

An ICC Arbitration Clause Found Unenforceable in Russia: Potential Risks and Drafting Considerations

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A Judge of the Supreme Court of the Russian Federation (the “Supreme Court”) has recently upheld decisions of the lower courts refusing to enforce an ICC award on the ground that, *inter alia*, the underlying ICC arbitration clause did not constitute an enforceable agreement to submit a dispute to arbitration under the ICC Rules (Case No. A40-176466/17).¹ According to the Supreme Court’s Judge, reference to the “Rules of Arbitration of the International Chamber of Commerce” in the language of the arbitration clause—without reference to the “ICC International Court of Arbitration” itself—was ambiguous and did not evince the parties’ consent as regards a specific institution to resolve their dispute. The Russian courts found that the arbitration clause did not meet the principles of “*certainty and enforceability*”, and the ICC International Court of Arbitration therefore had no jurisdiction over the dispute.

**Debevoise
& Plimpton**

The President of the ICC, Alexis Mourre, sent a letter to the Supreme Court expressing serious concerns over the approach the Russian courts had taken with respect to what on the face of it appeared to be a standard ICC clause² and asking the Chairman of the Court to clarify the position. It is unclear if the Supreme Court will engage with the ICC’s request, and whether such engagement will become public. We understand that neither the ICC nor the Supreme Court has so far responded to requests for comments from the press.

In any event, a finding of the Russian courts that an ICC clause is unenforceable in Russia simply for failure to specify the exact name of the arbitral institution—endorsed by all instances of Russia’s judiciary—is significant, and it may have consequences for enforcement of arbitration agreements and awards in Russia. Indeed, given the prevalence of the ICC arbitration clauses in contracts with Russian parties, the effect of the ruling could be widely felt.

¹ The case docket is available in Russian at: <http://kad.arbitr.ru/Card/e14833d5-67ca-48a9-adff-78c46640dabe>.

² Anna Zanina, Andrey Rayskiy (14 November 2018). Justice Does Not Cross Borders. *Kommersant* newspaper. The article in Russian is available at: <https://www.kommersant.ru/doc/3798973>.

Notably, the ICC has recently modified its standard arbitration clause recommending that, for arbitration agreements with a Russian or Chinese seat, the arbitration clause should explicitly refer to disputes being submitted “to the International Court of Arbitration of the International Chamber of Commerce and shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules”.³

Below we discuss the case and its potential implications. We also consider some of the steps the parties may consider taking in order to mitigate the risk of non-enforcement of their current or future arbitration agreements in Russia.

Background. The underlying dispute concerned a contract between a Luxembourg-based Dredging and Maritime Management SA (“Claimant”) and a Russian construction company JSC “Inzhtransstroy” (“Respondent”). The contract provided for arbitration in Geneva, Switzerland, and contained an ICC arbitration clause in the following terms: “any disputes which have not been amicably settled shall be finally settled in international arbitration proceedings. Unless the parties agree otherwise, disputes shall be finally settled in accordance with the Rules of Arbitration of the International Chamber of Commerce”.

A dispute arose over Inzhtransstroy’s performance of the contract, and Claimant brought ICC proceedings seeking damages. On 15 September 2014, a tribunal chaired by Christophe Imhoos awarded Claimant EUR 3.6 million plus interest.

On 21 September 2017, Claimant filed an application with the Moscow *Arbitrazh* (Commercial) Court (first instance court) to recognize and enforce the award in Russia. On 8 February 2018, the Court denied the application, on two independent bases:

- *First*, the enforcement of the award would be contrary to Russian public policy. Respondent had been subject to bankruptcy proceedings in Russia and in September 2017 reached a settlement with its creditors (excluding, among others, Claimant). According to the Court, it would be prejudicial to the rights of settlement creditors if the award were enforced; in addition, the enforcement would “creat[e] a threat” of deterioration of the debtor’s financial conditions and, potentially, may lead to the debtor “ceasing to exist”.
- *Second*, the ICC International Court of Arbitration lacked jurisdiction over the dispute because there was insufficient evidence of the parties’ intention to submit their dispute to that body. This update focuses on the second ground.

The Court first explained that “an enforceable arbitration agreement” is one where the parties “determined a particular place for resolution of their dispute with a particular name

³ See <https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/>.

of the institution entrusted with the resolution of the dispute”. The Court emphasized that “the parties must in as clear terms as possible set out identifying characteristics of such an institution” and that “setting out the name of the institution in a “broad” sense is unacceptable.” Applying these criteria to the arbitration clause before it, the Court found that there was no enforceable arbitration agreement. According to the Court, reference to the ICC Rules “in and of itself” did not constitute an agreement of the parties to submit their dispute to “a specific arbitration court”.

The Court’s ruling⁴ was upheld on appeal by the *Arbitrazh* (Commercial) Court for the Moscow District⁵ and by a Judge of the Supreme Court,⁶ who refused to transfer the cassation appeal for review by a panel of judges of the Economic Division of the Supreme Court. Neither the appeal court nor the Supreme Court appears to have engaged in substantive analysis of the issue of enforceability of the arbitration clause, largely restating the views expressed by the first instance court. The Judge added, however, that the arbitration clause in question did not meet the principles of “certainty and enforceability”. The Judge did not elaborate on or otherwise explain this last point. On 19 November 2018, Claimant filed an appeal against the Judge’s refusal to transfer the case for review by the Economic Division of the Supreme Court.⁷

Analysis and implications. A finding of the Moscow *Arbitrazh* (Commercial) Court—arguably the most experienced commercial court in Russia—that an ICC clause is unenforceable on the mere basis that it did not include an explicit reference to the institution, and the Supreme Court’s Judge’s endorsement of the same, is surprising for the following reasons.

First of all, the conclusion in this case is difficult to reconcile with the fact that the ICC Rules specifically refer to the International Court of Arbitration as the body that “administers the resolution of disputes by arbitral tribunals” (Article 1). No other body or institution may or would be able to, as a practical matter, administer disputes under the ICC Rules. The courts appear to have given no regard to that fact or to the language of

⁴ Decision of the Moscow *Arbitrazh* (Commercial) Court, dated 8 February 2018, in case No. A40-176466/17.

⁵ Resolution of the Moscow District *Arbitrazh* (Commercial) Court, dated 25 April 2018, in case No. A40-176466/17.

⁶ Ruling of the Supreme Court of the Russian Federation No. 305-ES18-11934, dated 26 September 2018, in case No. A40-176466/17.

⁷ The Supreme Court Judge’s refusal to transfer a case for review by the Economic Division of the Supreme Court may be overruled by the Chairman or Deputy Chairman of the Supreme Court, and the case may then be sent for a panel review to the Supreme Court’s Economic Division (Article 291.6(8) of the *Arbitrazh* (Commercial) Procedure Code of the Russian Federation).

the ICC Rules.⁸ This is despite the clear statutory direction that any doubts over validity and enforceability of agreements shall be resolved in favour of upholding them.⁹

Second, the courts' approach appears to be inconsistent with the Russian courts' earlier practice with respect to interpretation of ICC arbitration clauses. In July 2013, the Supreme *Arbitrazh* (Commercial) Court, the highest judicial instance for resolution of commercial cases at the time, held that a mere reference to the ICC Rules was sufficient to evidence the parties' intention to submit their dispute to arbitration under the ICC Rules.¹⁰ After a fairly detailed consideration of the ICC Rules, the Court concluded unequivocally in that earlier case that the clause was valid and enforceable under Russian law.

Third, the courts' approach appears to be inconsistent with the Supreme Court's subsequent position in its December 2018 review of court practice relating to arbitration.¹¹ In that review, the Supreme Court confirmed that "*arbitration clauses which comport with the arbitration clause recommended by the arbitral institution itself agreed by the parties are enforceable*" and reaffirmed the principle that any doubts over validity and enforceability of agreements shall be resolved in favour of upholding them.¹² The Supreme Court's review made no reference to the decision at hand refusing the enforcement of the ICC award. It discussed instead a decision from a different judicial district in which a court enforced an ICC clause despite the fact that it did not refer to the ICC International Court of Arbitration.¹³ Notably, the Supreme Court's review of court practice was considered and approved by the Presidium of Supreme Court, comprising 13 judges of the Supreme Court, including the Chairman, whereas a decision in a Case No. A40-176466/17 not to transfer the case for further review was made by a single Judge of the Supreme Court.

The conclusion in that case may nevertheless raise concerns over enforceability of ICC arbitration clauses in Russia and, potentially, other standard arbitration clauses lacking

⁸ It is not clear from the text of the court rulings whether the Russian courts were provided with a copy of the ICC Rules. However, given the fact that the first instance court specifically referred to information regarding ICC Model Clauses on the Institution's official website, it is reasonable to assume that it had access to and could easily review the text of the ICC Rules.

⁹ Article 7, Part 8, of Federal Law No. 382-FZ on Arbitration dated 29 December 2015.

¹⁰ Resolution of the Presidium of the Supreme Arbitrazh (Commercial) Court of the Russian Federation No. 2572/13 dated 16 July 2013 in case No. A 27-7409/2011.

¹¹ While not legally binding, such reviews are highly authoritative. The views expressed therein are typically followed by lower courts.

¹² "Review of the practice of considering court cases relating to fulfillment of the functions of assistance [with respect to] and control over arbitration courts and international commercial arbitrations", approved by the Presidium of the Supreme Court of the Russian Federation on 26 December 2018, pp. 9-11.

¹³ The Supreme Court's review states that the relevant section was prepared on the basis of materials from the court practice of the Federal *Arbitrazh* (Commercial) Court of the West Siberian district.

express reference to a specific arbitral institution. Indeed, the LCIA, SCC and VIAC model arbitration clauses appear to be similarly vulnerable to the risk of non-enforcement in Russia as none contains a specific reference to the relevant arbitral institution.¹⁴ This will therefore come as an unwelcome surprise to arbitral institutions. Often it is precisely to avoid the risk of unexpected interpretations and enforcement difficulties that standard arbitration clauses are recommended. Carefully drafted to ensure that they are universally understood and consistently enforced across a variety of jurisdictions, they represent a tried-and-tested means of agreeing to resolve the parties' disputes by arbitration in accordance with respective institutional rules.

The courts' approach in this case may also be of consequence to *ad hoc* arbitrations. Given the first instance court's unqualified statement that an enforceable clause should include "a particular name of the institution entrusted with the resolution of the dispute", there is some risk that this *dictum* may be seized upon by recalcitrant award debtors to challenge all awards issued by *ad hoc* tribunals including UNCITRAL tribunals. *Ad hoc* clauses typically do not designate any institution to administer disputes.

While the lower courts' finding and the Supreme Court Judge's decision not to transfer the case for review by a panel of judges of the Supreme Court's Economic Division are not binding on Russian courts, and may ultimately be overruled, they nonetheless may influence the way some Russian judges would approach the interpretation of arbitration agreements with similar language in future. The fact that the Supreme Court's review of court practice makes no reference to the decision refusing to enforce an ICC clause and endorses the view that such clauses should be enforced—despite the lack of express reference to a specific arbitral institution—may give some comfort to foreign litigants. For the time being, however, while the decision stands, parties seeking to resist enforcement of foreign arbitral awards in Russia or attack their validity in set-aside proceedings for lack of consent to arbitrate (for arbitrations seated in Russia) may have more ammunition to do so.

Recommendations. It is perhaps too early to speculate on the exact consequences of the approach taken by the Russian courts to the interpretation of an ICC clause in this recent case. As noted, the decision is not binding and may ultimately be overruled. Moreover, the Supreme Court appears to have declined to adopt that approach in its most recent review of the court practice relating to arbitration.

¹⁴ Unlike model arbitration clauses of certain other arbitral institutions, HKIAC model arbitration clause, for example, refers to "arbitration administered by the Hong Kong International Arbitration Centre" (<http://www.hkiac.org/arbitration/model-clauses>). Similarly, SIAC model arbitration clause refers to "arbitration administered by the Singapore International Arbitration Centre" (<http://www.siac.org.sg/model-clauses/siac-model-clause>).

However, insofar as the enforcement risk remains, businesses may wish to explore the ways in which to mitigate it. Existing arbitration clauses that do not refer to a specific arbitral institution may need to be revised, to confirm and clarify the parties' intention to submit their disputes to the arbitral institution envisaged by the rules. Agreeing on a formal amendment may be advisable. Where impractical, the parties may consider a simple exchange of emails to confirm their understanding.

With respect to future contracts where enforcement in Russia is a possibility, the byword for drafting arbitration clauses for the time being is caution. The parties must exercise utmost care in ensuring that all necessary details regarding their preferred dispute resolution option is fully and clearly spelled out in the arbitration agreement. As noted above, the ICC has recently recommended that, for arbitration agreements with a Russian or Chinese seat, the arbitration clause should explicitly refer to disputes being submitted "*to the International Court of Arbitration of the International Chamber of Commerce and shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules*".¹⁵

Finally, when it comes to enforcing arbitration agreements or the awards stemming from such agreements, in Russia, one lesson from that recent decision of the Russian courts might be to not readily assume particular experience or expertise on the part of the Russian judges in matters of arbitration law and practice. What may seem axiomatic to seasoned arbitration practitioners, such as the fact that arbitrations under the ICC Rules can only be administered by the ICC International Court of Arbitration, may be less obvious, or unknown, to members of the Russian judiciary. Steps may need to be taken to properly contextualize and fully develop any such issues, to ensure that they are properly understood and considered by the judges dealing with enforcement matters.

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Please do not hesitate to contact us with any questions.

¹⁵ See <https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/>.

LONDON



Wendy J. Miles QC
wjmiles@debevoise.com



Samantha J. Rowe
sjrowe@debevoise.com



Patrick Taylor
ptaylor@debevoise.com



Maxim Osadchiy
mosadchi@debevoise.com

MOSCOW



Evgeny Samoylov
esamoylov@debevoise.com



Olga S. Nesterova
osnesterova@debevoise.com

NEW YORK



Mark W. Friedman
mwfriedman@debevoise.com