The Application of the New York Convention in the Russian Federation

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Abstract: The article presents the results of the analysis of the application of the New York Convention in the Russian Federation. The article reveals the concept of "arbitration courts" and "arbitration" and how these concepts are reflected in the Russian legislation. Modern trends of arbitration regulation in Russia and prospects of domestic and international arbitration are defined. Authors analyze the historical roots and various doctrines of the tertiary courts and international commercial arbitration that reflect the understanding of these institutions in the Russian legal system. These views in some way affect the consequent implementation of the New York Convention provisions with respect to foreign arbitral awards on the Russian territory.

1. Introduction

On August 10th 1960 the USSR Presidium of the Supreme Soviet ratified the New York Convention on the recognition and enforcement of foreign arbitral awards. Along with the ratification the Presidium of the Supreme Soviet made an announcement that the provisions of the Convention would be applied with respect to awards that were made within the territory of the states which are non-members of the Convention. In such cases the awards would be enforced on the principle of reciprocity. No other declarations and/or reservations were made at the moment of ratification of the Convention.

2. Methodology

The methodological apparatus of scientific research consists of successfully tested in the course of fundamental and applied research general and special methods of scientific knowledge:

- Philosophical method based on the dialectical method of cognition. This method belongs to the group of methods of general scientific character;
- Formal logical method that includes analysis and synthesis, induction and deduction, abstraction and generalization, analogy and comparison. This method belongs to the group of methods of general scientific character;
- Systemic-structural method. This method belongs to the group of methods of general scientific character;
- Historical method. This method belongs to the group of methods of general scientific character;
- Formal-legal method of analysis. The method belongs to the group of special legal research methods;
- Dogmatic method (the study of the dogma of law, based on the provisions of existing norms of law, legislation, by-laws and international agreements). The method belongs to the group of special legal research methods.
- Methods of interpretation of law, including lexical, systematic, teleological, doctrinal and authentic methods of interpretation. The method belongs to the group of special legal research methods;

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- Content analysis. This method belongs to the group of expert and sociological methods of research and evaluation of the results.

The need to determine the trends of arbitration regulation in Russia and the prospects for domestic and international arbitration dictates the need for regulatory analysis and modelling.

The use of philosophical, formal-logical, systemic-structural and historical methods was a prerequisite for scientifically-based and methodically-verified implementation of scientific research. Without the involvement of the formal legal method of analysis, the dogmatic method and the method of interpretation of law, it was impossible to conduct scientific research of a legal nature. The use of the content analysis method in addition to the special legal methods of the study allowed to link the results of the study with the current and future socio-economic realities.

3. The Understanding of the Notion "Arbitration Courts" in the Russian Federation

On March 1st 1996 the Supreme Arbitration Court of the Russian Federation issued an official Letter No. OM-37 in which it clarified the question what international treaties should be applied in case the enforcement of the "decisions of arbitration courts of a state on the territory of another state: the New York Convention or the treaties on legal assistance". In this Letter the Supreme arbitration court provided that the New York Convention regulates the questions of the mutual recognition and enforcement not of the court decisions but of the arbitration awards that is the awards made on the territories of the foreign states by the arbitrators chosen by the parties in the commercial disputes or appointed by the arbitration organs according to the parties' agreement in a pre-defined order. According to the terminology accepted in the Russian Federation, such courts are named "tertiary courts" (treteyskie sudy). The International Commercial Arbitration Court (ICAC) and the Maritime Arbitration Commission (MAC) at the Chamber of Commerce and Industries of the Russian Federation as well as other tertiary courts organized in accordance with the Temporary Regulation on a tertiary court for the settlement of the economic disputes of the June 24th June 1992 (ceased its action with the adoption of the Federal Law of July 24th 2002 No.102-FZ "On tertiary courts in Russia Federation") are considered to be the arbitration courts in the Russian Federation.

The Treaties on the mutual legal assistance on civil and criminal matters concluded by the Russian Federation (previously – USSR) are applied on the bilateral basis as well as concluded within the Commonwealth of Independent States (CIS) multilateral treaties; the Agreement on the order of the resolution of the disputes arising out of the economic activities of March 20th 1992 and the Convention on the legal assistance and legal relations in civil, family and criminal matters of January 22nd of 1993 provide for the mutual recognition and enforcement of the court decisions on civil and criminal matters of one of the states on the territory of the other. In the said International treaties "a court" means state courts (not arbitration (or tertiary) courts), which are competent according to the law to enforce the decisions of the other contracting states' courts, meaning the courts of the general jurisdiction and arbitration (economic) courts. The Letter also points out that some of the treaties (e.g. with Algeria, Yemen, Iraq) provide for the mutual recognition and enforcement not only of arbitration awards but of state courts as well, while the New York Convention deals only with arbitration awards.

Several foreign international arbitration bodies were also included in the Supreme Arbitration Court Letter, such as London Court of International Arbitration (LCIA), International Arbitration Court of the International Chamber of Commerce in Paris, American Arbitration Association, Arbitration Institute of the Stockholm Chamber of Commerce, International Arbitration Court of the Federal Chamber of Economics in Vienna and others.

The detailed quotation of the Supreme Arbitration Court Letter on the one hand allows us to understand the logic of the position with respect to implementation of the New York Convention. On the other hand, we need to consider the fact that it is addressed to the courts implying this Convention in practice. To understand the sense and the idea of the terminology of the Letter it is advisable to look at the historic roots of the State Arbitration Courts in Russia and the practice of implementation of New York Convention and further perspectives of the Russian judicial system.

4. Historical Roots of the Term "State Arbitration Court", the Origins of the Russian Institute "State Arbitration Courts"

The specific feature of Russian law, one should keep in mind, is the specific understanding of the term "arbitration". This specific understanding has historic roots but continues to affect legal minds, specializing in the dispute resolution proceedings. After the October revolution of 1917 and era of nationalization of industries, the new government came to the "New Economic Policies" (or "NEP") which provided among other measures the support of the competition between the "old bourgeois enterprises" and the new state-owned "socialist factories". The new factories were governed in accordance with new discipline. The civil procedure legislation was old fashioned as well as the "old" courts which applied the "old tsarist economic legislation". In order to provide an adequate dispute resolution mechanism for the disputes, arising between the state-owned enterprises in an amicable way, corresponding to the nature of these enterprises, arbitration commissions were created in accordance with the Regulation of CEC (Central Executive Committee) and SPK (Soviet of Peoples Commissars) of September 21st 1922. Initially those Arbitration Commissions were of arbitral nature but very soon they turned into state regulatory bodies empowered to resolve the disputes of the state – owned enterprises of certain industries.

Before the start of Perestroika, the State Arbitration Court at the USSR Council of Ministers represented a semi-judicial and semi-administrative body conglomerate. The ministries had Arbitration Courts within their administrative structures. These bodies on the one hand resolved the disputes within the corresponding industry fulfilling the function of a state court. On the other hand, those bodies had the power to issue regulations which were obligatory for state enterprises. But essentially these hybrid bodies were of arbitral nature which they inherited from the commissions of the NEP and early 20-ies of the XX century. One should understand that while resolving a dispute these semi-courts/semi-regulators by making a decision resolving the conflict at the same time provided for the measures of preventive nature regulating the activities of the enterprises.

With this idea arbitration courts survived "Perestroika" and are still operative until now. One of the first laws of the economic reform was the Federal Constitutional Law on Arbitration Courts in the Russian Federation of April 28th 1995 No. 1-FKZ. Article 7 of the said Law provides that acts, adopted by the arbitration courts, decisions, definitions, regulations are obligatory for all the state bodies, local state bodies, other bodies, organizations, officials, citizens and are to be executed on the whole territory of the Russian Federation. The provision of the article 7 represents a rudimentary approach, which reflects the trend to fulfill the "double function" of the body, allowing the Court to resolve disputes and at the same time to perform functions of a regulatory nature.

Although State Arbitration courts were in fact real state economic courts, there were some features that had conserved from arbitration proceedings. First of all, the proceedings were less formal than in ordinary civil courts. Starting from the 90-s of the XX century the reform of Arbitration Courts was aimed at the formalization of the proceedings and at pushing them towards the proceedings in ordinary courts. The Arbitration Procedural Code of 2002 is a document which is applied along with the Civil Procedure Code. One of the most difficult problems was to separate the competence of the Court systems including the power to enforce arbitration (tertiary courts) awards. At the end of the XX century Arbitration Courts competed actively with the courts of general jurisdiction for the powers of enforcement of foreign arbitration awards [1]. Neither APC of 1992, nor APC of 1995 provided for such competence and the powers to enforce foreign arbitration awards belonged to the courts of general jurisdiction. The State Arbitration Court received the powers to enforce foreign arbitration awards only with the adoption of the APC of 2002.

A brief historical analysis of the origin of the State arbitration courts demonstrating the "arbitral past" of these "state arbitration" courts in our opinion helps to understand the deepest roots of the existing dichotomy of the Russian judicial system. This dichotomy leads to some problems and instability connected with the division of the competence between the arbitration courts and civil courts. For some time, this competition for the competence concerned the enforcement of foreign awards but at the present moment the situation resulted with the "victory" of the State arbitration courts. This dichotomy in fact is the problem of the fast development of the legal infrastructure

which should correspond with the requirements of the market reforming of the society.

Maybe the "arbitral roots" of the state arbitration courts are the real cause of the "arbitrocide" tendency (term analogue to "genocide" with respect to commercial arbitration) [2]. This tendency unfortunately exists in Russia in the field of dispute resolution and enforcement of arbitration awards. Sometimes it seems that state arbitration courts are "jealous" of commercial arbitration, forgetting that commercial arbitration and state courts (including the Russian state arbitration courts) represent different systems of protection of the violated economic rights.

5. Conclusion

The study allowed us to determine the modern tendencies in arbitration regulation in Russia and the perspectives of the internal and international arbitration. In particular, the mixture of state court and arbitration systems, in spite of its historic origin, at the present moment leads to the contradictory position of the state jurisdiction with respect to arbitration as a special way of settlement of disputes. On the one hand, state arbitration courts are extremely busy and judges suffer from an enormous number of disputes to be resolved. Sometimes this leads to the inaccurate resolution of disputes including inadequate and insufficient motivation of the court decisions. On the other hand, state arbitration courts do everything to avoid the transfer of at least a part of the tremendous number of disputes to commercial arbitration courts preferring any other form of ADR (alternative dispute resolution [3]) but arbitration. This contradiction negatively affects business relations.

The liberalization of economic and political regime in the process of the economic reforms made it necessary to develop an effective dispute resolution system. The Law on tertiary (arbitration) courts was adopted in 2002. In practice it is very difficult to separate internal and international arbitration. Such separation seems absolutely impossible if we take into consideration the fact that according to Article 1 (point 2) the following disputes are referred to international commercial arbitration – "disputes arising between enterprises with foreign investment, international associations and organizations established in the territory of the Russian Federation". One should keep in mind that according to Article 4 (point 6) of the Russian Federal Law of July 9, 1999 No. 160-FZ "On Foreign Investments in the Territory of the Russian Federation" a Russian commercial organization becomes a commercial organization with foreign investments starting from the day when a foreign investor becomes a participant of such an organization and it stops to be the organization with foreign investments on the day when the last foreign investor ceases its participation. So, it is obvious that a status of an organization with foreign investments can change very rapidly (especially in cases if the shares of a joint stock company are traded in an exchange).

The regulation developed in Supreme Court documents of 2017 – 2019 (on recognition and enforcement of foreign arbitral decisions and on private international law) shows that the coordination between state courts and international commercial arbitration (tertiary or arbitration court) with the competence to solve foreign trade and investment disputes becomes looser and looser to the detriment of foreign trade relations [4, 5].

The coming changes affect the details of dispute resolution: the Law on International Commercial Arbitration applies in disputes (in case arbitration takes place in Russia) in which a party is an organization with foreign investments, and if foreign participants cease their participation in the organization, there is a possibility of the application of the Law on Tertiary Arbitration. To take into consideration this situation, arbitral institutions engaged in the dispute resolution prefer to combine the competence to resolve both domestic (internal) disputes and international disputes due to the fact that there are not many differences between international and domestic awards.

The movement towards the unification of the arbitration regulation began quite recently. The new Federal Law "On Arbitration (Arbitration Proceedings)" No. 382-FZ of December 29, 2015 regulates the formation and activity of arbitration tribunals and permanent arbitration institutions in the territory of the Russian Federation as well as arbitration proceedings. It also provides several rules applicable to both domestic and international arbitration.

The formal requirements to an international award are provided within Article 31 of the Law on International Commercial Arbitration which almost completely repeat Article 31 of the UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments adopted in 2006) (further - UNCITRAL Model Law). The requirements with respect to the form and the content of an award of the internal tertiary arbitration court are provided in Article 33 of the Law on tertiary courts. Although these requirements seem to be more formalized, the essence is almost the same. Most of arbitration practitioners in Russia make both domestic (internal) and international awards.

The link between the dispute resolution proceedings regulation and the material law should be taken into consideration. One of the examples is connected with the participation in the Washington Convention on the Settlement of Investment Disputes (ICSID Convention, 1965). The said Convention is not in force for Russia as it has not ratified [6], but it would be advisable to comment on it.

It should be admitted that one the most effective means other than the New York Convention is the mechanism provided within the Washington Convention of 1965 on the International Centre for Settlement of the Investment Disputes (ICSID). Russia has signed the Convention in 1992, but up until now has not ratified it. The situation with the Washington Convention is contradictory. On the one hand, the Washington convention as a document which was not ratified by the Russian Federation is ineffective for Russia. On the other hand, some of the Bilateral Investment Treaties, signed by Russia provide for the dispute resolution in ICSID and the Government Regulations No. 456 of June 9th 2001 "On the agreements between the Government of the Russian Federation and the foreign governments on mutual protection of the investments" which contain the model bilateral investment agreement also provide for the ICSID [7] dispute resolution clause. This Regulation adopted the Model Form of a Bilateral Investment treaty which provides a condition (article 8 of the Model Form) on the order of the dispute resolution between the contracting Party (State – recipient of the investments) and an investor from the other Contracting Party.

The Energy Charter Treaty (ECT) was also signed by the Russian Federation but was not ratified. The ECT also provides for the settlement of investment disputes by means of ICSID. The status of the ECT Agreement was the subject matter of the arbitration preliminary award in Hulley Enterprises Limited (Cyprus) case [8], concerning the dispute arising out of the dispute connected with the Yukos liquidation. The lack of understanding of the nature of the investment as "vesting of the capital" reflected within the Russian law lead to the situation when a Russian citizen who was a controlling party of the offshore company which received investment papers as a result of the privatization process was considered to be a foreign investor. The criteria were absolutely formal and did not reflect the essence of the investment activities and the relationship between an investor and a recipient of the investment at all. Besides this approach turned out to be leading to a confusion between investment and corporate relations. Still the tendency to limit the scope of disputes which can be resolved by means of commercial arbitration can be illustrated by admission of the non-arbitrability of the "corporate disputes". These attempts demonstrate the lack of understanding both of the nature of commercial arbitration as well as of the nature of the legal relationship dealing with the so called "corporate disputes". Such disputes have been already found non-arbitrable in Ukraine [9]. Attempts to argue the arbitrability of corporate disputes still exist in Russia. With respect to the Russian experience the recognition or enforcement of arbitral awards and the consequent rejecting of the enforcement abroad the situation looks vice versa. The awards of the domestic institutional arbitration which were refused the enforcement "at home" seek to be enforced abroad. The examples are connected with the enforcement of the Yukos awards and Maksimov's case [10]. With respect to the enforcement of Maksimov's case award in the recent literature we found a small mention as an example of the abroad enforcement of an ICAC award that was refused enforcement in Russia [10–14].

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