Are Russian courts becoming more arbitration friendly?

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Reference to arbitration rules without specifying arbitral institution
Ad hoc arbitration clause upheld

Comment

While the Russian courts are known to be overly formal when it comes to the analysis of arbitration clauses, two recent cases may signify a move towards a more arbitration-friendly interpretation of parties’ agreements and a greater respect for parties’ desire to arbitrate.

Reference to arbitration rules without specifying arbitral institution

In Bosch v Avtosped the intervention of the presidium of the Supreme Arbitrazh Court was required to enforce an arbitration clause that referred to the arbitration rules, but not to the arbitral institution.

The dispute arose out of a transportation agreement between Avtosped Internationale Speditions GmbH and a company that later became Bosch Termotechnika LLC. It related to compensation for damage caused to goods in the course of transportation. Section 7 of the transportation agreement contained an arbitration clause which read:

"If the parties fail to reach an agreement, the case should be referred to a court at the respondent's location and the dispute shall be settled under the laws of that state under the 'Rules of Conciliation and Arbitration of the International Chamber of Commerce' by one or more arbitrators appointed in accordance with the said Rules. The award shall be final and binding and shall not be subject to appeal."

Nevertheless, Bosch filed a claim with the state arbitrazh court, which – despite Avtosped's objection – decided the case on the merits and awarded damages. The appellate court confirmed this decision and stated that from the wording of the arbitration clause, it was impossible to understand the real intentions of the parties with respect to the arbitral institution chosen for resolution of the dispute. This ruling was confirmed by the cassation court.

The reference to an arbitral institution is sometimes considered critical to the enforceability of an arbitration clause. For example, in Regus v Kubik the Moscow Circuit Federal Arbitrazh Court held that a clause making reference to the International Commercial Arbitration Court Arbitration Rules, but failing to refer to the institution itself, meant that the parties had chosen ad hoc arbitration.

Avtosped filed a revision complaint and the case was referred to the presidium of the Supreme Arbitrazh Court. The presidium granted the objection and terminated the proceedings with reference to the existing arbitration agreement. The full resolution was published on October 16 2013.

The presidium explained that a court faced with an objection to its jurisdiction on the basis of an arbitration clause must grant the objection if it is satisfied that:

- the subject of the dispute is arbitrable;
- the arbitration agreement is in writing; and
- the arbitration agreement is not invalid, inoperative or incapable of being performed.

In the present case, the presidium found that the dispute was arbitrable because:

- it arose out of the contractual and private relationships of the parties; and
- there is no legislative prohibition against referring disputes arising out of transportation agreements to international arbitration.
As for the lack of clear reference to an arbitral institution, the presidium concluded that the clause referred to the International Chamber of Commerce Rules, which describe in detail the procedure for the formation and functioning of the arbitral tribunal, as well as the procedure for resolution of disputes in this arbitral institution. Presumably, the same reasoning could apply in any other case where rules make it clear that disputes are to be administered by a specific body (which most rules do).

Ad hoc arbitration clause upheld


In 2005 OJSC Amur Ship Yard (ASY) entered into an agreement with VMF Partnership GmbH for the sale of certain equipment; ASY was the buyer and VMF was the seller. Section 10.2.2 of the agreement provided that any dispute between the parties relating to performance of the agreement or its terms which the parties could not settle themselves, would be resolved by the Khabarovsk Arbitrazh Court in accordance with Russian law. Pursuant to Section 10.2.3 of the agreement, if the seller was the respondent in such a dispute, the dispute would be subject to trade arbitration in the country where the seller was located in accordance with the UNCITRAL Arbitration Rules.

The dispute arose when ASY filed a claim for invalidation of Section 10.2.3 of the agreement and recovery of Rb116 million from VMF. In response, VMF objected to the court's jurisdiction with reference to Section 10.2.3. In its October 28 2013 ruling[^5], the first-instance court granted VMF's objection.

ASY argued that the arbitration clause was inoperable, as it specified neither the full name nor the location of the arbitral institution. The first-instance court rejected this argument, as the agreement between the parties clearly indicated their intention to resolve disputes in accordance with the UNCITRAL Arbitration Rules.

Furthermore, ASY argued that the agreement violated the balance of the parties' rights as well as the principle of the parties' equality, as VMF could allegedly choose whether to refer disputes to the state courts (Section 10.2.2) or to arbitration. The court interpreted the dispute resolution agreement literally – that is, that a claim against ASY was to be filed with the Khabarovsk Arbitrazh Court, whereas a claim against VMF was to be filed with one of the institutions in Germany administering arbitrations in accordance with the UNCITRAL Arbitration Rules. The first-instance court noted that VMF, being a respondent in the proceedings, could not in fact make such a choice (as suggested by ASY), and that the claim against VMF could have come before the state court only if the arbitration clause were ignored by both parties. Interestingly, while ASY referred to the *Sony Ericsson* case, the first-instance court distinguished the case at hand on the grounds that the factual circumstances were different.

ASY appealed the first-instance court's ruling. On December 6 2013 the appellate court confirmed the lower court's decision and dismissed the appeal.[^6]

The appellate court particularly emphasised the principle of the parties' autonomy and noted that by signing the 2005 agreement, the parties had agreed to the dispute resolution procedure provided for therein. The appellate court also supported the lower court's conclusion that the *Sony Ericsson* principle did not apply to the case at hand, as VHF did not enjoy a right to choose between litigation and arbitration.

ASY filed a second appeal with the cassation court, which is now pending. The case may well go all the way to the Supreme Arbitrazh Court.

**Comment**

These two cases demonstrate that the Russian courts are prepared to treat arbitration agreements with greater respect. This development should be welcomed.

After the presidium's ruling in *Bosch*, the courts have been reminded that the arbitration rules form part of the parties' agreement to arbitrate and, therefore, the allegedly missing elements of the agreement can be found in the rules themselves.

At the same time, the presidium directed that the lower courts satisfy themselves that the disputes in question are arbitral under Russian law. Theoretically, this could affect Russia-related disputes in instances where the disputes are considered non-arbitrable in Russia (eg, in relation to corporate disputes).

In *Amur Ship Yard* the court underlined the overriding significance of the parties' intention to arbitrate certain disputes. Moreover, the court found the courage to distinguish this case from *Sony Ericsson*, which means that the judges fully understand the limited application of the principle contained therein.

*For further information on this topic please contact Andrey Panov at Norton Rose*
Endnotes


(2) Resolution available in Russian at ras.arbitr.ru/PdfDocument/17935cea-c5de-4d16-91a8-b69964a94ab9/%D0%9040-29251-2011__20120313.pdf.

(3) Resolution available in Russian at kad.arbitr.ru/PdfDocument/52d87cb1-0140-4c3f-93ee-9bb161c1288c/A27-7409-2011_20130716_Reshenija%20%20postanovlenija.pdf.

(4) Case A73-5339/2013, available in Russian at kad.arbitr.ru/Card/328d4f5f-f110-4367-afd4-71d47e35cc44.


(6) Resolution available in Russian at kad.arbitr.ru/PdfDocument/7a114f86-4e3c-4350-9fbd-b3a193e41e1a/A73-5339-2013_20131206_Postanovlenie%20apelljacionnoj%20instancii.pdf.

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