (e.g. "Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation" instead of the "International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation") on the basis that the parties supposedly did not reach an agreement to arbitrate because they named a non-existent arbitral institution. In such cases Russian courts usually disregard the *competence-competence* doctrine,[15] even though the latter is explicitly provided for by Art. 16 of the Arbitration Act, which is applied regularly by arbitral tribunals seated in Russia.[16]

3.2 Exclusivity

The question of the validity of alternative arbitration clauses which provide a party with the option to submit a dispute either to court or to arbitration is being debated in Russian jurisprudence.

[14] Fouchard, Gaillard, Goldman, *International Commercial Arbitration*, 1999, p. 193.

[15] See Decree No. KG-A40/7725-03 of the Federal Arbitrazh Court of the Moscow District dated 6 November 2003.

[16] See, e.g., ICAC Awards No. 217/2001 dated 6 September 2002, No. 375/1996 dated 23 April 2003, No. 58/2003 dated 30 December 2003 and No. 78/2006 dated 17 January 2007.

There have been a number of court cases in which an alternative arbitration clause has been held valid.[17]

In particular, in the Decree of the Federal Arbitrazh Court of the North-West District dated 23 September 2005, the court confirmed the validity of an arbitration agreement containing a clause providing for (i) non-exclusive jurisdiction of the English courts, and (ii) a unilateral right of one of the parties to refer disputes to arbitration.

In its ruling No. 6920/07 of 8 June 2007, the Supreme Arbitrazh Court of the Russian Federation (Russia's highest commercial court) held that an optional arbitration clause that provided for the right of both parties to refer disputes to either a Russian arbitral tribunal or a Russian state court was admissible.

In case law of the ICAC the tribunals have confirmed their jurisdiction over disputes arising out of contracts that have an alternative arbitration clause.[18] In these cases only one of the parties to the contract had the right to choose between a state court or the specified arbitration forum. The court ruled that such clauses were compliant with the Arbitration Act.

Professor Michael G. Rozenberg has expressed the view that arbitration clauses envisaging the option of recourse to a state court should be accepted. He notes:

> *where a contract contains an arbitration clause that stipulates an alternative right to resort to one of two arbitral tribunals to resolve a dispute, the claimant may apply to either of them at its discretion.*[19]

However, there are a number of works in which the authors are sceptical about the validity and/or enforceability of alternative arbitration clauses, particularly in situations where the right to choose between two forums is vested in one party only.

[17] See, e.g., Clause 1 of the Review of Court Practice on Challenging Arbitral Awards and on Granting Writs of Execution for Mandatory Enforcement of Arbitral Awards (approved by the Presidium of the Federal Arbitrazh Court of the Urals District); Decree of the 9th Arbitrazh Appellate Court No. 09-AP-76550/09-25-306 of 7 December 2009.

[18] Awards Nos. 41/2001, 138/2002, 17/2003 and 112/2007.

[19] *Практика Международного коммерческого арбитражного суда при ТПП РФ за 2007—2008 гг.* / сост. М.Г. Розенберг. М.: Статут, 2010. [*Practice of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the RF in 2007—2008* / compiled by M.G. Rozenberg. Moscow: Statut, 2010.]

In particular, Boris R. Karabelnikov argues:

> *an arbitration agreement under which the parties are deliberately put on an unequal footing (when one party cannot institute proceedings at its own initiative) contravene both the [New York] Convention and national acts of the Russian Federation and England in the sphere of commercial arbitration, and should be declared void.*[20]

Other legal scholars have also taken the view that alternative arbitration agreements are invalid or unenforceable.[21]

3.3 Parties That Have Not Signed an Arbitration Agreement

Russian law does not recognize such concepts as "Agency" "*Alter Ego*", "Estoppel" or "Group of Companies"[22] which allow a party that has not signed the arbitration agreement and is not a legal successor to the signatory to nonetheless be brought into an arbitration.

However, under the following circumstances an arbitration agreement may be binding for a party that has not signed it:

(a) Assignment

The Arbitration Act itself does not set out any rules on the consequences of assignment of an agreement containing an arbitration clause.

[20] Карабельников Б.Р., *Исполнение решений международных коммерческих арбитражей. Комментарий к Нью-Йоркской Конвенции 1985 г. и главам 30 и 31 АПК РФ 2002 г.* (издание второе, переработанное и дополненное). Москва, ИБК-ПРЕСС, 2003. С. 138 [Karabelnikov, B.R., *Enforcement of International Commercial Arbitration Awards. Commentary to the 1958 New York Convention and Chapters 30 and 31 of the 2002 Arbitrazh Procedure Code of the RF* (2nd edition, amended and supplemented). Moscow, IBK-PRESS, 2003, p. 138].

[21] Брунцева Е.А., *Международный коммерческий арбитраж (учебное пособие для высших учебных заведений)*. Санкт-Петербург, 2001. С. 141-142. [Bruntseva, Ye. A., *International Commercial Arbitration (A Study Guide for Institutes of Higher Education)*, St. Petersburg, 2001. pp. 141-142]; Балашов А.Н., Зайцев А.И., Зайцева Ю.А., *Третейское судопроизводство в Российской Федерации: учебное пособие*. Москва, ЗАО Юстицинформ, 2008.] [Balashov, A. N., Zaitsev, A.I., Zaitseva, Yu. A., *Arbitration in the Russian Federation: A Study Guide*. Moscow: ZAO Yustitsinform, 2008].

[22] See, e.g., Hanotiau, B., *Groups of Companies in International Arbitration* in: Pervasive Problems in International Arbitration / Edited by Loukas A. Mistelis and Julian D.M. Lew, QC, Kluwer Law International, 2006, p. 281 *et seq.*

While there is case law in which an assignee was not joined as a party to the arbitral proceedings,[23] the majority of court judgments support the position that an arbitration clause should apply to a third party that is the assignee of a contract.[24] The latter position is also supported by Russian legal scholars.[25]

(e) Bank Guarantees

Disputes arising from bank guarantees often involve several parties, in particular the bank and the party to the main contract, which is a separate contractual instrument from the bank guarantee.

Russian case law is not consistent in this regard. On one hand, there are a few cases where tribunals or the courts have held that the party to the main contract may not bring a claim against the bank on the basis of the arbitration clause contained in the main contract.[26] Usually the reason for not recognizing the extension of the arbitration clause of the main contract to the guarantor is that a bank guarantee is a standalone set of rights and obligations which should have a separate dispute resolution mechanism. On the other hand, there has been one case where a bank was held bound by the arbitration clause in the main contract for the reason that it did not make any express reservation when issuing the bank guarantee under the main contract.[27]

In Russia bank guarantees are considered a unilateral transaction that is signed by the bank only. This is an interesting legal problem, involving as it does a unilateral transaction that requires only one party's signature and an arbitration agreement contained therein which requires both parties' consent. There have been no published cases addressing the issue of whether or not the arbitration clause in a bank guarantee is binding for a beneficiary that has not signed the guarantee and, consequently, the arbitration agreement.

[23] Decree of the Federal Arbitrazh Court of the Volga-Vyatka District No. A43-8080/2004-23-220 dated 8 October 2004 and Decree of the Federal Arbitrazh Court of the Moscow District No. KG-A40/8417-06 dated 13 September 2006.

[24] ICAC Award No. 30/2003 dated 27 October 2003, ICAC Award No. 161/2002 dated 23 May 2003 and Decree of the Federal Arbitrazh Court of Moscow District No. A40-21993/08-47-230 dated 24 November 2008.

[25] See, e.g., Розенберг М., *Уступка права требования по договору займа* // ЭЖ-Юрист, 2005, № 47. С. 9-10. [Rosenberg, M., *Assignment of Right in a Loan Agreement*, in: EZh-Yurist, 2005, issue 47, pp. 9-10.

[26] ICAC Awards No. 249/1997 dated 2 September 1998 and No. 49/1992 dated 28 April 1995; Decree of the Federal Moscow Oblast Arbitrazh Court No. KG-A40/9029-10.

[27] ICAC Award No. 381/1999 of 15 January 2001.

We believe that in such situations the arbitration clause may be considered an offer to conclude the arbitration agreement between the bank and the beneficiary. The latter can accept the arbitration clause by either sending written acceptance to the bank or submitting a claim to the arbitral tribunal stipulated by the arbitration clause. Otherwise, the arbitration agreement cannot be deemed concluded.

4. CONSOLIDATION OF ARBITRATION PROCEEDINGS

Neither Russian legislation nor Russian case law touches upon the issue of consolidation of arbitration proceedings.

The Arbitration Act does not contain any provisions on consolidation of claims or proceedings. The ICAC Rules have only one relevant provision, which states that "*if a statement of claim contains claims arising out of several agreements, it is accepted for consideration provided there is an arbitration agreement that encompasses such claims*" (§ 11 (3) of the ICAC Rules).

The ICAC usually does not accept statements of claim if they are based on more than one contract, even if all the contracts contain identical or similar arbitration agreements and the parties to the contracts are the same. In a recent case, a tribunal acting under the ICAC Rules noted that consolidation is possible if such an option is provided by (i) the agreement of the parties, (ii) the rules of the relevant arbitration institution or (iii) the legislation of the place of arbitration. The tribunal decided that none of these conditions were met in the case in question.[28]

5. ARBITRABILITY

Art. 1 of the Arbitration Act provides that the following disputes may be resolved through international commercial arbitration: (i) disputes arising out of contractual or other civil law relationships connected with foreign trade and other kinds of international business where the place of business of at least one of the parties is located abroad, (ii) disputes between enterprises with a foreign interest and international associations and organisations established in the Russian Federation or between members thereof, and (iii) disputes between the parties specified in (ii) and other subjects of Russian Federation law.

[28] ICAC Award No. 35/2007 dated 17 December 2007.

The same article stipulates that the Arbitration Act shall not affect any other law of the Russian Federation by operation of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of the Arbitration Act. Under Russian law, as a general rule, all commercial and other civil law disputes are arbitrable unless otherwise provided for by federal law. Public law disputes, such as disputes arising out of public misfeasance, cannot be referred to arbitration.[29] This approach is also supported by Russian legal scholars.[30]

There are a few types of disputes which federal law explicitly treats as non-arbitrable, e.g. bankruptcy, privatization, etc.[31]

In this article we will touch upon only two recent developments of the arbitrability in Russia.

5.1 Arbitrability of Real Estate Disputes

In Russia, objective arbitrability has been discussed by the Supreme Arbitrazh Court of the Russian Federation, which stated that the arbitrability of disputes should be determined on the basis of the following criteria:

(e) the nature of the relationships involved in the dispute;
(f) the presence/absence of "exclusive competence" of the state courts to hear the dispute;

Art. 38 and Art. 248 of the Arbitrazh Procedure Court provide for the "*exclusive competence*" of arbitrazh courts with respect to international disputes over rights to immovable property located in Russia.

Although the above-mentioned articles are silent as to the arbitrability of such disputes, Russian courts have treated them as establishing a limitation on objective arbitrability, i.e. Russian courts consider such disputes to be non-arbitrable.[32] Moreover, all real estate rights in Russia are subject to

[29] See, e.g., Letter of the Supreme Arbitrazh Court of the Russian Federation No. VAS-S06/OPP-1200 dated 23 August 2007.

[30] Маковский А.Л., Карабельников Б.Р., *Арбитрабильность споров: российский подход* // Международный коммерческий арбитраж, № 3, 2004, С. 16-20. [Makovsky, A.L., Karabelnikov, B.R., *Arbitrability of Disputes: The Russian Approach*, in: International Commercial Arbitration Journal, 2004, issue 3, pp. 16-20].

[31] For more detail, see Ivan Marisin and Roman Khodykin, *Russian Federation* in: World Arbitration Reporter, vol. 1, pp. RUS-36—RUS-38.

[32] Informational Letter No. 96 of the Supreme Arbitrazh Court of the Russian Federation dated 22 December 2005 "Review of Arbitrazh Court Practice in Cases

registration in a state register. The position of the Supreme Arbitrazh Court is based on the premise that the state registration of transactions and other legally significant actions with real estate have an inherent "public element", meaning that arbitral tribunals are precluded from hearing civil law disputes involving real estate.[33] On the other hand, disputes involving pecuniary claims related to immovable property (e.g. for recovery of rent in arrears) are considered arbitrable.[34]

Based on analysis of case law, the Supreme Arbitrazh Court of the Russian Federation came to the following conclusions:[35]

(i) Russian state courts exclusively may establish rights to immovable property located in the Russian Federation;
(ii) transactions involving immovable property may be considered by Russian arbitral tribunals but cannot be considered by foreign arbitration institutions;
(iii) arbitral awards providing for the performance of obligations under transactions with immovable property may be complied with voluntarily by the parties or may be enforced; and
(iv) arbitral awards relating to rights to immovable property are not enforceable under Russian law.

This approach in court practice is criticised by Russian legal scholars, who believe the wording "*exclusive competence of the arbitrazh courts*" should not be construed as limiting objective arbitrability given that the law does not explicitly state that such disputes cannot be referred to arbitration.[36]

This problem ended up before the Constitutional Court of the Russian Federation, which was tasked with deciding whether or not real estate

on Recognition and Enforcement of Foreign Court Judgments, on Challenging Arbitral Awards and on Issuance of Writs of Execution for the Enforcement of Arbitral Awards"; Decree No. 207/04 of the Presidium of the Supreme Arbitrazh Court dated 11 May 2005.

[33] Clause 27 of Informational Letter of the Presidium of the Supreme Arbitrazh Court of the Russian Federation No. 96 of 22 December 2005.

[34] Decree No. 207/04 of the Presidium of the Supreme Arbitrazh Court of the Russian Federation dated 11 May 2005; Decree No. KG-A40/11651/07 of the Federal Arbitrazh Court of the Moscow District dated 15 November 2007; Decree No. 10680/08 of the Presidium of the Supreme Arbitrazh Court of the Russian Federation dated 3 February 2009.

[35] Letter of the Supreme Arbitrazh Court of the Russian Federation No. VAS-S06/OPP-1200 dated 23 August 2007.

[36] Маковский А.Л., Карабельников Б.Р. Цит. соч. С. 16-20. [Makovsky, A.L., Karabelnikov, B.R., *Op. cit.*, pp. 16-20].

disputes are arbitrable. The application to the Constitutional Court was made by the Supreme Arbitrazh Court, which argued that real estate disputes have a public element in the form of state registration and therefore should be considered "public law disputes" which cannot be referred to arbitration.

On 26 May 2011 the Constitutional Court made public the following conclusions in response to the Supreme Arbitrazh Court's application.[37]

Firstly, disputes arising out of civil law relations are arbitrable. A dispute cannot be held to be of a public law nature solely due to the fact that the subject matter of the dispute is real estate. It is the specifics of the legal relations from out of which a dispute arises and the specifics of the parties to the dispute that determines whether or not it is a public law dispute. The state registration requirement applicable to real estate does not change the parties to a dispute, nor the nature of the legal relations out of which it arises; it is connected only with the specifics of the subject matter of the dispute. Therefore, disputes arising out of civil law relations (including, without limitation, disputes relating to mortgage foreclosure and disputes arising out of agreements stipulating the transfer of title to real estate, etc.) may be heard by arbitral tribunals.

Secondly, disputes arising out of administrative law and other public law relations may not be referred to arbitration, nor may disputes that are heard through special proceedings and do not have the traditional characteristics of disputes over a right (e.g. cases where the court must establish facts of legal significance but not award any remedy, etc.). The legislators may set out and refine a list of types of disputes that are arbitrable.

Thirdly, according to the Constitutional Court's interpretation, Art. 248 of the Arbitrazh Procedure Code is meant to delineate the jurisdiction of state courts of various countries in cross-border disputes, not to exclude the possibility of disputes that are within the exclusive jurisdiction of Russian arbitrazh courts being referred to arbitration. Hence Art. 248 of the Arbitrazh Procedure Code does not preclude parties from availing themselves of alternative dispute resolution mechanisms.

[37] Decree of the Constitutional Court of the Russian Federation of 26 May 2011 No. 10-P "On a Case on Verification of the Constitutionality of the Provisions of Clause 1 of Art. 11 of the Civil Code of the Russian Federation, Clause 2 of Art. 1 of the Federal Law 'On Arbitral Tribunals in the Russian Federation', Art. 28 of the Federal Law 'On State Registration of Immovable Property Rights and Transactions', and Clause 1 of Art. 33 and Art. 51 of the Federal Law 'On Mortgage (Pledge of Immovable Property)' in Connection with a Request by the Supreme Arbitrazh Court of the Russian Federation".

Finally, the Constitutional Court ruled that arbitration *per se* does not violate the right to judicial recourse.[38] Moreover, Mr. Justice Aranovsky in his dissenting opinion went even further, expressing the view that justice may be administered both by state courts and arbitral tribunals.

The Constitutional Court's position is universally binding, so any alternative interpretation of the law by the courts is excluded.

This position of the Constitutional Court was warmly received by the Russian and international arbitration community.[39]

5.2 Arbitrability of Corporate Disputes

Again, neither the Arbitration Act nor the Private Arbitral Tribunals Act explicitly prohibits arbitration of corporate disputes.

While the Arbitrazh Procedure Code also contains no such express prohibition, its wording does however give rise to various interpretations.

Pursuant to Art. 33 of the Arbitrazh Procedure Code, corporate disputes fall within the special jurisdiction of arbitrazh courts. Art. 225[1] of the Arbitrazh Procedure Code provides a non-exhaustive list of disputes that are considered 'corporate' disputes.

[38] This issue has already been scrutinized in many countries. For analysis see: Lew, J.D.M., Mistelis, L.A. and Kröll, S.M., *Comparative International Commercial Arbitration*, 2003, pp. 82-90.

In the same vein, the Constitutional Court of the Russian Federation in its Ruling of 9 December 1999 No. 191-O held that arbitration does not violate the right to access to court. For more detail, see: Муранов А.И., *Международный коммерческий арбитраж в актах Конституционного Суда Российской Федерации* // Московский журнал международного права, 2002, № 2, С. 143-164 [Muranov, A.I., *International Commercial Arbitration in Acts of the Constitutional Court of the Russian Federation* in: Moscow International Law Journal, 2002, No. 2, pp. 143-164].

[39] See, e.g., Скворцов О.Ю., *Третейское разбирательство как правосудие: этап развития новых идей в связи с Постановлением Конституционного Суда Российской Федерации от 26 мая 2011 г. № 10-П* // Третейский суд, 2011. № 4. С. 89-92 [Skvortsov O. Yu., *Arbitration as a Judicial Function: A Stage of Development of New Ideas in Connection with Decree of the Constitutional Court of the Russian Federation of 26 May 2011 No. 10-P* in: Arbitral Tribunal, 2011. No. 4. pp. 89-92]; Карабельников Б.Р. *Конституционный Суд Российской Федерации ставит точку в споре об арбитрабильности споров по российскому законодательству* // СПС Консультант Плюс, 2011 [Karabelnikov, B.R., *The Constitutional Court of the Russian Federation Draws the Line in a Dispute Over the Arbitrability of Disputes Under Russian Legislation* // Consultant Plus legal information database, 2011].

It should be noted that special provisions on corporate disputes were added to the Arbitrazh Procedure Code by the Federal Law of 19 July 2009 No. 205-FZ and came into force on 21 October 2009.

In recent cases, arbitrazh courts of the second[40] and third[41] instance have found that term "special jurisdiction" means the exclusive jurisdiction of arbitrazh courts, and that therefore, as the argument goes, corporate disputes may not be referred to arbitration. Under Russian law, judgments of the arbitrazh courts of the second and third instance can still be reversed by the Supreme Arbitrazh Court if it is satisfied that the judgments are inconsistent with uniform court practice, violate fundamental rights and freedoms, or infringe the public interest or the rights of the public in general.[42]

Interestingly enough, well before the above-mentioned decisions were rendered Russian arbitration specialists predicted such an interpretation, the implications of which are negative for international arbitration.

The view is widespread among Russian legal scholars that there is no good reason to treat corporate disputes as being non-arbitrable.[43] Usually the following arguments are made in favour of arbitrability:

- Neither the Arbitrazh Procedure Code nor any other federal law explicitly states that corporate disputes are not arbitrable.
- The term "special jurisdiction" was used by the legislators deliberately and is not tantamount to "exclusive jurisdiction". The main difference is that the legislators wanted to differentiate between the jurisdiction of arbitrazh courts and courts of general jurisdiction; there was no intent whatsoever to proscribe recourse to arbitration.
- The previous edition of Art. 33 of the Arbitrazh Procedure Code also encompassed corporate disputes, although the list was much shorter.[44]

[40] Decree of the 9th Arbitrazh Appellate Court of 4 July 2011 No. 09AP-14992/2011-GK.

[41] Decree of the Federal Moscow Oblast Arbitrazh Court of 10 October 2011 in case No. A40-35844/11-69-311.

[42] Art. 304 of the Arbitrazh Procedure Code.

[43] See, e.g., Комаров А.С., *Некоторые замечания по поводу третейского разбирательства корпоративных споров* // Основные проблемы частного права. Сборник статей к юбилею доктора юридических наук, профессора Александра Львовича Маковского / отв. ред. В.В. Витрянский, Е.А. Суханов. М.: Статут, 2010. [Komarov A.S., *Some Observations on Arbitration of Corporate Disputes* in: Fundamental Problems of Private Law. Collection of Articles in Honour of the Birthday of Doctor of Law and Professor Alexander Lvovich Makovsky. Eds.-in-chief V.V. Vitryansky and Ye. A. Sukhanov. Moscow: Statut, 2010.]

[44] The relevant previous wording of Art. 33 of the Arbitrazh Procedure Code was as follows:

However, the courts did not treat Art. 33 of the Arbitrazh Procedure Code as a legal provision limiting the arbitrability of disputes *per se*; it was suggested that the nature of the dispute must be considered, and only in the event that it is a public law dispute would arbitration not be possible.[45]

- The Arbitrazh Procedure Code provides that corporate disputes are to be referred to an arbitrazh court at the location of the relevant company. With this in mind, it could be argued that corporate disputes over shares or stakes in a foreign company can be resolved by arbitration, because no arbitrazh court has jurisdiction to consider such disputes.
- There is no good reason to exclude corporate disputes from the ambit of arbitral tribunals.

Thus, at the moment there are two decisions of arbitrazh courts of the second and third instances in which they have held that corporate disputes are not arbitrable because they are within the exclusive jurisdiction of Russian state arbitrazh courts. Although these decisions are not binding in Russia, they may be influential on other Russian judges. Sooner or later the Supreme Arbitrazh Court may take a decision on the arbitrability of corporate disputes, because at the moment this issue remains rather unclear.

6. ASSISTANCE BY THE COURTS

6.1 Extent of Court Assistance in Gathering Evidence

An arbitral tribunal or a party that has sought and obtained the approval of an arbitral tribunal can direct a request to the relevant Russian court asking

"*Arbitrazh courts consider cases:...*

(2) involving disputes on establishment, reorganisation and liquidation of organisations;...

(4) involving disputes between a shareholder and a joint stock company and participants in other entities arising out of the activities of entities, with the exception of labour disputes."

[45] Decree of the Federal Arbitrazh Court of the Northwest District dated 18 April 2005 in case No. A56-39334/03; Ruling of the Federal Arbitrazh Court of the Volga-Vyatka District dated 22 April 2010 in case No. A79-11157/2009; Decree of the Federal Arbitrazh Court of the Moscow District No. KG-A40/4241-09-P dated 04 August 2009 in case No. A40-30102/08-69-336; Decree of the Federal Arbitrazh Court of the Moscow District No. KG-A41/11095-06 dated 14 December 2006 in case No. A41-K1-17351/06.

for assistance in taking evidence. The courts may comply with such requests where the latter are within their competence and in observance of the rules on taking evidence (Art. 27 of the Arbitration Act).

There has been a reported case where the ICAC requested an arbitrazh court for assistance in taking evidence,[46] but it is unclear from publicly available sources whether or not the arbitrazh court did do so.

6.2 Injunctions in Support of Arbitration

Upon a party's request, arbitrazh courts can grant injunctive relief in support of a pending arbitration in situations where the court believes failure to do so could make enforcement of the award impossible, significantly complicate enforcement or cause the applicant to incur substantial damages.[47]

Generally, as follows from the Russian case law available, Russian courts tend to be reluctant to grant injunctive relief in the absence of clear evidence of the above difficulties.

By way of guidance, the following facts may serve as evidence that injunctive relief may be justified: (i) the defendant has taken steps aimed at disposal of its property, or (ii) the defendant has no property/money against which the judgment may be enforced. The possibility that the defendant's business activities may be discontinued and/or substantial indebtedness of the defendant may also be cited as evidence that an injunction should be granted.

Decisions on all applications for injunctions are made by courts *ex parte*.[48] If an injunction is granted by the court, any party is entitled to file a motion to lift it or to appeal the injunction to a higher court.[49]

It also appears that a party can request injunctive relief in support of an arbitration that has yet to commence,[50] although this is not expressly provided for in the Arbitrazh Procedure Code.

[46] ICAC Award No. 244/2000 dated 27 February 2002.

[47] Art. 90(3) of the Arbitrazh Procedure Code.

[48] Art. 93 of the Arbitrazh Procedure Code.

[49] Art. 93(7) and Art. 97 of the Arbitrazh Procedure Code.

[50] Informational Letter No. 78 of the Supreme Arbitrazh Court of the Russian Federation dated 7 July 2004.

7. RECOGNITION AND/OR ENFORCEMENT OF FOREIGN AWARDS

The enforcement in Russia of foreign arbitral awards in relation to commercial disputes is governed by the Arbitration Act, the Civil Procedure Code of the Russian Federation, the Arbitrazh Procedure Code of the Russian Federation and the Decree of the Supreme Soviet of the USSR on Recognition and Enforcement of Foreign Arbitral Awards of 21 June 1988 (which is applicable only to the extent it does not contradict the Arbitrazh Procedure Code).

It should also be noted that all international treaties to which the Russian Federation is a signatory, including the New York Convention, are considered to be part of Russian Federation law and may be applied directly.

Again, the majority of applications for recognition and enforcement of arbitral awards are heard by the Russian arbitrazh courts, hence the focus in this section is primarily on provisions of the Arbitrazh Procedure Code.

According to Art. 241 of the Arbitrazh Procedure Code, foreign arbitral awards can be recognized and enforced in Russia if the recognition and enforcement of such awards is envisaged in an international treaty to which the Russian Federation is a party or in Russian law.

The New York Convention is an international treaty that provides for recognition and enforcement of arbitral awards.

The New York Convention was ratified by the USSR on 24 August 1960 and came into force for the country on 22 November 1960. Russia is a legal successor of the USSR under all international treaties, including the New York Convention.

The Russian Federation made the following reservations in respect of the New York Convention:

(a) it will apply the New York Convention only to the recognition and enforcement of awards made in the territory of another Contracting State; and
(b) with regard to awards made in the territory of non-Contracting States, it will apply the New York Convention only to the extent to which those States grant reciprocal treatment.

Regarding awards that may be recognized and enforced in Russia, Art. 35 of the Arbitration Act provides a more favourable regime than the New York Convention, as it states that an arbitral award, *irrespective of the country in which it was made*, must be recognized as binding and, upon application in writing to the competent court, must be enforced, subject to the grounds for

rejection of recognition and enforcement of foreign arbitral awards envisaged by the Arbitration Act. Pursuant to Art. VII of the New York Convention, any interested party may seek to rely on Art. 35 of the Arbitration Act.

In addition to the New York Convention, the Russian Federation signed and ratified the 1972 Moscow Convention. This convention has not been denounced by the Russian Federation and still applies in some cases.[51] According to the Moscow Convention, arbitration awards are to be enforced voluntarily and, failing that, as if they were court judgments of the enforcing State. The grounds on which enforcement may be resisted are modelled after the New York Convention.[52]

As mentioned above, the Russian Federation is also a party to the European Convention. The European Convention deals with the enforcement of foreign awards indirectly, and its purpose was to supplement the New York Convention. It does not repeal, but merely restricts the grounds to refuse enforcement of awards to those envisaged by the New York Convention. It provides that an award that has been set aside in the country of the seat of arbitration may in certain circumstances be recognized by the courts of States applying the European Convention.[53]

There are also a number of bilateral treaties setting out rules on recognition and enforcement of foreign arbitral awards (e.g. with Algeria and Yemen).[54]

The grounds for dismissal of an application for enforcement are established by Art. 36 of the Arbitration Act and are similar to those set out in Art. V of the New York Convention.

Generally, the ratio of arbitral awards enforced by Russian courts is relatively high. According to statistics of the Supreme Arbitrazh Court, 312 cases on recognition and enforcement of foreign judgements and arbitral awards were adjudicated from 2008 to 2010.[55] While the statistics do not indicate how many applications were successful, based on our experience we would estimate that some 70-80% of requests for recognition and enforcement of foreign arbitral awards are granted by the Russian courts.

[51] See, for example, ICAC Award No. 67/1998 dated 18 April 2000.

[52] Lew, J.D.M., Mistelis, L.A. and Kröll, S.M., *Op. cit.*, p. 696.

[53] *Ibid.*, p. 694.

[54] For example, the Treaty on Rendering of Bilateral Legal Assistance between the Union of Soviet Socialist Republics and Algerian People's Democratic Republic dated 23 February 1982, the Treaty on Rendering of Legal Assistance in Civil and Criminal Cases between the Union of Soviet Socialist Republics and the People's Democratic Republic of Yemen dated 6 December 1985.

[55] Statistics are available on the website of the Supreme Arbitrazh Court: www.arbitr.ru.

Under Russian law arbitrazh courts are not permitted to examine the substance of the case on which an arbitral award was made;[56] the courts can only deal with issues relating to the grounds for rejecting recognition and enforcement. This approach is in general confirmed by case law.[57]

7.1 Application of the New York Convention in Practice

There have been a number of cases in recent court practice where Russian courts have recognized and enforced arbitral awards.

There is no special rule limiting Russian courts' powers to recognize and enforce arbitral awards under which specific performance is ordered. In particular, the Moscow Oblast Arbitrazh Court recognized and enforced an arbitral award rendered in London under the UNCITRAL Rules under which the respondent was ordered to deliver a specified volume of crude oil to the claimant.[58]

The most controversial ground for declining enforcement is *ordre public*, as Russian court practice has not developed a uniform definition and/or criteria of public policy.

Below are summarized some cases where Russian courts did not recognize and enforce arbitral awards that were rendered:

LLC "Trans Sibirsky Express Service" v. Sia "Tered Rail & Logistics". Sia "Tered Rail & Logistics filed an application with the Moscow City Arbitrazh Court seeking recognition and enforcement of an award rendered by the

[56] See, e.g., Карабельников Б., *Высший Арбитражный Суд не доверяет международному арбитражу* // Корпоративный Юрист, 2006 № 5. С. 43-44 [Karabelnikov, B., *The Supreme Arbitrazh Court Does Not Trust International Commercial Arbitration* in: Corporate Lawyer, 2006, issue 5, pp. 43-44]; Курочкин Д.В., *Несколько комментариев к рекомендациям Президиума ВАС по рассмотрению дел о признании и приведении в исполнение решений международных коммерческих арбитражей и иностранных судебных решений* // Международный коммерческий арбитраж, 2006 № 3. С. 73-74 [Kurochkin, D.V., "*Some Comments on the Recommendations of the Presidium of the Supreme Arbitrazh Court on Recognition and Enforcement of International Commercial Arbitration Awards and Foreign Court Decisions*" in: International Commercial Arbitration Journal, 2006, issue 3, pp. 73-74].

[57] Ruling of the Supreme Arbitrazh Court of the Russian Federation No. 12652/07 dated 30 November 2007, Ruling of the Moscow City Arbitrazh Court No. A41-K1-25659/04 dated 20 January 2005 and Decree of the Federal Arbitrazh Court of the Central District No. A08-6866/02-4 dated 2/8 February 2005.

[58] Judgment of the Moscow Oblast Arbitrazh Court dated 6 December 2004 in case No. A41-K1-25659/04.

Riga Arbitration Court. The Moscow City Arbitrazh Court refused to recognize and enforce the award, and the Federal Arbitrazh Court of the Moscow District upheld the judgment.[59] The ground for refusal was that the amount of damages to be paid was excessive and the nature of the damages was found to be punitive rather than compensational.

Unimpex Enterprprises Ltd. v. OJSC NPO "Saturn". Unimpex Enterprprises Ltd. filed an application with the Yaroslavl Oblast Arbitrazh Court seeking recognition and enforcement of an award rendered by the Arbitration Court at the Chamber of Commerce and Agriculture of the Czech Republic. The court refused to recognize and enforce the award, and the Arbitrazh Court of the Volga-Vyatka District upheld the judgment.[60] The ground for refusal was that the amount of damages was incompatible with the principle of adequacy. The amount of the penalty substantially exceeded the amount of the dispute. The court explicitly stated that punitive damages are not recoverable in the Russian Federation.

However, the following should be taken into account. Art. 1193 of the Civil Code provides that a rule of foreign law is not applicable in exceptional cases where the consequences of its application would clearly contradict Russian public policy. It is worth noting that the Arbitration Act states that the recognition and enforcement of an award may be refused if "*enforcement of the award*", rather than the application of foreign law, would contradict Russian public policy. In some cases the consequences of application of a rule of foreign law may be considered contradictory to Russian law but this does not necessarily mean that enforcement of an award based on that rule would contradict Russian public policy.[61] For instance, if an arbitral tribunal were to apply a foreign law rule that provides for punitive damages but

[59] Decree of the Federal Arbitrazh Court of the Moscow District No. A40-33331/07-8-340 dated 7 November 2007.

[60] Decree of the Federal Arbitrazh Court of the Volga-Vyatka District No. A82-10555/2005-2-2 dated 25 May 2006.

[61] See also Муранов А.И., *Применение международным коммерческим арбитражем российского материального права: невозможность ссылки на нарушение публичного порядка России?* // Московский журнал международного права. 2003. № 1. С. 180-181 [Muranov, A.I., *The Application in International Commercial Arbitration of Russian Substantive Laws: Impossibility of Invoking a Breach of Russian Public Policy?* in: Moscow Journal of International Law, 2003, issue 1, pp. 180-181], Муранов А.И., *Применение международным коммерческим арбитражем конкретных норм российского права и публичный порядок России: ошибки судебной практики* // Московский журнал международного права. 2003. № 2. С. 95-96 [Muranov, A.I., *The Application of Specific Rules of Russian Law and Russian Public Policy in International Commercial Arbitration: Errors in Court Practice* in: Moscow Journal of International Law, 2003, issue 2, pp. 95-96].

reduce the amount of punitive damages to a reasonable extent, then while the application of the foreign rule on punitive damages could be considered contradictory to Russian public policy under Art. 1193 of the Civil Code it should not preclude recognition and enforcement of the award, because such enforcement would not create any situation that could be held to affect Russian public policy.

There have also been cases where Russian courts have demonstrated an 'anti-arbitration' approach, refusing to enforce arbitral awards by broad interpretation of public policy or due to lack of proper notification or on other grounds.

These examples are of particular interest and are dealt with below.

7.2 Broad Interpretation of Public Policy

Konditerskaya Fabrika A.V.K. (Ukraine) v. AVK-Yug.[62] Konditerskaya Fabrika A.V.K. (Ukraine) filed an application with the Arbitrazh Court of the Republic of Kalmykia seeking recognition and enforcement of an award rendered by the International Commercial Arbitration Court of Ukraine. The Arbitrazh Court of the Republic of Kalmykia refused to recognize and enforce the award. The ground for refusal was that the amount of the award was denominated in foreign currency and that enforcement would be contrary to public policy. Unsurprisingly, the Supreme Arbitrazh Court of the Russian Federation set aside the judgment to correct this impropriety.

Russian courts also tend to dismiss applications for enforcement if there is a Russian judgment declaring the agreement in question invalid. There have been cases where, for example, a third party not bound by an arbitration agreement (a shareholder of a party involved in an arbitration) has brought a claim in a Russian court seeking that the contract on which the claims in arbitration are based be declared null and void *ab initio*; the underlying contract was declared void by the court, and enforcement of the arbitral award based on that contract was denied on the grounds that it would contravene public policy. In *European Bank for Reconstruction and Development v. JSC "Zoloto-Platina Bank"*,[63] the European Bank for Reconstruction and Development filed an application with the Sverdlovsk Oblast Court seeking recognition and enforcement of an award rendered in London by a sole

[62] Decree No. 9772/01of the Supreme Arbitrazh Court of the Russian Federation dated 6 August 2002.

[63] Ruling No. 45-G01-18 of the Supreme Court of the Russian Federation dated 28 May 2001.

arbitrator in a dispute over a suretyship agreement. The Sverdlovsk Oblast Court refused to recognize and enforce the award. The ground for refusal was that shareholders of JSC "Zoloto-Platina Bank" in litigation had demanded invalidation of the suretyship agreement containing the arbitration clause, and the suretyship agreement had been declared invalid by judgment of the Presnyansky Intermunicipal Court of Moscow dated 14 February 2001 and judgment of the Kirovsky District Court of Yekaterinburg dated 7 March 2001. The Sverdlovsk Oblast Court stated that enforcement of the arbitral award based on the suretyship agreement would contravene public policy. The Supreme Court of the Russian Federation upheld the judgment. The possibility for a shareholder to challenge a transaction entered into by the company follows from the fact that Russian law does not have a concept similar to the doctrine of 'privity of contract'. Under Russian law, any person who in the eyes of the court has a legal interest in the dispute could commence legal action.

It should be noted that Russian scholars tend to support a narrow interpretation of *ordre public*, arguing that not every inconsistency between an arbitral award and the national legislation should be deemed to constitute a violation of public policy, but rather only violation of fundamental principles of the legal system.[64]

Sometimes creditors experience difficulties enforcing arbitral awards against Russian state-owned enterprises or companies in which federal or local authorities have a substantial interest. But even under such circumstances there have been cases where creditors have managed to get an award recognized and enforced.

For example, in *Joy-Lud Distributors International Inc. Ltd. v. JSC "Moscow Oil Refinery"* the applicant sought recognition and enforcement of an arbitral award against JSC "Moscow Oil Refinery", a company in which the Moscow government has a major stake. The courts of the first, second and third instances dismissed the application, but the Supreme Arbitrazh Court of the Russian Federation set aside the judgments and granted recognition and enforcement of the award.[65]

[64] See, e.g., Карабельников Б.Р. *Исполнение и оспаривание решений международных коммерческих арбитражей. Комментарий к Нью-Йоркской конвенции 1958 г. и главам 30 и 31 АПК РФ 2002 г.*—М., Статут, 2008. С. 333 [Karabelnikov, B.R., *Enforcement and Disputing of International Commercial Arbitration Awards. Commentary on the New York Convention 1958 and Chapters 30 and 31 of the Arbitrazh Procedure Code of the RF of 2002*, Moscow: Statut, 2008, p. 333].

[65] Decree No. 5243/06 of the Presidium of the Supreme Arbitrazh Court dated 19 September 2006.

Other mistakes in applying the New York Convention are encountered in Russian court practice (e.g. the requirement that the applicant provide additional documents not mentioned in the New York Convention)[66] but they do not carry much weight, as they tend to be corrected by the higher courts.

* * *

Russia remains a country in transition, as only 20 years have passed since the collapse of the USSR. But the positive trends should not be underestimated. It is hoped that the BRIC countries, and Russia in particular, will soon assume an important role in the field of international arbitration.

[66] Decree No. F03-A51/00-1/1830 of the Federal Arbitrazh Court of the Far East District dated 10 October 2000.