

Impact of proposed reform on international arbitration

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Introduction

In early 2014 the Ministry of Justice published for public consultation various draft laws relating to the reform of arbitration legislation. The consultation process was completed in April 2014 and revised drafts have now been issued. While the proposed amendments mostly concern the domestic arbitration regime, several changes are of importance to both international arbitration institutions and users. This update provides a brief overview of some of the proposed amendments to the extent that they are relevant to international arbitration.

Need for reform

Russia has different regimes for international and domestic arbitration. The Law on International Commercial Arbitration dates back to 1993, and adopts the United Nations Commission on International Trade Law (UNCITRAL) Model Law 1985, with some minor changes. The Law on Arbitral Tribunals, which covers domestic arbitration, was adopted in 2002, but shares few provisions with the Model Law. The calls to modernise the Law on International Commercial Arbitration began shortly after the revision of the UNCITRAL Model Law in 2006, but the bill to update the national law in line with the revised UNCITRAL Model Law remained pending before Parliament for several years without making progress. The Law on Arbitral Tribunals was generally considered to be outdated and there were calls to bring it into line with the more progressive Law on International Commercial Arbitration.

The draft laws will replace the Law on Arbitral Tribunals with a brand new act, the Law on Arbitration in the Russian Federation, which is primarily based on the UNCITRAL Model Law but also contains various provisions dealing with establishing arbitral institutions. The Law on International Commercial Arbitration will be slightly amended, but various questions relevant to international arbitration will be governed by the domestic arbitration law.

However, there is another reason for reform. Hundreds of arbitral institutions around Russia offer their services in both international and domestic arbitration. How many cases they handle is unknown, but many have been used for fraudulent ends, such as enforcing non-existent debts for the purposes of bankruptcies. Hence, there were calls to reform the system to exclude illegal activities.

Arbitral institutions have also been established by major corporations (so-called 'pocket' arbitral institutions). Such corporations usually insist on arbitration clauses in favour of their own institutions. On a number of occasions the Supreme *Arbitrazh* Court has ruled that such pocket arbitral institutions objectively lack impartiality and has set aside or refused the enforcement of their awards.

The reform was initially intended to address these concerns and to make Russia a more attractive place for arbitration. However, the proposed reform has gone much further, while its impact on Russia's appeal for arbitrations is doubtful.

Arbitration agreement

Initially, the draft laws were said to be based on the 2006 version of the UNCITRAL Model Law, but neither the relaxation of the written form requirement nor the provisions on interim measures found their way into the drafts. Following the public consultation, the drafters deleted this reference in the updated drafts.

According to the proposed amendments to Article 7 of the Law on International Commercial Arbitration, an arbitration agreement must be in writing. The written form requirement will be met if the agreement is concluded through an exchange of correspondence, including electronic communications which enable positive identification of the document's author. This latter requirement was criticised during the public consultations for making electronic communications too vulnerable, but under the revised draft it can be waived by written agreement of the parties.

The drafts also set out a number of presumptions, most of which had already been developed through court practice. An arbitration clause must cover all issues connected to the relevant contract, as well as the parties' actions in relation to performance thereof, unless the parties agree otherwise. Further, in interpreting the arbitration agreements, all doubts shall be interpreted in favour of its validity and enforceability.

The amended article also provides that in case of assignment, both new and previous creditors (or debtors, as the case may be) will be bound by an arbitration agreement.

The draft amendments expressly allow optional arbitration clauses, both symmetrical and asymmetrical. If this is adopted into law, it will eliminate all effects of the *Sony Ericsson* decision in this regard.

Arbitrability of corporate disputes

The proposed reforms may put an end to the uncertainty regarding the arbitrability of corporate disputes in Russia. The draft laws distinguish three categories of corporate dispute:

- Disputes involving contracting parties only (eg, disputes arising from share purchase agreements) shall be arbitrable.
- Disputes involving a greater number of parties (eg, disputes relating to the challenge of corporate resolutions) may be arbitrable under certain circumstances. In particular, these disputes can be referred only to arbitration institutions which have adopted specific rules for corporate arbitrations. Such rules for the arbitration of corporate disputes must comply with the requirements of the law, which were likely inspired by similar rules adopted by the German Institution of Arbitration. Notably, the place of arbitration for such disputes shall be Russia.
- Corporate disputes involving a public element (eg, disputes on state registration of corporations) cannot be referred to arbitration.

While this development should be welcomed, the draft laws have one concerning feature. According to transitional provisions, arbitration agreements relating to corporate disputes, including disputes falling within the first category, can be validly concluded only after April 1 2016. Arbitral agreements concluded before this date are deemed incapable of being performed. During the public consultations, numerous institutions suggested that corporate disputes falling within the first category shall be excluded from the scope of the transitional rules, but the Ministry of Justice expressly rejected this proposal.

Arbitral institutions

Since the main driving force behind the reform appears to be the wish to eliminate fraudulent arbitration institutions in Russia, the draft law on domestic arbitration contains extensive provisions governing the establishment of arbitral institutions, their operations and the requirements applicable to arbitration rules and arbitrators. These provisions also apply to Russian arbitral institutions administering international arbitration disputes.

The new rules provide that arbitral institutions can be established only by non-profit organisations and must be registered with the Ministry of Justice. Existing institutions will need to be reorganised; however, this does not affect the International Commercial Arbitration Court and the Maritime Arbitration Commission at the Russian

Chamber of Commerce and Industry.

Once an arbitral institution is registered, it must obtain authorisation from the Ministry of Justice. While the requirements for registration apply only to Russian arbitral institutions, foreign arbitral institutions will still need to obtain authorisation from the Ministry of Justice in order to administer disputes in Russia. While the extension of this requirement was heavily criticised during the public consultation, the ministry insisted on its inclusion.

The draft law contains fairly detailed provisions on what shall be included in arbitration rules. While there appear to be no extraordinary requirements and most arbitration rules would comply with them, it remains unclear why this needs to be regulated at the legislative level. Arbitral institutions will have to maintain a list of at least 30 arbitrators.

The draft laws also sets out requirements for arbitrators. These were clearly borrowed from the requirements applicable to state court judges. Notably, the sole arbitrator (or president of the three-member tribunal) must have a higher law degree. The parties can waive this requirement only by express written agreement; reference to arbitration rules will be insufficient for this purpose.

In addition, arbitral institutions must keep all case files for 10 years; however, the Ministry of Justice noted that this time limit may be reduced to three years. This requirement applies to both Russian arbitral institutions and foreign institutions administering disputes in Russia.

All these provisions were criticised by the arbitration community as excessive and at times futile, but to no avail.

Setting aside and enforcement

Initially, the draft laws proposed that setting-aside and enforcement cases would be heard at cassation court level. This was generally welcomed, because in many cases, the first-instance courts shown a lack of understanding of specific features of international arbitration, although their mistakes were usually rectified at the appeal level through the cassation courts. Nevertheless, this proposal has been removed from the updated drafts and setting-aside and enforcement applications will be heard by the first-instance courts, as before.

The wording of the Law on International Commercial Arbitration has been updated to bring it more into line with the New York Convention and the UNCITRAL Model Law.

In addition, parties to international arbitration agreements with Russia as the place of arbitration will be able to exclude the possibility of applying to set aside the award. Previously, this was permitted only in the context of domestic arbitrations, but recently the courts have started to apply the Law on Arbitral Tribunals to international arbitrations by analogy.

The draft laws also introduce new provisions for the recognition of foreign declaratory judgments and awards. If the international treaty provides for the recognition of such judgments and awards, they will be recognised in Russia without further enforcement proceedings. It is then up to the respondent to file any objections against the recognition of such judgment or award. The application must be filed within one month of the date on which the respondent learned about the relevant foreign judgment or award. The grounds for refusal of recognition are essentially the same as the grounds for refusal for enforcement. Hence, the burden of proving that a declaratory judgment or award should not be recognised rests on the losing party and, unless that burden is promptly discharged, the relevant judgment or award can be used in the proceedings in Russia without further formalities.

Comment

The draft laws contain various useful and welcome provisions. However, overall it appears that the drafters tried to eliminate the threat of using arbitration for fraudulent purposes without quite succeeding.

It is commonly accepted among the arbitration community in Russia that while the new rules on the establishment of arbitral institutions will complicate things, they will not prevent fraudsters from registering compliant institutions. They may also start using *ad hoc* arbitrations more actively, as the laws impose no requirements in relation to *ad hoc* arbitration.

The draft laws continue the trend for state overregulation of spheres which are usually self-regulated and require little involvement from the authorities. Requiring foreign arbitral institutions to obtain authorisation from the Ministry of Justice to administer arbitrations in Russia is unlikely to promote Russia as a venue for international arbitration.

So far, these are only draft laws and have not yet been introduced before Parliament. While the Ministry of Justice is optimistic that the laws will be approved later in 2014 and will enter into force from 2015, it may well take longer to get the bills all the way through Parliament. Moreover, the bills may be significantly amended in that process. Therefore, it is yet to be seen which direction the reform of Russian arbitration law will take.

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