SUPREME COURT OF THE RF ISSUES DIGEST OF CASE LAW ON THE ISSUES OF ARBITRATION

On 26 December 2018, the Presidium of the Supreme Court of the RF (the "**Presidium**") issued a Digest of Case Law Involving Judicial Assistance and Oversight in Relation to Domestic and International Arbitration (the "**Case Law Digest**")[1].

The Case Law Digest sets out certain positions taken by arbitrazh courts and courts of general jurisdiction in the last 5 years and provides guidance as to the resolution of similar disputes, including the following:

- arbitration clauses that are based on standard arbitration clauses recommended by arbitration institutions are enforceable (the enforceability of such agreements had recently been called into question by Russian courts);
- dispute resolution clauses under which both parties have the right to choose between a court of competent jurisdiction and international arbitration are valid;
- dispute resolution clauses under which only one party has the right to choose between a court of competent jurisdiction and international arbitration are invalid, and the party not granted that right under the clause is deemed to have that right;

The fact that the Case Law Digest has been issued by the Presidium would seem to emphasise the importance of this guidance in shaping uniform judicial practice. However, as has been noted by the Constitutional Court of the RF, the inclusion of a particular judicial act in a case law digest prepared by the Presidium does not turn that judicial act into a precedent binding on the lower courts[2].

ENFORCEABILITY OF STANDARD ARBITRATION CLAUSES

The need for clarification of this issue became apparent with the recent notorious case *Dredging and Maritime Management SA v. JSC Inzhtransstroy* (A40-176466/2017), in which Russian courts held that an arbitration clause referring to the Rules of the International Chamber of Commerce ("**ICC**"), the text of which was identical to the standard arbitration clause recommended by the ICC itself, to be unenforceable because it did not contain reference to "*the specific institution that will resolve the dispute*". The case even prompted the ICC to advise parties that may need to enforce an arbitral award in Russia to use a special wording of its standard arbitration clause which specifically references the International Court of Arbitration of the ICC[3].

Section 5 of the Case Law Digest contains the clarification that "[a]*n arbitration clause between the parties to a contract which conforms to an arbitration clause recommended by the arbitral institution chosen by the parties is enforceable*". In this way the Case Law Digest should mitigate the risks created by that case. The ICC has already removed the recommendation to use the specially worded standard arbitration clause from its website[4]. One hopes that Russian courts will not interpret this guidance from the Supreme Court of the RF literally and hold to be enforceable *only* those arbitration

[1] Available at: http://www.supcourt.ru/documents/all/27518/.

[2] Decree of the Constitutional Court of the RF No. 24-P dated 17 October 2017.

[3] See news on the website of Global Arbitration Review: https://globalarbitrationreview.com/article/1178369/icc-issues-updated-guidance-on-case-conduct.

[4] See information on the ICC website: https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/.

clauses that have been recommended by the arbitral institution chosen by the parties.

VALIDITY OF OPTIONAL DISPUTE RESOLUTION CLAUSES

Guidance on this question was needed in light of the inconsistent decisions taken by Russian courts, starting with the notable decree of the Presidium of the Supreme Arbitrazh Court of the RF in *Russian Telephone Company CJSC v. Sony Ericsson Mobile Communications Rus LLC* (A40-49223/2011). In that case, the Presidium of the Supreme Arbitrazh Court of the RF found that the dispute resolution clause, which gave only one party the right to choose between a court of competent jurisdiction and international arbitration (a unilateral option clause), was invalid. The position of the Presidium of the Supreme Arbitrazh Court of the RF was debated by legal practitioners and theoreticians, as it begged the question whether the court meant (1) the entire unilateral option clause is invalid, i.e. both the prorogation of jurisdiction and the arbitration clause, or (2) only the prorogation part of the unilateral option clause is invalid, or (3) irrespective of whether the unilateral option clause is invalid in its entirety or only partially, the consequence of such invalidity is that the parties are put on an equal footing, i.e. the other party is also vested with the right to choose arbitration or litigation.

- the inclusion in an arbitration clause of a reference to arbitration rules that stipulate the finality of the arbitral award does not constitute an "express" agreement on the finality of the arbitral award, as required under Russian legislation on arbitration;
- an "express" agreement of the parties as to the finality of an arbitral award does not preclude the losing party from opposing enforcement of the award in the RF on similar grounds;
- public law disputes and disputes expressly provided for by federal law are non-arbitrable;
- courts cannot review arbitral awards on their merits.

In 2015, the Economic Disputes Chamber of the Supreme Court of the RF determined in a case before it that the third approach is correct[5]. Sections 6 and 7 of the Case Law Digest also contain guidance that optional dispute resolution clauses are valid if they provide the parties with equal rights to refer a dispute to a court of competent jurisdiction or international arbitration. If, on the other hand, an optional dispute resolution clause provides only one party the right to refer disputes to the court of appropriate jurisdiction or international arbitration, then the other party is conferred the same right.

However, in practice there are also situations where a unilateral option clause grants one party the right to choose not between any court of competent jurisdiction and international arbitration, but between a specific court (such as an English court) and international arbitration. It remains unclear from the Case Law Digest whether in such situations the other party should be provided the same choice between an English court and international arbitration or that party should have the right to refer disputes to other competent courts as well.

EXCLUSION OF THE RIGHT TO CHALLENGE AN ARBITRAL AWARD

Article 40 of Federal Law No. 382-FZ of 29 December 2015 On Arbitration in the Russian Federation (the "**Arbitration Law**") and Article 34(1) of RF Law No. 5338-I of 7 July 1993 On International Commercial Arbitration (the "**ICA Law**") provide that "[i]f an arbitration agreement of the parties provides for administration of a dispute by a permanent arbitration institution, the parties may by their express agreement stipulate that the award is final [for the parties]".

From Article 2(13) of the Arbitration Law and Article 7(13) of the ICA Law it follows that parties may set out their "express" agreement as to the finality of an arbitral award only by including a provision on the finality of the arbitral award in the arbitration clause itself. In section 19 of the Case Law Digest it is reiterated that inclusion by the parties in an arbitration agreement of a reference to arbitration rules which stipulate the finality of the arbitral award does not constitute "express" agreement on the finality of the arbitral award.

An "express" agreement on the finality of an arbitral award means that it cannot be set aside by a court, and if a party initiates legal action seeking to have it set aside the proceedings in the case should be terminated. Nevertheless, if a party in whose favour an arbitral award has been made wishes to have it enforced and submits a corresponding application to court, the losing party will still be entitled to resist its enforcement (section 20 of the Case Law Digest). It should be borne in mind that the grounds for setting an arbitral award aside and for denying enforcement of an arbitral award are essentially the same. Therefore, the losing party will be able to oppose enforcement of an award on the same grounds as were available in seeking to have it set aside.

[5] Ruling of the Supreme Court of the RF dated 27 May 2015 in case No. 310-ES14-5919.

ARBITRABILITY OF DISPUTES INVOLVING A PUBLIC ELEMENT

Article 33(1) of the Arbitrazh Procedure Code of the RF and Article 22.1(1) of the Civil Procedure Code of the RF provide that disputes between parties to civil law relationships which are within the jurisdiction of arbitrazh courts and courts of general jurisdiction can be referred to arbitration. Conversely, disputes between parties to public law relationships cannot be referred to arbitration.

Article 33(2) of the Arbitrazh Procedure Code of the RF and Article 22.1(2) of the Civil Procedure Code of the RF list disputes that cannot be referred to arbitration under any circumstances. The lists include, among others, disputes arising out of relations regulated by Russian legislation (1) on privatisation of state and municipal property, and (2) on contracting in the sphere of procurement of goods, works and services to meet state and municipal requirements. The above articles also state that other categories of non-arbitrable disputes may be established by federal law.

In practice, there may be difficulties in borderline situations with civil law relationships that also involve a public element, and the arbitrability of such disputes is not explicitly excluded by federal law. Such situations include, for example, disputes involving concession agreements and relationships governed by Russian legislation on procurement of goods, work and services by certain types of legal entities[6]. And if Article 17 of Federal Law No. 115-FZ of 21 July 2005 On Concession Agreements imparts clarity with the provision that "*disputes between a grantor and a concessionaire can be resolved in accordance with the legislation* [of the RF] *in* […] *arbitration* [in the RF]", then Federal Law No. 223-FZ of 18 July 2011 On Procurements of Goods, Works and Services by Certain Types of Legal Entities is silent on the issue, hence the relevant case law is somewhat inconsistent[7].

Section 16 of the Case Law Digest affirms the arbitrability of disputes involving relationships governed by Russian legislation on procurement of goods, works and services by certain types of legal entities[8].

At the same time, section 16 of the Case Law Digest explicitly states that courts have the authority to "*uphold public policy*", and have the power to deny recognition and enforcement of arbitral awards upon finding "*such an element of public policy* [of the RF] *as the non-arbitrability of the dispute*" in relation to which the arbitral award has been rendered or "*violations of other elements of public policy*". Only an indicative list of such elements is mentioned in the Case Law Digest: property held by public-law entities, relations in the sphere of bankruptcy, state procurements, fair competition, conservatorship and guardianship, and "*expenditure of budgetary resources*".

As an example of the Russian courts "*uphold*[ing] *public policy*", one need look no further than a recent case where Russian courts denied recognition and enforcement to an LCIA award recognising the claimant's right of execution against shares in Lotos Shipyard JSC and to obtain compensation of its arbitration costs. From the text of the judicial acts it seems the courts did not hold the dispute to be a corporate dispute (or possibly they did not consider the question) and denied recognition and enforcement based on the reasoning that "*enforcing an award of a foreign arbitral tribunal, the respondent in respect of which is an organisation, the ultimate beneficiary of which is the Russian Federation, and in the framework of which execution is ordered against property of an entity, the ultimate beneficiary of which is also the Russian Federation, can cause a loss to the budget of the Russian Federation as a result of the removal of monies and their transfer to the accounts of foreign companies*"[9].

Therefore, if a dispute arising out of civil law relationships and rendered more complex by the presence of a public element is not explicitly categorised by law as being non-arbitrable, it could be argued that Russian courts will likely deem it to be arbitrable. However, at the stage of enforcement or setting aside of the award the Russian courts may find "*such an element of public policy* [of the RF] *as the non-arbitrability of* [the] *dispute*" in relation to which the award was rendered. This approach, in our view, creates further uncertainty for business entities.

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[6] This law applies, for example, to transactions entered into by state corporations, public law companies, natural monopolies, companies in which the state has an interest of more than 50%, etc. Companies that fall within the ambit of this law include some of Russia's largest companies.

[7] Ruling of the Supreme Court of the RF No. 305-ES17-1969 dated 20 March 2017; ruling of the Supreme Court of the RF No. 305-ES17-7240 dated 11 July 2018.

[8] The arbitrability of such disputes is also confirmed by recent amendments to Russian legislation which are to enter into force on 29 March 2019; see Article 45(10) of Federal Law No. 382-FZ dated 29 December 2015 (as amended on 27 December 2018) On Arbitration in the Russian Federation.

[9] Decree of the Arbitrazh Court of Moscow District dated 16 January 2019 in case No. A40-117331/2018.

NO REVIEWING ARBITRAL AWARDS ON THEIR MERITS

Section 18 of the Case Law Digest provides that a state court cannot review an arbitral award on its merits. There is an express statutory prohibition against reviewing arbitral awards on the merits[10]. Similar guidance has been given previously by the highest instances of the courts[11].

However, the concept of public policy is often interpreted by the courts so broadly that when reviewing an arbitral award to ascertain whether it breaches public policy often the merits of the decision are in fact reviewed[12]. One can only hope that in section 18 of the Case Law Digest the Supreme Court of the RF has let it be known that it intends to suppress such practice.

[10] Article 420 of the Civil Procedure Code of the RF, Article 232(6) of the Arbitrazh Procedure Code of the RF. An analogous provision could be found in Article 46(1) of Federal Law No. 102-FZ of 24 July 2002 On Arbitral Tribunals in the Russian Federation, which is no longer in force.

[11] See, for example, sections 4 and 12 of Information Letter of the Presidium of the Supreme Arbitrazh Court of the RF No. 96 dated 22 December 2005.

[12] For example, in case No. A40-230545/2016 the courts denied recognition and enforcement of an award of the Arbitration Institute of the Stockholm Chamber of Commerce on public policy grounds, finding that, among other things, when considering the dispute the tribunal applied the UN Convention on Contracts for the International Sale of Goods 1980, the application of which had not been expressly provided for by the parties. A request to refer the cassation appeal to the Economic Disputes Chamber of the Supreme Court of the RF for consideration was denied.

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