Arbitration Reform in Russia: Will Russia Become More Arbitration-Friendly?

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Het artikel behandelt de recente wetswijzigingen in de Russische Federatie ten aanzien van arbitrage. Een drietal Russische wetten is ingrijpend gewijzigd: de Wet van 1993 op de internationale handelsarbitrage; het Wetboek van burgerlijke rechtsvordering; en het Wetboek op het *arbitrazh* proces (voor economische geschillen). Voorts is de Wet op de scheidsgerechten (voor nationale – d.w.z. met slechts Russische partijen – private geschilbeslechting) in zijn geheel vervangen door een nieuwe wet.

De recente hervormingen op het gebied van nationale en internationale arbitrage in Rusland worden in het kort besproken. Daarbij komen aan de hand van uitspraken van de Russische (overheids)rechtspraak o.m. de volgende onderwerpen aan de orde: arbitrabiliteit; geldigheid van arbitrageovereenkomsten; de rol van (staats)rechtbanken bij arbitrage; en erkenning en tenuitvoerlegging van buitenlandse arbitrale vonnissen in de Russische Federatie. Tot slot worden enkele conclusies getrokken.

1. Introduction

The Russian arbitration landscape is undergoing significant changes, geared towards fixing multiple problems with domestic arbitration and stimulating development of international commercial arbitration by making Russia more arbitration-friendly.

This article aims to address the most pressing issues connected to the current arbitration reform in Russia. At first, we will briefly describe the historical backdrop of arbitration in Russia. Then we will summarize the main aspects of the ongoing arbitration reforms, their goals and prospects. We will address the central issues of (i) arbitrability; (ii) validity of arbitration agreements; (iii) assistance of state courts in arbitration; and (iv) enforcement of foreign arbitral awards in Russia.

We believe that the new arbitration laws reveal positive intentions of the Russian state. For instance, Russian legislation applicable to international arbitration cases (ICA Law)[2] has expanded its scope and become more aligned with the 1985 UNCITRAL Model Law on International Commercial Arbitration (Model Law).[3] Other novelties concern interpretation of arbitration agreements and assistance to arbitration: the former have secured the presumption of validity and enforceability of arbitration clauses, while the rules on judicial assistance in taking evidence have become more clear and coherent.

At the same time, positive changes have been accompanied by more controversial developments. Tightened grip in the form of governmental approval imposed over Russian arbitral institutions may extend to foreign ones, creating the dichotomy of approved versus non-approved arbitral institutions, having different powers and limitations, thereby creating confusion. This is especially so when dealing with corporate disputes and requests for assistance in collection of evidence. In both cases, approved institutions have significant advantages (discussed below) over *ad hoc* or non-approved arbitral centers.

Another problematic aspect of arbitration in Russia is non-arbitrability. Although the new laws directly provide that all categories of non-arbitrable issues should be listed in Russian federal law, court judgments of the past decade show a constant expansion of non-arbitrable topics. Even though Russia is not a common law jurisdiction, decisions of the highest courts are frequently relied upon, effectively creating the power of precedent.[4] For this reason, we will highlight some of the most interesting and far-reaching decisions of Russian courts, which potentially can have a great impact on an arbitral award (non-arbitrability, validity of arbitration clauses, matters affecting enforcement).

2. Russian Arbitration Landscape

Arbitration in Russia has a long history, going back to the XIV century. Perhaps surprisingly to some, arbitration as a method for dispute resolution existed during the Soviet time: as early as the 1930s, two major Russian arbitration institutions were created, namely the Maritime Arbitration Commission (MAC) and the Foreign Trade Arbitration Commission (the latter, currently known as the International Commercial Arbitration Court, ICAC). The USSR became a member of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) in 1960 and the European Convention on International Commercial Arbitration in 1961. However, due to the fact that

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2 The Law On International Commercial Arbitration, No. 5338-1 of 7 July 1993.

3 Under the amended ICA Law, arbitration is considered international if any place where a substantial part of the obligations should be performed or the place with which the subject-matter of the dispute is most closely connected, is located outside Russia. This was not so under the previous ICA law. Nevertheless, as opposed to the Model Law, ICA Law still does not link the international character of arbitration to the place of arbitration – arbitration seat, as does Article 1.3.b.i of the Model Law.

4 William Pomeranz and Max Gutbrod, The Push for Precedent in Russia's Judicial System, Review of Central and East European Law, Volume 37, Issue 1, 2012, pp. 1-30.

the Soviet economy remained essentially closed to foreign investment, arbitration law did not receive sufficient attention. This has changed after the collapse of the Soviet Union. As of now, Russia is a signatory to more than 80 bilateral investment treaties (BITs), most of them containing arbitration clauses; it is also a signatory to the Washington (ICSID) Convention, which has not yet been ratified by the Russian Parliament. Furthermore, as the legal successor to the USSR, Russia inherited international treaties from the Soviet times, including the New York Convention. After 1991 with the Russian economy liberated, there appeared to be a strong incentive to develop domestic arbitration regulations. As early as 1993, ICA Law referred to above was adopted, closely following the Model Law. In 2002, the Private Arbitral Tribunal Law of the Russian Federation (PAT Law) was passed to regulate domestic arbitration. The issues of recognition and enforcement of arbitral awards are addressed in two Russia's procedural codes: the Commercial Procedure Code[5] and Civil Procedure Code[6] (APK and GPK after their Russian acronyms).

3. Russian Arbitration Reforms Unfolded

3.1 *Background for reforms*

Commercial arbitration is a topic that has been constantly debated amongst Russian lawyers since the middle of the 2000s. In 2013, long awaited ideas for reforms in this area came alive, following the President Vladimir Putin's State of the Nation address, stressing the need to stengthen credibility of arbitral institutions. The first draft law on arbitration was prepared by the Russian Ministry of Justice in 2014. In May 2015, a new bill was introduced to the State Duma (the lower chamber of the Russian parliament). Finally, on 29 December 2015, the Russian President signed two laws:

- The Federal Law on Arbitration (FLA), which superseded PAT Law. It concerns primarily domestic arbitration,[7] and
- The Federal Law on Amending Certain Legislative Acts,[8] that introduced amendments to various laws including ICA Law, APK and GPK.

Despite the existing post-Soviet legislation in this field, some important areas of commercial arbitration remained virtually unregulated. The prime area, in this regard, concerns the approval of arbitration centers (a topic to which we return below). In the past decade, more than 1,000 arbitration centers have spread over the Russian territory, many of which were formed by commercial companies to resolve their own disputes with third parties, the so called "pocket" (*karmanniy*) arbitration institutions.[9] The resulting frequent abuses attracted close attention of the Supreme *Arbitrazh* Court[10] (or VAS after its Russian acronym) and created a negative image of arbitration in Russia in general. In addition to the goal of addressing problems with domestic arbitration, there also has been a state interest in promoting alternative dispute resolution (ADR) and Russia as a forum for ADR.

In the following paragraphs, we will introduce some core topics related to the current arbitration reform in Russia.

3.2 *Approved v. non-approved arbitral institutions*

The goal of bringing domestic arbitral institutions to order has led to significant regulatory innovations found in the newly adopted laws, and ultimately resulted in the increased control of the Russian state over arbitration institutions, both domestic and (to some extent) foreign.

Under FLA, domestic arbitral institutions can be established only by non-profit organizations and must be approved by the Russian Government. This move is designed to ensure the independence and impartiality of arbitrators, lacking in many "pocket" arbitrations. Russian non-approved institutions will be prohibited from administering Russia-seated arbitration or assisting in *ad hoc* arbitration.

Foreign institutions, as a general rule, are not obliged to obtain the requisite approval.[11] However, arbitration having its seat in Russia and administered by a non-approved foreign arbitration institute, will be regarded in Russia as *ad hoc* arbitration with all the resulting consequences. Under the 2015 reforms, such consequences are far reaching. For instance, *ad hoc* tribunals:

- are barred from resolving Russian corporate disputes (*i.e.*, Russia-seated corporate disputes);
- enjoy limited judicial support (e.g. they cannot ask for court assistance in obtaining evidence);
- parties to *ad hoc* arbitration cannot agree on the finality of an award or exclude court intervention in matters of the appointment and challenge of arbitrators.

The introduction of new rules related to registration and approval of arbitration institutions has complicated the existing arbitration fabric in Russia. Not only is arbitration divided between domestic and foreign, but now the division goes through the types of arbitral institutions and their respective powers. Despite the presumption that it should be relatively easy for foreign institutions to receive the required Russian state approval (the only condition is that they have "widely acknowledged international reputati-

5 The Commercial Procedure Code of the Russian Federation, No. 95-FZ of 24 July 2002 (as amended).

6 The Civil Procedure Code of the Russian Federation, No. 138-FZ of 14 November 2002 (as amended).

7 The Federal Law On Arbitration, No. 382-FZ of 29 December 2015.

8 The Federal Law On Amending Certain Legislative Acts of the Russian Federation, No. 409-FZ of 29 December 2015.

9 An example of such an arbitration institution is the Gazprom arbitration court founded in 1993 and having heard over 2,000 cases ever since (www.gazprom.ru/about/arbitral/).

10 It should be noted that VAS was abolished in August 2014 under the Federal Law No. 186-FZ of 28 June 2014 On the Introduction of Amendments into the *Arbitrazh* Procedural Code of the Russian Federation, with effect as of 6 August 2014. VAS was the highest court in economic and commercial matters. As of August 2014, the Supreme Court of the Russian Federation hears cases that were previously within VAS's jurisdiction. 'Arbitrazh court' has nothing to do with arbitration, but stems from the former Soviet system of *Gosarbitrazh* (State *arbitrazh* – a system of state *arbitrazh* institutions for the settlement of disputes between state-owned enterprises).

11 Some experts voice their concerns over the provisions of FLA (Article 52(13)), under which arbitration institutions having no approvals, will be prohibited from administering arbitrations as from 1 November 2017. As long as the law does not make a distinction between foreign and domestic institutions in the respective provisions, risks associated with non-enforcement of awards rendered by non-approved institutions after 1 November 2017 will persist.

on"), it remains unclear what their reaction to the new rules will be. We find it hard to imagine that many reputable international arbitration centers will decide to apply for the approval, seeing in it potential risks for their independence and credibility. Parties drafting arbitration agreements, therefore, need to exercise particular care when choosing an arbitration institution in Russia, considering the subject matter in dispute, evidence base and other relevant factors.

3.3 *Issues of arbitrability: more clarity?*

When considering the arbitration system of a country, it is crucial to understand which issues can be referred to arbitration and which are reserved for state courts only. For a long time, there was no clarity on the matter of arbitrability in Russia, causing uncertainty and ultimately harming the investment climate. Whereas certain kinds of cases were explicitly reserved for state courts in the applicable laws, other categories of non-arbitrable disputes had been "discovered" by Russian courts.

- Real estate disputes
  Until recently Russian courts treated real estate disputes as non-arbitrable for interfering with the state prerogative of land registration. However, the Russian Constitutional Court decided differently in 2011, concluding that disputes over the registered rights to immovable property could be subject to arbitration (*Resolution No.10-П of 26 May 2011*). However, in the decision of 11 February 2014, VAS ruled that disputes arising out of agreements for the lease of forest land plots could not be resolved by arbitration, primarily due to the special aim they serve, namely ensuring rational, permanent and sustainable forestry in order to satisfy the public demand for forest and forest resources (*Forest Group LLC v. Ministry of Ecology of Karelia, No. 11059/13*).
- Concession disputes
  In the case of *Nevskaya Concession Company v. City of Saint Petersburg*, the Russian Supreme Court held that while disputes arising out of concession contracts[12] were arbitrable, they could only be submitted to a Russian arbitral tribunal (*Ruling No. 307-ЭС16-3267 of 4 May 2016*). According to the court, that requires the tribunal to apply arbitration rules adopted by a Russian institution, while proceedings must be conducted under the auspices of a Russian arbitral institution (or, in a case of *ad hoc* arbitration, the appointment authority must be a Russian entity). Furthermore, the arbitration seat must be in Russia.
  The need to satisfy such requirements may harm projects involving financing of infrastructure projects by international investors, as they – as a rule – require a settlement of dispute mechanism outside the home country of the investment.
- Disputes with a public element
  A separate stream of cases dealing with the issue of arbitrability are public-related disputes, that is disputes involving a public element or interest. Although having no clear reference to the law, in 2014 VAS held that parties to a contract concluded pursuant to a public procurement scheme are not entitled could not agree on ADR (*Decision in ArbatStroy LLC v. Public Establishment of the Moscow Health Department, No. 11535/13 of 28 January 2014*). Since then, disputes related to the provision of services for state and municipal needs have been reserved for state court litigation. However, no unified jurisprudence has been formed with regard to the more general question whether disputes with state-owned entities can be decided by arbitration. For instance, in the Supreme Court case of the state owned *JSC Federal Grid Company v. CJSC Limb* the argument of public interest remained futile (*Ruling No. 307-ЭС15-16697 of 4 February 2016*). To the contrary, in another Supreme Court case of *Kazan Federal University v. Fifth Element LLC*, the court refused leave for enforcement noting the predominantly public law character of the legal relationship in dispute (*Ruling No. 306-ЭС15-15685 of 9 February 2016*).
  Considerations of public interest and the need to protect third parties attracted attention in a recent dispute involving a bank under the procedure of restructuring (*sanatsiia*) imposed by the Central Bank of the Russian Federation and administered by the state funded corporation, the Agency of Insurance of Deposits. The Supreme Court held that the initiation of the bankruptcy-prevention mechanism under the supervision of the Central Bank amounted to public engagement with private-sector credit relations, having among its purposes protection of individual bank depositors (*Decision in National Bank Trust v. Phosint Limited, No. 305-ЭС16-4051 of 16 August 2016*). Under such circumstances, a dispute challenging the purchase by the bank of promissory notes in the amount of USD 70 ml was held non-arbitrable, despite the arbitration clause contained in the purchase agreement.
- Corporate disputes
  Since 2012, corporate disputes concerning Russian companies were regarded non-arbitrable (*Ruling of VAS in Novolipetsky Metallurgicheskiy Kombinat v. Maksimov, No. ВАС-15384/11 of 30 January 2012*).[13] As a result of the 2015 arbitration reforms, most types of corporate disputes have become arbitrable. However, such disputes can only be administered by approved arbitral insti-

12 Contracts concluded pursuant to the Federal Law On Concession Agreements, No. 115-FZ of 21 July 2005. Such contracts – concluded between a state or municipal body and a private sector party – usually provide for construction, capital repair and use of roads, sea ports, hospitals and other socially significant facilities, whereby the state or municipality makes available the object and the private party is responsible for the construction or renovation, financing, operation, and maintenance of the infrastructure during the concession agreement.

13 *See* decision of the District Court of Amsterdam of 17 November 2011 (ECLI:NL:RBAMS:2011:BV5646), in which the Court refused leave for enforcement, as the arbitral award had been annulled by a Russian court in the cited case; cf. also, the decision of the Paris Tribunal de Grande Instance of 11 June 2012, in which the leave for enforcement was granted to the same award in the same matter in spite of the annulment of the arbitral award by a Russian court.

tutions. Another requirement is that such institutions need to adopt and publish special rules on the resolution of corporate disputes.[14]

The continuously expanding list of non-arbitrable disputes does not fit the official pro-arbitration policy. This was one of the reasons why the amended APK now states that all non-arbitrability instances need to be clearly prescribed by a federal law. For example, the following disputes are explicitly reserved for state courts under APK: privatization, insolvency, administrative and environmental damage cases, as well as cases related to contracts serving state and municipal needs. Unlike in the past, the new arbitration laws provide for the arbitrability of the majority of corporate disputes – a move generally welcomed by the business community (as one could expect in such situation).

An exhaustive list of non-arbitrable disputes represents a positive development in the interests of clarity and predictability. As can be expected, with any legislative reform, a lot will depend on the way judges interpret exceptions to the arbitrability rule. The greatest uncertainty comes from the public-interest rhetoric in defining arbitrability outlines. Purely commercial disputes with state owned enterprises should not fall under the arbitrability exceptions. While the extension of ADR to cover corporate disputes is welcomed by the business community as a move supporting foreign investment, either in the form of acquisitions (for instance resulting from a share purchase agreement) or joint ventures (for instance resulting from a shareholders' agreement). At the same time, there are plenty of unresolved issues when it comes to arbitration of corporate disputes. For instance, as the majority of Russian corporate disputes by operation of law fall under Russian *lex arbitri*, foreign arbitral institutions prepared to deal with such disputes will need to get through the approval procedure described above and adopt special procedural rules for resolving corporate disputes. In absence of those, arbitral awards will be equated to *ad hoc* awards and face likely unenforceability in Russia.

4. Arbitration Agreements: Pro-Arbitration Developments in Russia

It is hard to overestimate the importance of an arbitration agreement in international arbitration, as it establishes the consent of parties to be bound by arbitration. Ultimately, it is the goal of an arbitration agreement to establish such consent, revealing the will of the parties. However, from the wording of an arbitration clause or owing to other considerations, it is not always easy or even possible to reveal the parties' true intentions. In these situations, finding the right outcome becomes a major challenge for arbitrators (and judges where they might be involved in judicial consideration of an arbitral award).

In the *LLC Construction Company Pokrov v. JSC Techbau S.p.A.* case, the Moscow Circuit Arbitrazh Court considered the following arbitration clause (originally in the Russian language): "the dispute shall be resolved by an arbitration (*arbitrazhniy*) court by three arbitrators, that will be situated in Moscow. Arbitration will be held in International Chamber of Commerce in Paris in English." The court held that this wording did not allow it to conclude that the parties intended their disputes be referred to the ICC in Paris (*Decision No. Ф05-16417/2014 of 11 November 2015*). This seemed to be a rather formalistic approach, as the court did not discuss the parties' intentions in its decision or apply any available techniques to interpret the arbitration clause.

At first glance, the 2015 arbitration reforms appear to be grounded in a pro-arbitration approach in interpreting arbitration agreements, as the new law explicitly states that "when interpreting an arbitration agreement, any doubt must be construed in favor of its validity and enforceability."[15] However, the above case serves as a useful reminder that parties should strive to ensure the maximum clarity, when agreeing upon an arbitration clause, especially when translating it into foreign languages.

Two additional considerations that, undoubtedly, while be of value when signing arbitration agreements with Russian *situs* are as follows.

- Power of attorney
  In the case of *Izhvodokanal v. LLC Management Company Expert*, the Supreme Court of the Russian Federation gave a broad interpretation to provisions of APK, concluding that the power to sign an arbitration agreement needed to be expressly set forth in the power of attorney (POA), making a general POA to sign the agreement itself insufficient (*Decision No. 309-ЭС15-12928 of 29 February 2016*). The clear dangers of such a rigid interpretation could, theoretically, be mitigated by the application of the doctrine of *estoppel*. If a party participates in arbitration proceedings and objects to them only at the enforcement stage, a strong argument could be made that these actions constitute an abuse of rights. This is what happened in the *Izhvodokanal* case: the court held that prior behavior of a party and objections to arbitration (only) at the enforcement stage indicated signs of an abuse of rights. Nevertheless, specific requirements for signing arbitration agreements may still result in unnecessary obstacles.
- Unilateral (optional) arbitration clauses
  It is worth remembering that unilateral (optional) arbitration clauses, that is clauses giving a choice of venue for dispute resolution to one of the parties only, are considered void by Russian courts (*see Ruling of VAS in Novolipetsky Metallurgicheskiy Kombinat v. Maksimov, No. 305-ЭС16-7033 of 6 July 2016,* as well as *Decision of VAS in ZAO Russian Telephone Company v. Sony Ericsson Mobile Communications Rus LLC, No. 1831/12 of 19 June 2012*. For instance, when one party (e.g. the seller) – un-

14 There are two types of corporate disputes that can be administered under general arbitration rules, namely disputes related to ownership of shares, including disputes from acquisition agreements, and disputes in connection with the activities of share registrars (Article 225.1(1)(2) and Article 225.1(1)(6) APK).

15 Article 7(8) of FLA. We consider the pro-arbitration interpretation of arbitration agreements to apply whenever the arbitral seat is located in Russia.

der the contractual agreement – has a choice between arbitration and litigation, while the other party (e.g. the buyer) can appeal to arbitration only, the latter (under the holdings of these VAS cases) would be able to apply to a competent state court bypassing the terms of the arbitration agreement. To the contrary, arbitration clauses permitting one side to a dispute to choose the desired venue are considered valid, as any of the parties to the arbitration agreement may potentially become a claimant or respondent (*see Ruling of VAS in Piramida LLC v. BOT LLC, No. 310-ЭС14-5919 of 27 May 2015).*

Notwithstanding the peculiarities which we have highlighted above, the 2015 arbitration reforms signify a clear pro-arbitration trend when it comes to interpreting and applying arbitration agreements. E.g., the new arbitration legislation explicitly affirms the presumption of validity and enforceability of an arbitration clause, its survival in case of assignment, the finality of arbitration awards (the possibility for parties to waive their right to file setting aside actions with state courts – not applicable in *ad hoc* arbitration). Such developments should make the ground firmer in Russia for the domestic and international business community to trust and effectively use Russia as an ADR forum. Nevertheless, it is advisable to check an arbitration clause to ensure that its provisions are not self-contradictory, that it correctly names an arbitration institution (if any) and is not one-sided. We also strongly suggest that parties select an arbitration seat, because Russian courts may confuse the place of the arbitration proceedings with the place of arbitration (arbitration seat or *situs*). The theory of an arbitration seat (*mesto arbitrazha*) has not been sufficiently addressed in Russian legislation or court jurisprudence. Whereas the opportunity to choose an arbitration seat is a major advantage of arbitration, one should keep in mind that some kinds of disputes (*i.e.* the majority of Russian corporate disputes) are obligatorily grounded in Russian *situs*.

5. Assistance to Arbitration: Increased Role of Russian State Courts

Although the Russian Constitutional Court has continuously pointed out that arbitration institutions act in the capacity of civil society institutes, endowed with publicly important functions,[16] such institutions do not exercise state (judicial) authority and thus lack coercive, self-enforcement powers. For this reason, arbitration tribunals are not in a position to employ important tools needed for effective dispute resolution, e.g. they cannot enforce evidence disclosure let alone the rendered award itself. Therefore, they require support from local courts. The role of national courts in arbitration – whether active and readily available or passive and reluctant – largely determines whether or not a particular jurisdiction is arbitration-friendly, whether or not it provides for effective ADR.

5.1 *Assistance in taking evidence*

The reformed ICA Law contains a provision on the assistance of state courts in taking evidence that is similar to its previous version.[17] The major difference brought by the 2015 arbitration reforms is to be seen within APK, which was supplemented by Article 74.1, regulating in detail the scope and procedure for state court assistance in matters of taking evidence. While prior to the arbitration reforms court assistance was limited to interim measures and enforcement, now APK aims to provide the institution of arbitration with effective and expeditious ways of gathering evidence located in Russia.

Under the amended APK, an arbitration tribunal adjudicating a Russia-seated arbitration may request assistance in taking evidence from a state (*arbitrazh*) court at the place at which the evidence sought is located. Such a request must indicate the circumstances to be clarified and evidence to be obtained. Importantly, the evidence should fall within one of the following three categories: (1) written documents, (2) physical evidence, or (3) other documents and materials (e.g. photos, videos). The law does not provide for judicial assistance with respect to witness evidence, depositions or on-site inspections (for instance, inspection of a construction site). This limitation may stem from the Russian civil law tradition, relying upon written submissions and still characterized by an inquisitorial process.

The time limit for acting upon a motion for judicial assistance is set at 30 days after the receipt thereof by a competent court. The denial by a court to render assistance is not appealable. Article 74.1 APK states that a court will deny a motion if granting this motion would violate the rights of third parties or would infringe upon commercial, banking or other confidential information protecting the rights of third parties. Most importantly, when considering a motion for assistance to obtain evidence, the court needs to determine whether the motion is made in respect of an arbitrable dispute.

Therefore, the issue of arbitrability is legally determined at the stage of filing the motion for judicial assistance and, in theory has the force of *res judicata*. This may pose a serious threat to participants in arbitration proceedings, depriving them of the valuable checks and controls, which are attributed to the process of appeal. Judicial decisions on recognition and enforcement of arbitral awards – along with those related to set aside proceedings (which *ex officio* address issues of arbitrability), are appealable. Taking into account the above mentioned non-appealable character of a court ruling which denies a motion for judicial assistance, parties will be unable to make use of the regular appeal procedures and contest the decision on (non)-arbitrability.

As follows from the text of Article 74.1 APK, it applies to Russia-seated institutional arbitration. But what if the evidence situated in Russia is needed in arbitration having its seat outside the territory of the Russian Federation or in *ad*

16 *See* Decision of the Constitutional Court of the Russian Federation No. 10-П of 29 May 2011.

17 *See* Article 27 of ICA Law, stating that "an arbitral tribunal in arbitration administered by an approved arbitral institution or a party to such arbitration with the consent of the tribunal may request from a competent court of the Russian Federation assistance in taking evidence."

hoc arbitration, or in Russia-seated arbitration administered by a non-approved arbitral institution? In such cases court assistance may be blocked. This problem is further exacerbated by the absence of effective mechanisms for international cooperation in matters of taking evidence in arbitration: The Hague Evidence Convention,[18] joined by Russia in 2001, will most probably be held inapplicable to requests for judicial assistance issued by arbitral tribunals.

5.2 *Appointing and challenging arbitrators*

Apart from taking evidence, the 2015 reforms strengthened the role of the Russian judiciary vis-à-vis arbitration-related procedural issues: appointing and challenging arbitrators. Before the reforms, if no other agreed method was available in a Russia-seated arbitration, these functions would be performed by the president of the Chamber of Commerce of the Russian Federation. The new legislation empowers the Russian judiciary, in case of a deadlock, to make the necessary appointments. When choosing arbitrators, courts are required to follow the wishes of the parties in terms of an arbitrator's qualifications, and to secure appointment of an impartial and independent tribunal. However, in practice, the appointment procedure may face serious obstacles, since there are no guidelines with regards to such matters as conflict checks, negotiating and approving arbitrators' fees and dealing with other administrative issues, usually handled by arbitral institutions. In addition to the power of appointment, the Russian judiciary now will rule on motions challenging an arbitrator. If an institutional challenge fails, an aggrieved party now has the right to file a motion – with the state courts – challenging an arbitrator within one month from the date of notification on the initial decision rejecting its challenge.

An arbitration agreement may deprive state courts of both the power to appoint arbitrators and consider applications to challenge them. However, this is only possible in arbitration administered by an approved arbitral institution. Parties to *ad hoc* arbitration or Russia-seated arbitration administered by an institution not having received the appropriate approval from the Russian Government cannot exclude state court interventions.

The clear and transparent procedures for judicial assistance in collecting evidence have been designed to contribute to more efficient and predictable results in ADR. Our considered opinion is that these provisions point in the right direction. At the same time, some of the new provisions in the 2015 reforms – dealing with judicial assistance – require utmost care and attention of parties to arbitration. In particular, they should be quite cautious when requesting judicial assistance in disputes, the arbitrability of which may be questioned (e.g. "public-element" disputes). Furthermore, in making a decision to use institutional versus *ad hoc* arbitration, it will be wise to calculate the risks flowing from the limitations imposed by the Russian new arbitration legislation on *ad hoc* arbitration, *inter alia*, impossibility to request judicial assistance in evidence collection.

6. Enforcement of Foreign Arbitral Awards

Enforcement of foreign arbitral awards in Russia is regulated by Chapter 31 APK and Chapter 45 GPK, depending on the parties involved (e.g. legal or natural persons) and the nature and subject matter of the dispute. Recognition itself is not automatic and entails a special enforcement procedure (*exequatur*).

Once a final arbitral award is rendered, a party has a three-year period to apply to a competent Russian court for exequatur (Article 246 APK). This may be a rather short timeframe for Dutch standards (20 years).[19] Under the amended APK (Art. 243), a court has one month (instead of three months, as before) to review an exequatur request.[20] In the event that a Russian court renders a ruling recognizing and enforcing an arbitral award, it issues a writ of execution (*ispolnitelniy list*). This writ must be filed with the Russian Bailiffs Service within three years following the recognition and enforcement ruling. Failure to meet the stated deadlines, *i.e.* 3 years for requesting exequatur and 3 years for filing the writ with Russian bailiffs, may seriously hinder (if not make impossible) the enforcement of an otherwise valid arbitral award. Importantly, if a writ is returned to a party where a judgment debtor has no assets, this party has three years to re-file the writ with the bailiffs; otherwise, it becomes unenforceable.

The issues of recognizing and enforcing foreign arbitral awards is taking on increasing importance since the number of actions for recognition and enforcement is growing year after year. For instance, it was reported that only 437 such cases were adjudicated from 2004 to the first half of 2008.[21] A more recent source reports 179 cases in 2012 and 271 in 2015.[22] This upward trend may reflect the wider inclusion of the Russian economy into international commerce and trade and strengthened trust in the Russian legal system. The statistics, however, do not reveal the number of granted motions for recognition and enforcement. Our own analysis for the period covering 2012 to 2016 shows the number of motions granted to be above 80%. While this is an impressive number, awards that were not recognized or enforced surely will be revealing.

18 The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, The Hague on 18 March 1970.

19 Article 3:324 of the Civil Code of The Netherlands.

20 When a request for enforcement is filed with the competent court, it will normally satisfy such a request, provided the award was rendered in a country that is a party to the New York Convention and if it meets the requirements of the said Convention. Arbitral awards that have been rendered in states that are not parties to the New York Convention, are enforceable in Russia on the basis of a bilateral treaty providing for mutual recognition and enforcement or on the basis of the principles of reciprocity and comity.

21 Roman Khodykin, Arbitration Law of Russia: Practice and Procedure, Juris-Net, USA 2013, p. 168.

22 The figures for 2012 and 2015 also include cases for recognition and enforcement of foreign judgments, which are relatively small in number. The statistics come from the Supreme *Arbitrazh* Court of the Russian Federation and the Judicial Department at the Supreme Court of the Russian Federation.

6.1 ***Public policy***

One of the hotly debated grounds for refusing the recognition or enforcement of a foreign arbitral award is the argument that an award contradicts Russia's public policy. It was because Russian courts applied this ground not infrequently in the past that, in 2013, VAS issued guidelines[23] limiting application of the public policy exception. Since then, there has been a decrease in the number of cases in which the public policy doctrine was successfully relied on. The VAS guidelines proceed from the premise that refusal of recognition and enforcement of a foreign arbitral award on the ground of public policy only should be allowed in exceptional cases; that public policy order should not serve as substitution for other more specific grounds for denying a motion for recognition and enforcement; that the absence of legal concepts in Russia which are known in foreign jurisdictions (e.g. liquidated damages) should not serve as a ground for refusing recognition and enforcement on public policy grounds.

6.2 ***Impartiality and independence***

As we have already noted in this work, the driving force of the 2015 Russian arbitration reforms is the desire to heighten the impartiality and independence of domestic arbitral tribunals. However, foreign arbitration institutions were also affected. In the case of *Rietumu Banka* (Ruling of VAS, No. 305-ЭС16-3881 of 17 May 2016), the Russian courts refused to recognize and enforce an award rendered in arbitration proceedings administered by the Court of Arbitration of the Association of Latvian Commercial Banks. The enforcement court's grounds for dismissing the action was the fact that Rietumu Banka (the claimant) was a member of said Association, while the claimant's chairperson held a seat on the Association's Council (governing body). The president of the Association, who in this case acted as the appointing body, had been elected by the Association's members, including Rietumu Banka. This link, grounded in the sole fact of the claimant's membership in the Association, was sufficient for Russian courts to cast doubts upon the impartiality of the appointed arbitrator and to refuse to recognize and enforce the award.

6.3 ***Surprise doctrine***

A discussion of developments in the application of the public policy doctrine in Russia will not be complete without a mention of the "surprise doctrine" – recently addressed by Russian courts. It is the reliance by arbitral tribunals on facts or arguments not presented by or discussed with parties ("surprise decisions") prior to or, at least, during the arbitration proceedings. In the case of *ZAO Strabag* (*Decision of the Povolzhskiy Circuit Arbitrazh Court in case No. A57-22646/2015, of 9 March 2016*) the court held that the arbitral tribunal had relied upon legal provisions and arguments which differed from those cited (put forward) by the parties. Thus, the tribunal's award was found to be in violation of the principle of equality of arms, being at the core of Russia's public policy. The negative attitude of Russian courts to surprise decisions, also expressed in a few other cases over the last several years, should motivate the parties to always include all possible arguments (even those in the alternative) and all relevant facts in their written submissions and, also, forward during the arbitration proceedings.

6.4 ***Russian torpedo***

Another procedural matter which can affect the recognition and enforcement of a foreign arbitral award is the so-called "Russian torpedo". This denotes the tactic of challenging the underlying transaction in Russian state courts (frequently on corporate grounds, e.g. lack of shareholders' approval), while arguing the case in parallel arbitration proceedings. For instance, in *Rosgazifikatsia case* (*Ruling of VAS, No. 305-ЭС16-1939 of 11 April 2016*), VAS refused to enforce an award of the Arbitration Institute of the Stockholm Chamber of Commerce, which relied on the agreement, subsequently invalidated by a Russian state court. The enforcement court held that enforcement of the arbitral award would create a situation in which there were two contradictory judgments with equal legal force. The dangers of "Russian torpedo" may, however, be overestimated. In *Grasilis Holding BV* (*Decision of the 9th Apellate Court in case No. A40-176458/2015 of 18 March 2016*), the court refused to hear an action brought by the shareholders of a party to arbitration, reasoning that the shareholders only stand in place of the company itself; as long as the company is bound by an arbitration agreement, so are the shareholders. This seems justifiable to us, considering the considerable transaction costs growing out of parallel proceedings and the chances of two contradictory decisions being rendered in different jurisdictions.

As a result of the 2015 forms, Russian arbitration law has become more sophisticated, which is exemplified by the delineation between approved and non-approved arbitral institutions, and also, by the possibility to refer certain corporate disputed to arbitration. It is quite likely, therefore, that the recognition and enforcement of foreign arbitral awards likewise will become more complicated – remaining in the spotlight for years to come.

7. Conclusions

As in a number of other jurisdictions, Russia has updated its arbitration law with a view to making it more arbitration friendly, seeking to meet the expectations from the international community, and bringing its rules in accordance with domestic case law. The new arbitration framework seems to be more suitable and sufficiently flexible for effective functioning of the commercial arbitration regime in Russia.

Among positive changes introduced by the reform, one can mention expansion of disputes deemed to be arbitrable, most importantly corporate disputes. Legal certainty, crucial for creating and sustaining investment-friendly climate, is a key component of these reforms seen in the fact that under the new legislation, all exceptions to the arbitrability rule need to be enumerated in a federal law. Pro-arbitration

23 Information Letter No. 156 of 26 February 2013 of the Presidium of the Supreme *Arbitrazh* Court of the Russian Federation.

developments also come to light in the area of interpretation and application of arbitration agreements. For instance, the reforms provide for the presumption of validity and enforceability of an arbitration clause, its survival in case of assignment, and the finality of arbitration awards (if agreed by the parties). Other business-friendly developments are evident in the area of state support in taking evidence, which is now framed into clear and expedient set of rules.

At the same time, these Russian arbitration reforms have been accompanied by the division of arbitral institutions into two categories: approved and non-approved institutions. Depending on the status of an arbitral institution, the scope of rights and limitations imposed on such institutions – and the parties to arbitration proceedings administered by them – can vary. Although the procedure for obtaining approvals from the Russian Government does not appear to be burdensome, it is uncertain whether prominent foreign arbitration centers will be willing to go through it.

The success of the 2015 Russian arbitration reforms will, ultimately, depend on the application of new rules on the ground. One can expect that the genuinely cautious attitude of state courts to arbitration will persist for some time in the future. However, our view is that, eventually, the pro-arbitration mood will prevail among Russian judiciary.