

Chapter 40

RUSSIA

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I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

The Russian legal environment is rapidly changing. The changes started to occur during 2007–08 and greatly influenced dispute resolution in commercial matters. Since the beginning of the financial turmoil in September 2008, the character and direction of those changes have altered slightly, but the leading trend – towards more transparent and stable judicial practice in business litigation – remains the same. At the same time, the environment in the courts of general jurisdiction (focused on non-commercial disputes) did not undergo significant change, partly because of the large number of judges scattered throughout the country, partly owing to absence of strong willingness of the Supreme Court to change anything.

Another, more long-running trend which transpired in the past decade was the development of alternative methods of dispute resolution. With the advent of foreign investors and with inflow of Russian lawyers who acquired education and experience of work abroad, new methods of dispute resolution were brought to life. Alongside international arbitration, which already existed in the Soviet era as a means for dispute resolution in USSR international trade, new possibilities such as domestic arbitral tribunals appeared. Owing to an increasing number of complex disputes between banks and debtors, a topic of high priority now is the development of other ADR methods such as mediation.

The structure of dispute resolution framework in Russia can be considered through a number of levels.

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i Interstate (international), state (jurisdictional) and non-state

The most essential criterion for distinguishing between different avenues for dispute resolution is the source of their authority. On the basis of this criterion one can discern the following institutions or other kind of vehicles for resolving disputes which are recognised on the territory of Russia:

- a* international, or interstate (such as the European Court of Human Rights);
- b* state, or jurisdictional (the Constitutional Court of the Russian Federation and constitutional courts of the subunits of the Russian Federation, arbitrazh courts, courts of general jurisdiction, justices of the peace);
- c* non-state (International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (also known as ‘MKAS’), domestic arbitral tribunals, commissions for labour disputes etc.).

The jurisdiction of the European Court of Human Rights (‘ECHR’) became mandatory for the Russian Federation from 18 April 1998 following enactment of the Federal Law on Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms. Pursuant to this law, ECHR became a kind of ultimate resort for Russian litigants, and the precedents of ECHR became binding upon legislation and jurisprudence in Russia. In the business litigation context, the most frequently applied provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms are Article 6, the right to a fair trial and Article 1 of the First Protocol to the Convention relating to the protection of property.

The full applicability of the Convention in domestic disputes has recently been confirmed by the Constitutional Court of the Russian Federation in respect of the courts of general jurisdiction.¹

The system of state courts comprises two types of courts:

- a* courts handling commercial disputes with the participation of entrepreneurs and legal entities (arbitrazh courts), and
- b* courts of general jurisdiction (including justices of the peace) that consider disputes not related to commercial (entrepreneurial) activity.

The delimitation between the two jurisdictions may be sometimes not be easy to identify. In unclear situations it is decided either on the basis of existing practice or on the principle of access to justice. The latter is applied when a person filed a claim in, say, a court of general jurisdiction and was denied trial owing to inappropriate jurisdiction. In this case an arbitrazh court shall accept the claim, because otherwise an applicant would be deprived of proper access to justice.

Importantly, arbitrazh courts enjoy specific jurisdiction determined by subject matter of the dispute and the personality of litigants (legal (including private entrepreneurs) or physical). The first criterion is the most important one. For example, disputes between shareholders, or disputes of shareholders with their companies are

1 The judgment was announced on 26 February 2010 and is yet to be published.

tried in arbitrazh courts irrespective of whether any of the participants are legal entities, entrepreneurs or just natural persons.

The structure of both arbitrazh courts and courts of general jurisdiction is by and large similar and comprises the highest instance (the Supreme Arbitrazh Court (also known as ‘VAS’) and the Supreme Court, respectively), the lower courts of appeal (for arbitrazh courts there are two tiers of appeal – cassation (higher) and appellate instance (lower)) and trial courts (arbitrazh courts – on the regional level, courts of general jurisdiction on district level). Justices of the peace constitute the lowest tier of the general jurisdiction system. They consider disputes on small amounts (below 50,000 roubles) between physical persons not in connection with commercial activity, and some other relatively simple categories of cases.

The highest instances (the Supreme Arbitrazh Court and the Supreme Court) can act as the courts of first instance in cases where the acts of federal government or President are challenged. The main task of the highest courts, however, is unifying and maintaining consistent court practice. This is done through consideration of certain cases *a certiorari* or by delivering general clarifications on application of laws in certain subject (bills of exchange, sale contracts, bankruptcy, VAT, foreign currency regulations international commercial arbitration etc.). These clarifications can be mandatory or advisory in nature. In the Supreme Arbitrazh Court, before granting the revision *a certiorari*, the panel of three judges delivers a preliminary opinion explaining the reasons for such decision. Such preliminary decision may also be important for understanding of the legal position of the court. After such decision is issued, the case is finally decided by the Presidium of Supreme Arbitrazh Court, which usually consists of 12 to 19 judges.

Importantly, the year 2009 has seen a crucial change in the powers of the Supreme Arbitrazh Court as the highest instance for the resolution of commercial disputes. In essence, the court itself started to consider its rulings as binding upon all arbitrazh courts, making their legal force very similar to that of precedents in common law countries. It has taken a number of steps for the court to attain this conclusion. First, in 2008 the court made a general clarification that a change in its ‘legal position’, reflected in either a clarification or in a judgment in a particular case, can be a ground for retrial of a case due to ‘newly discovered facts’. This made every court’s ruling equal to a precedent. The rule was tested in the Constitutional Court, which confirmed the Supreme Arbitrazh Court’s interpretation with a number of restrictions (such as the prohibition to apply the Supreme Arbitrazh Court’s changed positions retroactively where this can harm an entity in public prosecution, etc.).

ii Judicial and administrative

When looking at the system of jurisdictional institutions for dispute resolution in Russia, it is also necessary to understand to which branch of power it belongs. Under article 118 of the Constitution, justice in Russia is vested solely with courts. However, certain kinds of disputes may or, sometimes, must be referred to administrative justice.

To understand this concept it is necessary to keep in mind the distinction between rights in public and private areas. The former deals with state interests and primarily touches upon fiscal, antimonopoly, monetary and other types of regulatory relationship, which are essentially public functions. These relations are governed by public law, such

as Tax Code, Law on Protection of Competition, Law on Securities Market, Code for Administrative Offences, etc. The private area regards commercial transactions where free will and autonomy prevail. These relations are covered by the Civil Code and a number of other special laws, and therefore the rights arising out of these relations are sometimes referred to as 'civil rights'.

This distinction is significant for proper identification of a type of dispute and of a suitable avenue for its settlement. Article 11 of the Civil Code provides that an administrative route for protection of civil rights is possible only when specifically provided by law. The general rule for the protection of civil rights is that they are protected, and disputes are handled, by courts or by arbitral tribunals.

At the same time, in administrative relations, for example, in taxation, the approach is that the administrative route, which belongs to the executive branch, is frequently appropriate. However, it does not prevent a person from going to a court should an administrative decision be unfavourable.

iii International arbitration and domestic arbitral tribunals

The permanent international arbitration institution in Russia is the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation. It was introduced with the adoption of the Law on International Commercial Arbitration in 1993. This law is based on the United Nations Commission on International Trade Law ('UNCITRAL') Model Law on International Commercial Arbitration as of 1985.

Domestic arbitral tribunals (*treteyskie sudy*) were introduced in Russia by the Law on Arbitral Tribunals in the Russian Federation of 2002. The law establishes a framework for both institutional and *ad hoc* arbitral tribunals, sets out requirements for arbitrators and gives outlines of procedure. It specifically states that this law does not apply to international arbitrations. Thus international and domestic arbitrations have different regulation and are treated in procedural legislation separately. But a number of principles remain essentially the same; that is why when Russian-trained commentators delve into the topic of international arbitration, they sometimes refer to domestic arbitral tribunals as well.

iv ADR and means of dispute settlement

Alternative dispute resolution has become a new yet actively discussed topic in recent years. The reason is that state courts are currently overloaded with cases and work on a verge of their capacity. ADR was proposed as a way to cure the situation and relieve the courts from simple or, *vice versa*, complicated cases which can be better and faster resolved, or settled through arbitration, mediation or other methods. This initiative is vigorously supported by the current chairman of the Supreme Arbitrazh Court of the Russian Federation, as well as by a number of other high-ranking and prominent lawyers.

The efforts are materialised in a draft Law on Mediation prepared by the Russian Union of Industrialists and Entrepreneurs and introduced to State Duma (the lower chamber of the federal legislative body in Russia) one year ago. Reportedly, the other draft has recently been prepared by the Administration of the President and is also now in the process of submission to State Duma.

II THE YEAR IN REVIEW

*i On certain procedural issues arising during consideration of cases involving non-performance or inappropriate performance of contractual obligations*²

As the result of financial crisis, many debtors became unable to perform their obligations under contracts, which in turn led to a growing number of complaints and court proceedings with creditors seeking to recover money due, damages, etc. In order to oppose such claims, the debtors started employing disruptive tactics such as challenging the underlying contract and initiation of parallel proceedings, which caused suspension of main proceedings and delayed judgment on merits. The Supreme Arbitrazh Court clarified that such tactics should be opposed by courts; the main proceedings should not be suspended even if the contract is challenged. If the main and the torpedo proceedings are started within the same court, the proceedings should be consolidated to ensure that the case is adjudicated promptly.

*ii Petrokommerz OJSC v. Arkada OJSC et al*³

As an aftermath of financial instability, the Russian bond market was shaken by numerous defaults on bonds and subsequent disputes in courts and in arbitration. Since the regulation of bonds is apparently underdeveloped in Russia, creditors were faced with numerous legal issues and impediments in courts. This dispute was the first one that reached the highest instance. The courts of the three lower instances denied all claims of the bond holder applying general principles of contract law. The Supreme Arbitrazh Court reversed this, emphasising that those general principles cannot be applied to bonds without modification. The peculiarity of these instruments should have also been taken into account. The court instructed the first instance to reconsider the case paying attention to specific regulations enshrined in the Law on the Securities Market. The case is now being tried *de novo*.

*iii Rentpool BV v. Podyemnye Tekhnologii LLC*⁴

The issue before the courts was whether a foreign judgment can be enforced in Russia on the basis of international comity only, and in the absence of an international treaty specifically providing for that. The Arbitrazh Procedure Code of Russia does not mention comity or international reciprocity as grounds for granting *exequatur* in Russia, and in 2006, the Arbitrazh Court of Moscow invoked this principle, which at that time

2 Decree of the Supreme Arbitrazh Court No. 57 dated 23 July 2009.

3 Case No. A40-72027/08-48-612, decision of the Arbitrazh Court of Moscow City dated 29 January 2009, partially confirmed by the decree of the Ninth Arbitrazh Appellate Court dated 30 March 2009, confirmed by the decree of the Federal Arbitrazh Court of Moscow Circuit dated 11 June 2009, reversed in full and directed on remand by the decree of the Supreme Arbitrazh Court dated 10 November 2009.

4 Case No. A41-9613/09, decision of the Arbitrazh Court of Moscow Oblast dated 8 June 2009, confirmed by the decree of the Federal Arbitrazh Court of Moscow Circuit dated 29 July 2009, confirmed by the decision of the Supreme Arbitrazh Court dated 07 December 2009).

was not confirmed by higher instances. The issue was revisited in February 2009 in another case before the Federal Arbitrazh Court of Moscow Circuit; the recognition and enforcement of a US judgment was denied because the party seeking such recognition failed to adduce evidence of reciprocity existing in the US.⁵ Finally, in the summer 2009 the same question was addressed with respect to a judgment rendered by a Dutch court. Quite surprisingly, this time the outcome was positive. The courts applied the principles of international comity and reciprocity and recognised the judgment. The Supreme Arbitrazh Court stated that this approach corresponds to international obligations of Russia, *inter alia*, assumed by virtue of Article 6 the European Convention on Human Rights and Fundamental Freedoms.

*iv Smolenskiy Passazh LLC v. Kalinka-Stockmann CJSC*⁶

This decree of the Supreme Arbitrazh Court was long awaited as it was expected to deliver a clarification on arbitrability of disputes over real estate in Russia. The arbitration was connected with the extension of a lease contract covering the lease of commercial premises in the centre of Moscow. The arbitration agreement in the contract provided for arbitration in the MKAS. The landlord, having lost the arbitration before the MKAS, petitioned the local courts seeking annulment of the award. The three courts of lower instance set aside the award, with the reasoning that the subject matter of the arbitration – rights of lease over immoveable property – could not be referred to arbitration.

The preliminary judgment of the Supreme Arbitrazh Court, granting the petition to review the lower courts' judgments, contained a detailed analysis of the problem of arbitrability of real estate disputes. The judges made the conclusion that there are no provisions in Russian law that preclude such disputes from being arbitrated. However, after the case passed the Presidium, the outcome turned out to be disappointing. The court in its final decision did not consider the issue of arbitrability of disputes over real estate at all. Instead, the judges were concerned only with the scope of the arbitration agreement. It was a standard MKAS arbitration agreement covering '[a]ny dispute, controversy or claim which may arise out of or in connection with the present contract, etc'. In the opinion of the court, this wording does not include the extension of the contract, and therefore the arbitrators exceeded their powers by ruling that the contract shall be extended. This surprising finding should now be taken into account by everyone who wishes to enter into arbitration agreement in respect of any Russia-related dispute. At the same time, quite regrettably, the question whether disputes over real estate can be arbitrated in Russia is still far from being clarified

5 See decree of the Federal Arbitrazh Court of Moscow Circuit, dated 17 February 2009 in case No. A40-7480/08-68-127.

6 Case No. A40-28757/08-25-228, decision of the Arbitrazh Court of Moscow City dated 14 August 2008, confirmed by the decree of the Federal Arbitrazh Court of Moscow Circuit, dated 13 October 2008, confirmed by the decree of the Supreme Arbitrazh Court, dated 19 May 2009.

III PRACTICE AND PROCEDURE

i Overview of court procedure

According to the dual system of courts in Russia (courts of general jurisdiction and arbitrazh courts), procedure is regulated by two codes: the Civil Procedure Code, effective since February 2003, and the Arbitrazh Procedure Code in effect since September 2002. The rules of both codes have been interpreted by the highest courts with respect to a number of subjects such as preparation to a hearing (in 2006), granting injunctive relief (in 2004 and 2006), retrial owing to newly discovered circumstances (2007), proceedings in appellate instance (2009), etc.

The courts are usually not very flexible in application of the vast majority of procedural rules; as such, the rules themselves do not provide for a broad interpretation. This approach, however, is now moving towards a more liberal one. For example, it has become the recent practice that once a party to litigation becomes aware of the dispute, it is supposed to keep an eye on any further developments in its case by means of the official site of the arbitrazh court. Thus, the delivery of notifications through regular post is no longer necessary. However, this progressive approach is not admitted in all regions.

One of the most remarkable features of commercial litigation in Russia is its time frame. The trial court shall finish consideration of the case in three months from the date of filing a claim. The decision enters into force one month after it was delivered. If the decision is appealed, the court of appeal shall consider the petition within one month of its submission. The cassation court (appeal on the decisions that had already entered into force) also has one month to consider the petition. These three instances are usual for a vast majority of cases where a real dispute was involved. In sum, the time one needs to obtain a legally binding judgment is normally from three to six months. The percentage of violation of the terms is relatively small – only 5.9 per cent in 2007, 7.4 per cent in 2008 and 6.6 per cent for the first half of 2009.

ii Class action proceedings

Russian procedural law for a long time did not recognise class actions. But in 2009 the legislation experienced sea changes in that respect. A new chapter was introduced in the Arbitrazh Procedure Code called ‘Consideration of Cases on Protection of Rights and Legitimate Interests of Groups of Entities’ (effective since 21 October 2009). It provides that a legal or natural entity participating in the disputed relationship can bring a claim in protection of other participants of the same relationship. If such a claim is filed, other members of the group can join the proceedings by submission of a simple petition (either individually or collectively).

The new rules provide that class action proceedings can be initiated in corporate disputes, disputes arising out of activity of the security market and in other instances corresponding to the aforementioned criteria.

The important problem which is not addressed by the new regulation is equal distribution of costs of litigation. In the author’s experience, this obstacle is currently barring many potential litigants from bringing a class action.

In addition, in cases where the interests of the public at large are harmed or endangered (e.g., in environmental offences), the state prosecutor can step in with a separate claim for protection of public interests. The same rule is provided in the Law on

the Protection of Consumers' Rights: the rights of consumers at large can be protected by a claim of consumers' associations or municipalities.

iii Representation in proceedings

Russian procedural law does not limit the rights of persons to represent themselves in courts except for criminal and constitutional procedures that have certain peculiarities. A representative in court shall be always a physical person; this follows from a general principle that a legal entity acquires its rights and discharges duties only through its bodies which finally are physical persons (general director, head of management company, etc.). The power of attorney can be issued to a legal entity; in this case the representative in court shall be at the same time a valid representative of that legal entity – by power of attorney or otherwise.

There is one specific exclusion connected with class action proceedings. The person who initiated such proceedings is entitled to represent the whole group without power of attorney, being thus authorised by the mere fact of filing a class action.

iv Enforcement of foreign judgments

Under Russian law, the general principle is that foreign judgments are enforced only when it is directly provided by an international treaty or by a federal law. There are no laws that provide for such enforcement; therefore a party seeking to enforce a foreign court judgment may only have recourse to an appropriate treaty.

The countries that concluded such treaties with the Russian Federation are the following: CIS countries (Belarus, Kazakhstan, Uzbekistan, Tajikistan, Armenia, Georgia, Ukraine, Kyrgyzstan, Moldova, Azerbaijan, Turkmenistan), the Baltic States (Lithuania, Latvia, Estonia), Argentina, Vietnam, Greece, Egypt, Iran, Yemen, Italy, Cyprus, Cuba, Mongolia, Albania, Algeria, Bulgaria, Hungary, Iraq, China, North Korea, Romania, Tunisia, Spain, Poland, the Czech Republic, Slovakia, Bosnia and Herzegovina, Macedonia, Serbia and Montenegro, Slovenia and Croatia.

As is evident from the list, there are a lot of countries not included in the list that are presently, and for a long time have been, major commercial partners of the Russian Federation. Taking this obstacle into account, the courts started to search for other avenues to enforce foreign judgments. One of such successful attempts can be found in a well-known resolution of the Federal Arbitrazh Court of the Moscow Circuit.⁷ The subject of the case was recognition and enforcement of the decision of the High Court of England and Wales for collection of money under a syndicated credit agreement. Although Russia and the UK have no treaties directly providing for such recognition, the court in Moscow decided to recognise and enforce the judgment on the basis of the Partnership and Cooperation Agreement Establishing a Partnership between the European Communities and their Member States, of the One Part, and the Russian Federation, of the Other Part of 24 June 1994. The court found that pursuant to Article 98(1) of the Agreement, the parties granted each other's natural and legal persons access to courts free of discrimination to defend their commercial property. The court

7 Resolution of the Federal Court of Moscow Circuit of March 02, 2006 No. KG-A40/698-06-P.

interpreted this provision in light of Paragraph 1, Article 6, of the Convention for the Protection of Human Rights and Fundamental Freedoms. The court also made reference to the judgment of the ECHR of March 19, 1997 in *Hornsby v. Greece* where the court stated that the execution of a judgment must be regarded as an integral part of the trial. Applying this reasoning, the court affirmed the judgment of the trial court that also recognised the English judgment, but on the basis of the principle of reciprocity. Notably, the cassation instance did not mention this principle, therefore it is far from clear whether the reference to reciprocity was valid or not. Anyway, the recognition was granted, and the mentioned resolution of the Federal Arbitrazh Court of the Moscow District was later upheld by the Supreme Arbitrazh Court.

As discussed *supra*, the principle of reciprocity and international comity, as well as article 6 of the European Convention on Human Rights and Fundamental Freedoms, can now be invoked in Russian courts as the basis for the recognition and enforcement of foreign judgments.

IV OUTLOOK AND CONCLUSIONS

The year 2009 was a hard year for the Russian courts and, indeed, a very dynamic one for litigators. With a 50 per cent increase in the number of filed claims in the first half of 2009, the courts seemed to be doing impossible while trying to produce justice in due course. Despite all the difficulties, the level of Russian arbitrazh courts has increased over the year, which is clearly demonstrated by texts of the rulings.

The legislative organs, at the same time, attempted to introduce brand new concepts and approaches in legislations, which was partially driven by the crisis, and partially by earlier plans that no one wanted to reconsider. As the result, there is much new regulation in Russia which is still to be analysed and adapted on Russian soil. This is a huge task not only for judges, who are supposed to be main interpreters of the new rules, but for other practising lawyers as well. It is pleasing to see that Russia has moved much closer to international standards of commercial litigation.