

DECREE OF THE PLENUM OF THE RUSSIAN SUPREME COURT ON MATTERS RELATED TO ARBITRATION

On 13 December 2019, Decree of the Plenum of the Russian Supreme Court No. 53 On Fulfilment by Courts of the Russian Federation of the Functions of Assistance and Oversight in Respect of Arbitral Proceedings and International Commercial Arbitration (the "**Decree**") was published.¹ The clarifications set out in the Decree unfortunately do not address many of the unresolved issues that stem from the recent changes to the legislation on arbitration. While many of the clarifications are relatively self-evident, the very fact that they are included in the Decree should be seen as a positive development. The Decree is binding on the Russian courts, and one hopes that it will facilitate greater predictability in how arbitration-related issues are decided.

ARBITRATION CLAUSES

In the Decree it is stated that a pro-arbitration approach should be taken to the interpretation, validity and enforceability of arbitration clauses.

Para. 21 of the Decree states "*unless agreed otherwise by the parties, the arbitration agreement shall apply to any transactions aimed at execution, amendment or termination of the contract specified in the arbitration agreement, and also to any disputes related to its conclusion, entry into force, amendment, termination or validity, including the return by the parties of everything performed under a contract that is declared invalid or not concluded. Unless follows otherwise from the wording of the arbitration agreement, its effect shall apply to claims for non-contractual damages, claims for recovery of unjust enrichment and other claims, if such claims are related to the contract in relation to which the arbitration agreement is concluded*".

In para. 24 of the Decree, the admissibility of "waterfall" arbitration clauses (when parties specify multiple arbitral institutions in the arbitration clause and make the final choice contingent upon the occurrence / non-occurrence of agreed conditions) is confirmed to a certain extent: this paragraph expressly states that it is acceptable "*to provide the claimant with a choice between an arbitral tribunal and a court; [between] two or more arbitral institutions... etc. An alternative agreement on the dispute resolution procedure can also envisage the right of one party to bring a claim in one arbitral tribunal or court named in the arbitration agreement, and of the second party — in another arbitral tribunal or court*". The settled approach to so-called "asymmetric" arbitration clauses (when only one contractual party has the

Key provisions of the Decree:

- a pro-arbitration approach to the interpretation, validity and enforceability of arbitration clauses is declared
- certain rules on the choice of the seat of arbitration by the parties and the associated consequences are clarified
- a pro-arbitration approach to issues of notification of the parties to arbitral proceedings is declared
- some guidance is given on the use of public policy grounds by the courts and on the arbitrability of disputes
- many questions encountered in practice are not definitively clarified

¹ The text of the Decree (in Russian) is available at <http://supcourt.ru/documents/own/28587/>. This briefing does not cover all of the clarifications set out in the Decree.

right to choose) is preserved: in case of such a clause it is contemplated that each (i.e. including the "deprived") party to the contract has the right to choose.

In para. 26 of the Decree it is stated that *"any doubt should be interpreted in favour of the validity and enforceability of the arbitration agreement. The party to the arbitration agreement which is challenging its validity and enforceability must prove that any interpretation leads to its invalidity and/or unenforceability"*.

Para. 30 of the Decree provides as follows: *"In interpreting an arbitration agreement that contains an inaccurate name of the arbitral institution or of the applicable rules of arbitration, one should bear in mind whether it is possible to determine the arbitral institution or arbitration rules, the use of which was the subject of the parties' expression of will.... An arbitration agreement that is consistent with the arbitration agreement recommended by the arbitral institution agreed upon by the parties is enforceable.^[2] Where there are doubts as to the validity and enforceability of the arbitration agreement, not only the text of the arbitration agreement but also other evidence to establish the actual will of the parties (including the negotiations and correspondence preceding the arbitration agreement, and the subsequent conduct of the parties) should be assessed"*.

Unresolved questions

As we described in detail in our [briefing](#) in January 2019, Federal Law No. 531-FZ of 27 December 2018 On the Incorporation of Amendments to the Federal Law On Arbitration in the Russian Federation and to the Federal Law On Advertising (the "**Amending Law**") introduced amendments to Federal Law No. 382-FZ of 29 December 2015 On Arbitration in the Russian Federation (the "**Domestic Arbitration Law**"). The new Article 7(7.1) of the Arbitration Law states *"[f]or disputes... involving claims for invalidation of transactions of a legal entity brought by its participants and/or for application of the consequences of the invalidity of such transactions to be considered by an arbitral tribunal it is sufficient for the arbitration agreement to have been entered into between the parties to the relevant agreement or transaction"*.

From that provision it follows that a regular arbitration clause (such as a standard clause in a construction contract referring disputes to the International Court of Arbitration at the International Chamber of Commerce) binds not only a Russian company but also its participants (shareholders), if they are contesting the construction contract on behalf of their company. Such an approach may be based on the position that the company's participants (shareholders) filing the claim on its behalf should be regarded as representatives of the company (Art. 65.2 of the RF Civil Code).

However, no such change was made to Art. 225.1 of the RF Arbitrazh Procedure Code. That article provides that disputes involving claims of participants (shareholders) of a Russian company can be referred to arbitration when the arbitration clause meets four conditions. One of the conditions is that the company's participants (shareholders) themselves must be parties to that clause.³ Therefore, there is a clear contradiction between the Domestic Arbitration Law and the RF Arbitrazh Procedure Code.

The Decree contains no guidance as to how this contradiction should be resolved, in particular, whether a Russian company's participants (shareholders) are bound by an arbitration agreement that has been entered into between that company and its counterparty.

What is more, para. 23 of the Decree, in our view, adds no clarity. It states that an arbitration clause contained in a legal entity's charter *"is valid in respect of a corporate dispute with counterparties of the legal entity (third parties) involving claims of the [participants (shareholders) of the legal entity] if such third parties are also parties to the arbitration agreement"*.⁴ What should happen when there is one arbitration clause in a contract between a Russian company and its counterparty, but a different clause in the Russian company's charter? The Decree does not answer this question.

Unfortunately, it also remains unclear whether disputes arising out of sale and purchase agreements are corporate disputes if the subject matter of the dispute is not the ownership of shares (or participation interests in a limited liability

² In the high-profile case No. A40-176466/2017, which made it up to the RF Supreme Court, it was found that such an arbitration clause is unenforceable (see our [briefing](#) from February 2019).

³ The four conditions are as follows: (i) disputes must be administered by a permanent arbitral institution ("**PAI**"); (ii) disputes must be heard in accordance with the special rules of procedure applicable to corporate disputes; (iii) the seat of arbitration must be in the territory of Russia; (iv) the legal entity itself, all of its participants, and any other persons acting as claimants or respondents must be parties to the arbitration agreement. In practice these conditions are often impossible to meet.

⁴ A third party can join an arbitration clause by entering into a stand-alone arbitration agreement with the legal entity or by making a declaration of accession to the arbitration clause in the charter.

company) (for example, disputes involving recovery / return of the purchase price, recovery of damages or forfeits, invalidation of contracts etc.).

SEAT OF ARBITRATION; LAW APPLICABLE TO THE ARBITRATION AGREEMENT

The courts have had difficulties establishing the meaning of the term "seat of arbitration". The Decree contains certain clarifications regarding this concept which, it is hoped, will help to reduce the number of unexpected judicial decisions on such (largely straightforward) matters:

- *"The seat of arbitration may differ from the place where the arbitral institution under whose rules the arbitration is conducted is located and from the place where the hearing in the case is held"* (para. 15).

Given that in RF Law No. 5338-1 of 7 July 1993 On International Commercial Arbitration (the "**International Arbitration Law**") it is expressly stated that *"the parties may at their discretion agree on the seat of arbitration (including by reference to arbitration rules)..."*, para. 15 of the Decree can be understood to mean that the parties are entitled to determine the seat of arbitration, even if there is no link between it and the parties, the arbitral institution or the location of the hearings.

At the same time, the law may establish a requirement applicable to the seat of arbitration (for example, for certain categories of corporate disputes arbitration can only be seated in Russia); failure to comply with such a requirement can render the arbitral award unenforceable in Russia.

It should also be noted that under § 21 of the Rules of Arbitration of International Commercial Disputes of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (the "**ICAC**"), *"[t]he seat of arbitration shall be Moscow, the Russian Federation"*. The wording of this provision is peremptory. In § 24 it is stated that *"deviation from the Rules is possible in the cases specified by the Rules"*.

- *"By virtue of the principle of the autonomy of the arbitration agreement, the law applicable to the arbitration agreement may differ from the law applicable to the main contract and the law applicable to the arbitral procedure"* (para. 27).

Hence situations are possible where, for example, the main agreement is governed by Russian law, the arbitration clause is governed by English law (and, consequently, questions surrounding the interpretation, existence, effect, formal and material validity⁵ of the arbitration clause will be determined in accordance with English law), and the arbitral procedure itself is governed by French law (for example, where disputes are referred to arbitration in accordance with the rules of the International Court of Arbitration at the International Chamber of Commerce seated in Paris, France).

- *"In the absence of a choice by the parties of the law applicable to the arbitration agreement, it is subject to the law of the country in which the award is made or is to be made in accordance with the arbitration agreement"* (para. 27).

To preclude disputes over whether the parties have chosen the law applicable to the arbitration agreement, when drafting a contract it can be explicitly stated that the law chosen by the parties is also applicable to the arbitration agreement.

- The seat of arbitration determines which provisions of the International Arbitration Law apply to the arbitral proceedings.

If the arbitration is seated abroad, then only those provisions of the International Arbitration Law which relate to Russian state courts will apply to the arbitral proceedings (specifically, what the courts should do if in breach of the arbitration agreement a claim is filed in Russian court; the rules on the authority of the courts to order interim measures; the rules on recognition and enforcement of arbitral awards in Russia) (para. 7).

If the arbitration is seated in Russia, then the International Arbitration Law in its entirety will apply to the arbitral proceedings. In addition, certain provisions of the Domestic Arbitration Law will apply (para. 7). Notably, para. 7 of the Decree provides that *"in relation to international commercial arbitration, if the seat of arbitration is in the territory of the Russian Federation... Chapter 9 of [the Domestic Arbitration Law], "Formation and activities of permanent arbitral institutions in the Russian Federation", [among other provisions] will apply"*. In other words, for example, if parties were to refer a dispute to the London Court of International Arbitration and specify that the seat

⁵ Some grounds for material invalidity are not subject to the law applicable to the arbitration clause.

of arbitration is Russia, then provisions of the Domestic Arbitration Law regulating, among other things, questions of attribution of PAI status to foreign arbitral institutions, would apply to that arbitration. In our [briefing](#) from January 2019 we noted that with the amendment of the Domestic Arbitration Law at the end of 2018 the possibility of foreign arbitral institutions considering disputes seated in Russia was cast into serious doubt. It would seem that the explanation given in para. 7 of the Decree means that if a foreign arbitral institution is not conferred PAI status, awards rendered under the auspices of that institution will not be recognised in Russia. However, neither the law nor judicial practice is clear in this respect.

- *"It is not permitted to challenge arbitral awards in the courts of the Russian Federation [by filing an application to have it set aside] if the seat of arbitration was outside the Russian Federation" (para. 42): the award must be challenged in the courts at the seat of arbitration.*

QUESTIONS OF NOTIFICATION OF PARTIES TO ARBITRAL PROCEEDINGS

- The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965) (the "**Hague Convention**") does not contain any requirement that notice of arbitral proceedings be given.

In the past, the courts have occasionally applied the Hague Convention to the sphere of international commercial arbitration and due to violation of its provisions denied recognition and enforcement of foreign arbitral awards in the territory of the Russian Federation, invoking improper notification of one of the parties to the arbitral proceedings.⁶

Now, in para. 48 of the Decree it is stated *"due to the dispositive nature of arbitral proceedings, the parties may establish any procedure for receiving written communications or observe the procedure that is established in the rules of the permanent arbitral institution, the application of which the parties have agreed upon"*.

- A party that changes its address bears the risk of failure to receive a notification and cannot invoke such change of address as grounds for denial of recognition and enforcement of an arbitral award (para. 48 of the Decree).

RECOGNITION AND ENFORCEMENT / SETTING ASIDE OF ARBITRAL AWARDS

Jurisdiction of the courts

- The Decree confirms the rule that where both legal entities and individuals (without individual entrepreneur status) are respondents in an arbitration, an application for issuance of a writ of execution / recognition and enforcement of the arbitral award, irrespective of the nature of the claims, must be filed with a court of general jurisdiction (para. 11). An exception is made with respect to arbitral awards rendered in corporate disputes: applications in relation to them must be filed with an arbitrazh (state commercial) court (para. 11).
- Para. 14 of the Decree concerns territorial jurisdiction over applications for enforcement of arbitral awards / to have arbitral awards set aside, including in situations where a debtor's address is unknown.

However, the Decree does not clarify whether it is possible to initiate the procedure of enforcement of an arbitral award in Russia in situations where the debtor's address is known but is outside Russia, while the debtor's assets are located in Russia. In a recent case a court found that such a procedure could be initiated in Russia if the debtor had assets located in Russia.⁷

Public policy

- In para. 44 of the Decree it is noted that state courts do not have the power to review an arbitral award on its merits and must limit themselves to establishing whether or not there are grounds to set aside the award / deny recognition

⁶ See, for example, Decree of the Federal Arbitrazh Court of the Moscow Region dated 27 March 2014 in case No. A41-6930/13.

⁷ See Ruling of the Economic Disputes Chamber of the Russian Supreme Court dated 13 July 2018 No. 305-ES18-476 in case No. A40-118786/2017 (the formalistic approach set out in this ruling is not binding for the lower courts).

and enforcement of the award. An explicit prohibition against reviewing arbitral awards on their merits is enshrined in law.⁸ A similar clarification was given previously at the level of the highest courts.⁹

In para. 51 of the Decree it is explained that denial of recognition and enforcement of arbitral awards on public policy grounds should happen in exceptional cases only and should not be used in place of special grounds.

Arbitrability

In para. 17 of the Decree it is emphasised that the categories of disputes which are non-arbitrable should be explicitly set out in federal law. The wording of this paragraph essentially replicates the provisions of the relevant statutes. In particular, it is stated that disputes arising out of Federal Law No. 44-FZ of 5 April 2013 On Contracting in the Sphere of Procurements of Goods, Works and Services to Meet State and Municipal Needs are non-arbitrable.

It should be noted that in the draft of the Decree it was explicitly stated that disputes between contractors under state and municipal contracts, on one side, and third parties engaged to do such work (e.g., subcontractors), on the other side, are arbitrable. However, this provision was omitted from the final text of the Decree.

Unfortunately, the Decree does not eliminate the uncertainty surrounding the arbitrability / the conditions of arbitrability of disputes arising out of Federal Law No. 223-FZ of 18 July 2011 On Procurements of Goods, Works and Services by Certain Types of Legal Entities (this has become a pressing issue in light of amendment of Art. 45(10) of the Domestic Arbitration Law at the end of 2018 — see our [briefing](#) from January 2019).

⁸ Art. 420 of the RF Civil Procedure Code; Art. 232(6) of the RF Arbitrazh Procedure Code.

⁹ See, for example, para. 18 of the Review of the Presidium of the RF Supreme Court of Judicial Practice Involving Fulfilment of the Functions of Assistance and Oversight in Respect of Arbitral Tribunals and International Commercial Arbitrations; paras. 4 and 12 of Information Letter of the Presidium of the RF Supreme Arbitrazh Court No. 96 of 22 December 2005.

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