The Russian Supreme Court's first ever Plenum Resolution on Arbitration

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A cura di:

In December 2019 the Russian Supreme Court issued its first ever Plenum Resolution on Arbitration (Resolution). A Supreme Court Plenum Resolution is a court act of the highest level, is binding for lower state courts and usually serves as a “bible” for judges dealing with the relevant topic.

The Resolution covers many issues regarding arbitration that have been previously discussed by courts of various levels. The Supreme Court has systematized and sustained the key approaches to arbitration developed during the past 25 years, but has not touched upon the majority of issues raised by the recent arbitration reform in Russia.

The Supreme Court continues and strengthens the pro-arbitration approach presented a year ago in its review of court practice. Importantly, the Resolution was drafted by the Supreme Court task force transparently, with the participation of the Russian arbitration community. According to the drafters, it is purported to send a message to Russian state courts to soften their attitude towards arbitration in general and to arbitration institutions accredited by the Russian Ministry of Justice in particular. Read more here.

Key takeaways:

1. The Supreme Court stated that civil relations are arbitrable by default. Exceptions should be directly provided for in the law. On the contrary, as a common rule, public relations are not arbitrable.

   Although this concept is clear, a question arises as to what happens when it comes to civil relations involving a certain public element. For example, Russian state courts pay specific attention to the use of public (state) funds in civil contracts. A recent decision of the Supreme Court is noteworthy here. The provision of public (state) funds two (corporate and contractual) levels above a specific civil contract were considered by the Supreme Court as a public element in that civil contract that should be taken into account when reviewing the arbitral award.1

2. A model arbitration clause recommended by an arbitration institution is enforceable by default. In case of doubt, not only the text of the arbitration clause but also other evidence (e.g. negotiations, correspondence, the conduct of the parties) should be assessed to establish the actual will of the parties. Any doubts should be interpreted in favor of the validity and enforceability of the arbitration agreement. The party challenging the validity or enforceability of the arbitration agreement must prove that any interpretation leads to a conclusion that the arbitration agreement is invalid and/or unenforceable.

3. The arbitration clause is binding on universal (e.g. reorganization of a legal entity) and singular (all forms of a party change in a contract) successors. An arbitration clause included in the charter of a company is binding for new shareholders of such company.

4. The Resolution establishes the presumption that an arbitration clause covers all types of contractual claims,
claims arising from the contract and non-contractual claims related to the contract, including for example, damages and unjust enrichment.

5. As a general rule, the parties can choose a law applicable to the arbitration agreement that is different from the law applicable to the main contract and the law applicable to the arbitral procedure. If the parties have not chosen the law applicable to the arbitration agreement, it is subject to the law of the country in which the award is made. Interestingly, we already see court rulings using this concept with reference to the Resolution. Therefore, it might be reasonable to directly state the law applicable to the arbitration agreement in the contract if the place of arbitration is different from the country whose law is applicable to the main contract.

6. The Resolution provides that it is not permissible to challenge arbitral awards in Russian courts if the seat of arbitration is outside Russia. Therefore, the award must be challenged in the country of the seat of arbitration.

7. The seat of arbitration may be different from the location of the arbitral institution and different from the place where the hearings are in fact held.

This is a commonly accepted principle. However, Russian courts previously sometimes had misconceptions about this.\textsuperscript{3} The Resolution guides the state courts in the right direction.

\textsuperscript{1}Ruling of the Supreme Court of the Russian Federation №307-ЭС19-7534 dated 18 September 2019

\textsuperscript{2}Ruling of the 9th Appeal Arbitrazh Court dated 10 February 2020 №09АП-80251/2019-ГК.

\textsuperscript{3}See, for example: Ruling of the Arbitrazh Court of the Moscow District dated 19 July 2017 and Ruling of the Supreme Court of the Russian Federation No. 305-ЭС-17-16090 dated 13 November 2017.