
THE
INTERNATIONAL
ARBITRATION
REVIEW

EDITOR
JAMES H CARTER

LAW BUSINESS RESEARCH

THE INTERNATIONAL ARBITRATION REVIEW

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INTERNATIONAL
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REVIEW

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EDITOR'S PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another. The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more lawyer hours of reading than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. But there is a niche to be filled for analytic review of what has occurred in each of the important arbitration jurisdictions over the past 18 months, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world is consumed with debate over whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter
Sullivan & Cromwell LLP
New York
June 2010

Chapter 22

RUSSIA

*Mikhail Ivanov and Anna Zhukova**

I INTRODUCTION

The practice of resolving disputes through arbitration is undergoing rapid development in Russia. The arbitration courts in Russia do not form a part of the Russian Federation judicial system, and thus represent an alternative form of dispute resolution. However, arbitration courts and state courts, despite all the differences, are in general equally recognised as instruments of civil rights protection, performing one and the same function of justice.

There are two types of commercial arbitration in the Russian Federation: international commercial arbitration and domestic commercial arbitration. Separate laws have been developed with respect to these types of commercial arbitration.

International commercial arbitration is governed by the Russian Federation Law No. 5338-1 ‘on International Commercial Arbitration’ dated 7 July 1993 (‘the ICA Law’), which is based on the Model Law on International Commercial Arbitration, adopted in 1985 by the United Nations Commission on International Trade Law (UNCITRAL).

The main criterion qualifying arbitration proceedings as international is the presence of a ‘foreign element’ in the dispute, which means that either the parties to the dispute must be located in different countries or, if both parties to the dispute are Russian companies, at least one of them has a foreign shareholder.

The ICA Law applies to international commercial arbitration if the seat of arbitration is in the Russian Federation. If the seat of international commercial arbitration is abroad, the ICA Law applies to such arbitration in specific cases provided by the ICA Law, such as in the enforcement and challenge of arbitral awards, the obligation of a state court to consider a claim that is subject to an arbitration agreement until one of the parties invokes such agreement, and taking interim measures in support of arbitration.

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Pursuant to an agreement of the parties, the following may be referred to international commercial arbitration:

- a* disputes resulting from contractual and other civil law relationships that arise in the course of foreign trade and other forms of international economic relations, provided that the place of business of at least one of the parties is situated outside of the Russian Federation; and
- b* disputes arising between enterprises with foreign investments or international associations and organisations established in the Russian Federation, disputes between the participants of such entities, and disputes between such entities and other subjects of Russian Federation law.

According to the ICA Law, if an international treaty of the Russian Federation establishes rules other than those that are contained in Russian legislation relating to arbitration, the rules of the international treaty shall be applied.

The procedure for the establishment of domestic (national) arbitration courts and their activities are regulated by the Federal Law No. 102-FZ ‘on Arbitration Courts in the Russian Federation’ dated 24 July 2002 (‘the Law on Arbitration Courts’). Pursuant to Clause 1, Article 1 of the Law on Arbitration Courts, if the parties so agree, any dispute arising from civil law matters may be submitted to domestic arbitration courts, unless otherwise set forth in federal law.

The Law on Arbitration Courts applies to domestic disputes provided that there is no foreign element (as previously referred to), which makes the dispute subject to international commercial arbitration. The Law on Arbitration Courts specifically provides that it does not apply to international commercial arbitration. A domestic arbitration court is also entitled to consider a dispute between a Russian entity and a foreign company, but in this case the rules of the ICA Law apply. We can thus see that the jurisdiction of domestic arbitration courts is of a general nature, while the jurisdiction of international arbitration courts is specific and limited to cases with a foreign element.

Apart from the ICA Law and the Law on Arbitration Courts, each permanent arbitration institution has its own procedural rules, which also apply when the parties submit a dispute to that permanent arbitration institution.

In the context of enforcement and challenge of arbitral awards within the Russian Federation, one must also mention the *Arbitrazh*¹ Procedural Code of the Russian Federation (‘RF APC’), which was adopted on 14 June 2002.

In speaking about the distinctions between international and domestic arbitration, the following should be noted: the ICA Law and the Law on Arbitration Courts set

1 Term *arbitrazh* relates to state commercial courts, which form an integral part of the national judicial system. These courts consider disputes connected with commercial (economic) activities, including disputes that arise from relationships between commercial entities and governmental authorities (such as antimonopoly, taxation, registration authorities and the like).

different timeframes for judicial review of decisions (rulings, decrees) of an arbitration court on its competence to examine the case.

i International commercial arbitration

Pursuant to Part 3, Article 16 of the ICA Law, an arbitration court is entitled to choose to examine the question of whether it has jurisdiction:

- a* before considering the case on its merits, as a ‘preliminary issue’, or
- b* at the same time as it makes its final award on the case.

This gives the court the opportunity to take each case into consideration individually, to weigh the dangers of spending significant time and expense on unnecessary arbitration proceedings (if the decision on jurisdiction is left until the court makes an award on the case on its merits).

If a separate decision that the international arbitration court has jurisdiction is made as ‘on a preliminary issue’, this decision can be disputed in a state court within one month of the party’s receipt of such decision.

According to the ICA Law, upon examination of the justification of the arbitration tribunal’s decision regarding its jurisdiction, the decision of the state court is not subject to appeal to higher instance courts. At the same time, while the ICA Law does not provide for the possibility of appealing a decision of the state court, the RF APC (which was adopted after the ICA Law) does set forth such a possibility. Russian state *arbitrazh* courts resolve this conflict of laws in favour of the RF APC.

While the case is being examined in the state court, the arbitration court may continue with the proceedings and make an arbitral award. If a decision that an arbitration court has jurisdiction is taken at the same time as an award on the case’s merits, such decision can be disputed in state court only within the framework of procedures for annulment of (final) arbitration awards, or this issue can be raised in procedures for enforcement of (final) arbitration awards.

A decision of an arbitration court rendered as a ‘preliminary issue’ on the lack of its jurisdiction cannot be disputed in a state court. Regardless of the fact that such a decision is not necessarily a final decision on the issue of which court – state or arbitration – has jurisdiction, an arbitration court cannot be forced to examine a dispute.

ii Domestic arbitration

According to the Law on Arbitration Courts, an arbitration court will examine a petition from any party that objects to its jurisdiction and decide on it without postponing the issue, handing down an award on the case’s merits. If an arbitration court rules that it lacks jurisdiction, then it cannot consider the case on its merits. The Law on Arbitration Courts does not establish the possibility of appealing before a state court the decision of an arbitration court regarding its competence. In this connection, the rules of the RF APC providing for the possibility of appeal before state *arbitrazh* courts of preliminary decisions of arbitration courts on their jurisdiction are not applicable to domestic arbitration courts.

Regarding the types of arbitration courts, it should be noted that modern Russian law defines two types of arbitration courts (arbitration): permanent arbitration courts

(designed for institutional arbitration) and *ad hoc* arbitration (or arbitration tribunals established for the resolution of a particular dispute).

Permanent arbitration courts are stable arbitration institutions with a permanent location and with their own regulations (for example, regulations determining the procedure for arbitration proceedings and regulations for conciliation procedures), which regularly examine cases, and do not terminate their activities when examination of a particular case is complete. An *ad hoc* arbitration tribunal is created for the resolution of a single dispute, and after the dispute's resolution, is disbanded. There is no defined location; the proceedings are held at a location determined by agreement of the parties or by the *ad hoc* arbitration tribunal itself. The procedure for this type of arbitration proceedings, as a general rule, is determined by rules selected by the parties, with any deviations that the parties may agree upon.

According to the ICA Law, 'arbitration' means any arbitration, whether conducted by a tribunal set up specifically for a given case or administered by a permanent arbitral institution.

The major international commercial arbitration institution in the Russian Federation is the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation in Moscow ('the ICAC'). The ICAC is an independent and permanent arbitration institution operating in accordance with the ICA Law, the Statute on the ICAC annexed to the ICA Law, and the ICAC Rules.

A large number of arbitration institutions have been established in Russia. Other well-established institutions (apart from the ICAC) are the Arbitration Court of the Moscow Chamber of Commerce and Industry, the Arbitration Court of the St Petersburg Chamber of Commerce and Industry and the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation in Moscow.

With respect to statistics relating to arbitration in the ICAC,² in 2009 the ICAC received 250 claims from companies from 45 countries. In comparison, in 2008 the ICAC received 158 claims from companies in 38 countries, which shows the rapid development of commercial arbitration in Russia.

Russian companies were participants in 231 of the disputes. The ICAC also received 18 disputes in which both parties were foreign companies. With respect to the variety of contracts from which the disputes arose in 2009, as in previous years, disputes connected with foreign trade sale-purchase (supply) agreements were the most common, with 149 such disputes submitted (accounting for 60 per cent of the total).

II THE YEAR IN REVIEW

Developments affecting international arbitration

In 2009, there were no changes either to the legislation on international commercial arbitration in Russia or to the ICAC Rules.

Before moving on to examples of judicial practice that relate to the activities of international commercial arbitration courts, it should be noted that in general, such practice

2 According to the ICAC website: www.tpprf-mkac.ru/statisticeng.php

is connected with control on the part of state courts over awards made in international commercial arbitration (in particular, when a party requests that a (state) *arbitrazh* court set aside an arbitration award, or that an award made in international arbitration be recognised and executed). As a reminder, state courts do not examine the case on its merits, and, as a general rule, do not oversee the reasoning of arbitral awards.

The ICA Law provides for an exhaustive list of grounds on which an arbitral award may be set aside, basically reproducing the language of Article 5 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (‘the New York Convention’). The majority of grounds are based on procedural breaches that have occurred within the course of the arbitral proceedings and have to be proved by a party. An arbitral award may be set aside by the state *arbitrazh* court if:

- a* the party making the application for setting aside furnishes proof that:
- a party to the arbitration agreement was incapacitated, or the said agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereof, under the law of the Russian Federation;
 - a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case;
 - the award was made regarding a dispute not contemplated by or not falling within the terms of submission to arbitration, or contains decisions on matters beyond the scope of submission to arbitration, provided that if the decisions on matters submitted to arbitration can be separated from those on matters not so submitted, only that part of the award that contains decisions on matters not submitted to arbitration may be set aside; or
 - the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the ICA Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with the ICA Law; or
- b* the court finds that:
- the subject matter of the dispute is not capable of settlement by arbitration under the law of the Russian Federation; or
 - the award is in conflict with the public policy of the Russian Federation.

The grounds for refusing recognition or enforcement of an arbitral award are almost the same as for the annulment of the award. Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

- a* at the request of the party against whom it is invoked, if that party furnishes proof to the competent court where recognition or enforcement is sought that:
- a party to the arbitration agreement was incapacitated in some manner or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereof, under the law of the country where the award was made;
 - the party against whom the award was made was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case;

- the award was made regarding a dispute not contemplated by or not falling within the terms of submission to arbitration, or it contains decisions on matters beyond the scope of submission to arbitration, provided that if the decisions on matters submitted to arbitration can be separated from those on matters not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;
 - the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
 - the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which or under the law of which that award was made; or
- b* if the court finds that:
- the subject matter of the dispute is not capable of settlement by arbitration under the law of the Russian Federation; or
 - the recognition or enforcement of the award would be contrary to the public policy of the Russian Federation.

It should be noted that if a party is seeking recognition and enforcement of an arbitral award issued in a foreign arbitration, the grounds for refusing recognition or enforcement of an arbitral award are to be determined according to the New York Convention, provided that the award has been made in the territory of one of the contracting States.

Arbitration developments in local courts

i *Lack of proper notice*

In a number of cases, foreign arbitral awards were denied recognition and enforcement by the state courts of the Russian Federation because the respondents were not duly notified of the proceedings or were otherwise unable to present their case.

For instance, in *Belintertrans v. TransEurope-Inform*,³ the Federal Arbitrazh Court of the North-West Region denied recognition and enforcement of the award because of improper notice to the respondent. What is notable in this case is that notice was sent to the address stipulated in the contract, but the respondent argued that the person who signed in confirmation of receipt of the notice was not the respondent's employee. It can therefore be concluded that sending notice to the address stipulated in a contract does not guarantee that proper notice has been given if it is received by a non-authorised person.

3 (2009) International Arbitration Court at the Belarusian Chamber of Commerce and Industry.

In *Loral Space and Communications Holding Corporation v. Globalstar*,⁴ the Russian state *arbitrazh* courts denied recognition and enforcement of an award issued under the auspices of the LCIA because of the lack of proper notice to the respondent. The Supreme Arbitrazh Court of the Russian Federation overturned the decisions of the lower instances and concluded that proper notice does not necessarily require a single integrated document; proper notice may include a number of complementary communications in accordance with the relevant arbitration rules.

In *Valars SA v. Agro-Holding*,⁵ the Supreme Arbitrazh Court of the Russian Federation concluded that the defendant's correspondence with the arbitral tribunal was sufficient proof of proper notice.

ii Infringement of public policy

There is a widespread perception that Russian state courts frequently use proceedings on enforcement or annulment of arbitral awards to reconsider the case on the merits, referring to infringement of Russian public policy. At the same time, recent years have seen Russian courts work out a more uniform conception of what is to be understood by the term 'infringement of public policy'.

Judicial practice in 2009 confirmed the approach to this issue that had been previously applied. Thus, in *Open Society Institute Management Services Limited v. CJSC Sector-1*,⁶ the Supreme Arbitrazh Court of the Russian Federation concluded that an award of an international arbitration court may be deemed an infringement of public policy of the Russian Federation if its enforcement results in actions that:

- a* either directly violate the law or are detrimental to the sovereignty or security of the state;
- b* affect the interests of large social groups;
- c* are incompatible with the principles on which the country's economic, political or legal systems are built;
- d* affect the constitutional rights and freedoms of individuals; or
- e* contradict the main principles of civil law, such as equality of the parties, inviolability of property and freedom of contract.

In the above case, the Supreme Arbitrazh Court of the Russian Federation took the approach that reference to infringement of public policy may be acceptable if foreign law was used to make the award; if the arbitral award was based on the rules of Russian law, only non-observance of the fundamental principles of procedural law may be claimed as an infringement of public policy. The future will show the extent to which the lower courts and the Supreme Arbitrazh Court itself will be prepared to follow the guidelines outlined in this recent case. In any event, it should be noted that in the decision referred to above, the Supreme Arbitrazh Court apparently did not intend to suggest some kind of all-embracing definition of the public policy or set forth some final limitations on

4 (2009) London Court of International Arbitration.

5 (2009) Grain and Feed Trade Association.

6 (2009) ICAC.

the application of the public policy argument. The decision did not address at all the possibility of raising the public policy argument in cases affecting the issues of Russian substantive public law (like competition law) irrespective of whether Russian or foreign law was applied by the arbitral tribunal.

iii Challenging the arbitration agreement

In *Hebestreit Rapido GmbH v. Confectionery plant Saratovskaya* (2009), a court of first instance refused to recognise and enforce a foreign arbitration award on the formal grounds that the name of the foreign arbitration court that was set out in the arbitration clause was not identical to the actual name of the arbitration court that handed down the award. The Supreme Arbitrazh Court of the Russian Federation established that the court of first instance did not take into account that, when assessing the objections of the party with respect to the choice of the International Arbitration Court at the Chamber of Economics in Austria as not being based on the arbitration clause of the parties to the contract, it should have been guided by the rules of the law that were to be applied to that clause, taking into account the provisions of subclause ‘a’, Clause 1, Article V of the New York Convention and Clause 2 of Article VI of the 1961 European Convention on International Commercial Arbitration (‘the Geneva Convention’), to which Germany and Russia are parties and which should be applied in this case. The parties’ arbitration clause excluded any state courts from examining disputes that arose between the parties from or in connection with the contract. The parties also indisputably and unambiguously agreed on the place of any future arbitration proceedings: Vienna. In assessing the content of the arbitration clause, the reference to disputes being subject to arbitral review in the Chamber of Industry and Commerce in Vienna, the court of first instance should have taken into account that the Austrian Federal Economic Chamber, located in Vienna, is an organisation analogous to the chambers of trade and industry that exist in other countries, and that the International Arbitral Centre at the Austrian Federal Economic Chamber is the only institutional (permanent) international commercial arbitration court created within it. Under such circumstances, the Supreme Arbitrazh Court of the Russian Federation came to the conclusion that the disputed decision of the court of first instance violated the uniformity in *arbitrazh* courts’ interpretation and application of the rules of law and, in accordance with Clause 1, Article 304 of the RF APC, should be overturned.

In *Valars SA v. Agro-Holding*, the Supreme Arbitrazh Court of the Russian Federation concluded that the absence of an original contract between the parties did not affect the arbitration clause.

iv Finality of arbitration awards

Article 40 of the Law on Arbitration Courts establishes that an award of an arbitration court can be disputed by a party to the case by submitting an application to have the award set aside to the competent court if the arbitral agreement does not set out that the decision of the arbitration court is final. In elaborating on this rule of the law, the Presidium of the Supreme Arbitrazh Court of the Russian Federation, in its informational letter No. 96 of 22 December 2005, explained that an *arbitrazh* court terminates proceedings on a case to set aside an arbitration award if it establishes that the

arbitration agreement contained a provision that the decision of the arbitration tribunal is final. The Supreme Arbitrazh Court further stated that violations that were made in the arbitration tribunal's examination of the case may be brought to light during court proceedings on the issuance of the writ of execution (i.e., the confirmation procedure); terminating the annulment proceedings thus does not deprive a party of the possibility of defending its rights and legal interests in court in the future.

The ICA Law does not contain rules analogous to Article 40 of the Law on Arbitration Courts. In this connection, until recently, judicial practice on termination of the proceedings on annulment of arbitral awards related only to awards made by domestic arbitration tribunals. However, as of late, state *arbitrazh* courts have begun to apply these rules to international commercial arbitration as well. In particular, in *EuroPol Gaz v. Gazprom Export* (2009), the Supreme Arbitrazh Court of the Russian Federation came to the conclusion that if the parties under the contract wished ICAC's decisions to be final and binding on them, neither would have the option of applying to a state court to have the award made by the arbitration tribunal set aside, and if such an application is made the proceedings should be terminated. The Supreme Arbitrazh Court cited Paragraph 44 of the ICAC Rules, pursuant to which ICAC decisions are final and binding as of the date they are handed down, are performed by the parties voluntarily in the established timeframe and, if not performed, are enforceable in accordance with the law and international treaties. The Supreme Arbitrazh Court confirmed that a supposed violation during ICAC's consideration of the case in question that would be grounds for overturning the decision may be brought to light during court proceedings on the issuance of the writ of execution.

In these circumstances, according to the most recent practice of Russian courts, terminating the proceedings on annulment of the arbitral awards does not deprive the affected party of the possibility of defending its rights and legal interests in court in the future.

Investor–state disputes

Russia has entered into a number of bilateral investment treaties ('BITs'), which, in general, are similar in content and provide for the fair and equitable treatment of investments in signatory countries and prohibit nationalisation or expropriation (or measures having the effect of nationalisation or expropriation) without compensation. Those BITs typically provide for arbitration under the UNCITRAL Arbitration Rules, or before the Arbitration Institute of the Stockholm Chamber of Commerce. The Russian Federation signed the ICSID Convention on 16 June 1992 but has not ratified it. None of the investment treaty arbitrations to which the Russian Federation is a party, therefore, have taken place before the ICSID.

The principal investment treaty case involving the Russian Federation is in fact a series of three arbitrations conducted under the auspices of the Permanent Court of Arbitration in The Hague under the Energy Charter Treaty, following the dismantling

of the Yukos group by the Russian Federation;⁷ the UNCITRAL Arbitration Rules apply. These arbitrations are believed to be the largest arbitrations ever, reportedly involving in the range of \$100 billion in damages sought by investors. On 30 November 2009, the same arbitral tribunal in the three cases, composed of Charles Poncet, Judge Stephen Schwebel and Yves Fortier as presiding arbitrator, rendered three partial awards upholding jurisdiction under Article 26 of the Energy Charter Treaty. The key issue in the three cases was whether the Energy Charter Treaty applied to the Russian Federation; the Russian Federation had signed the treaty in 1994 but had not ratified it. The Energy Charter Treaty, however, includes a provision regarding its 'provisional application' (Article 45). The arbitral tribunal decided that this clause should receive application notwithstanding the absence of ratification of the treaty and paved the way for the investors to plead their case on the merits. The case is ongoing and may be so for many years to come.

As part of the Yukos 'saga', another award was rendered in 2009, in the case of *Renta 4 SVSA and others v. the Russian Federation*, under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce. In that case, seven Spanish claimants, holders of American Depositary Receipts in Yukos Oil Corporation, alleged that the Russian Federation breached the Spain/Russia BIT. In an award on preliminary objections made on 20 March 2009, the arbitral tribunal held that it had jurisdiction only with respect to part of the claims.

III OUTLOOK AND CONCLUSIONS

Contrary to common perception, the Russian Federation appears to be gradually moving towards a more arbitration-friendly position. A good example of this is provided by a recent development providing for the possibility of Russian courts adopting interim measures in support of international arbitration outside of Russia. The rule that establishes the possibility of interim measures being taken by a Russian arbitrazh court in support of commercial arbitration first appeared in the Arbitrazh Procedural Code of the Russian Federation adopted on 24 July 2002; however, until recently, this rule was rarely used in practice. In the recent case of *Edimax Limited v. Shalva Tchigirinsky* (2010), the Supreme Arbitrazh Court of the Russian Federation confirmed that a Russian *arbitrazh* court is competent to take interim measures on cases being examined on their merits in international commercial arbitration. In that particular instance, the arbitration took place before the LCIA. This development is an excellent sign for the further development of international arbitration in Russia.

7 *Hulley Enterprises Limited (Cyprus) v. the Russian Federation, Veteran Petroleum Limited (Cyprus) v. the Russian Federation, and Yukos Universal Limited (Isle of Man) v. the Russian Federation*.

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