CONFERENCE REVIEW NOTES

KAZAN ARBITRATION DAY: THE RULE-OF-LAW DEVELOPMENT AND REGIONAL GOVERNANCE

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DOI: 10.17589/2309-8678-2017-5-2-129-135

Recommended citation: Damir Valeev et al., *Kazan Arbitration Day: The Rule-of-Law Development and Regional Governance*, 5(2) Russian Law Journal 129–135 (2017).

The third Annual Symposium of the Journal «Herald of Civil Procedure» «2016 – Kazan Arbitration Day: The Rule-of-Law Development and Regional Governance» was hosted by the Law Faculty on September 30, 2016.

The opening ceremony of the event took place in the Hall of the Board of Trustees of the Kazan University, followed by an academic discussion on legal issues of the Symposium. The Symposium participants and invited guests had the opportunity to discuss the most current and topical issues of civil procedural law, to present the latest Russian and foreign academic works in this direction to colleagues, to offer further ways of development of contemporary civil procedure, and to exchange experience and accumulated knowledge.

The Symposium discussed both the issues that directly related to arbitration proceedings as well as the most relevant news in the field of civil procedure and enforcement proceedings in general.

1. Unification of Civil Procedure and Enforcement Proceedings on International and Domestic Levels

The Symposium was opened by the report of *Professor Vladimir Yarkov (Urals State Law University, Russia)*, on the topic "The Global Code of Enforcement in the System of Harmonization of Enforcement." The Global Code of Enforcement was developed within the framework of the International Union of Bailiffs. This document has been in the focus of attention of the International Union for a long time. The idea was suggested in the framework of the Union and its first presentation was made at a congress in Washington in 2006, where the notion of harmonization of executive proceedings in the field of justice without borders was put forward. The idea of this code is creating a common world standard of enforcement proceedings, which would be equally applicable to both states with common law and continental law, as well as to states with an extrabudgetary enforcement system, and those with state funding. The Code is general in nature, it includes many provisions which are not entirely attributable to Russia. Professor Yarkov highlighted the following most significant provisions:

– consideration of the right to performance as a fundamental right in the Code;

– the possibility of introducing the obligations of the debtor to declare his property into national law;

– inability of using professional secrecy as grounds for refusal to provide information;

– the need of using new technologies for the transparency of enforcement proceedings;

– the need for taking on the role of mediator and conciliator for bailiffs in the stage of enforcement proceedings.

The speech of *Professor Alexander Bonner (Kutafin Moscow State Law University (MSAL), Russia)* was devoted to the liquidation of the Supreme Arbitration Court of the Russian Federation and the creation of a unified Civil Procedure Code of the Russian Federation. In his report, Alexander Bonner noted that the idea of a unified procedural code is not new. Once it was proposed as the idea of "judicial law," which implied the unification not only of civil procedure, but criminal and administrative procedures as well. Alexander Bonner expressed his negative attitude towards the idea of unification of codes and explained that a part of the Civil Code rules applies to all subjects of civil relations: both citizens and legal entities, while another part of the norms of this Code, as well as the norms of the Family Code in Russia, applies only to citizens, and another part only to legal entities. Also, the judicial process is frequently based on different kinds of evidence. In the courts of general jurisdiction, testimonies are the primary form of evidence, while in arbitration courts, written evidence has the highest significance.

2. Arbitration

As for reports about arbitration proceedings, there should be noted the speech of *Gleb Sevastyanov (Saint Petersburg State University, Russia)* on the topic "Modern Reform of the Arbitration Trial: Statement of the Problem and Some Results." According to Gleb Sevastyanov, it is necessary to observe the following three basic conditions for effective arbitration:

– the guarantee of its availability. As Sevastyanov pointed out, we keep talking about access to justice *per se* but do not really think about the availability of alternative dispute resolutions, in particular, the institute of arbitration. He drew attention to the question of how many arbitration courts there should be in Russia. It is estimated that there are 2–3 thousand courts across Russia – which is quite a significant number. There is no country in the world with the same quantity. But given the size of the country, if the number of state courts is 2–3 thousand, why should we lower the number of arbitration courts if they should be the most available to the parties?

– development and improvement of legislation which should correspond to the legal nature of arbitration and to international standards, while taking national peculiarities into account;

– formation of an arbitration-oriented approach in the practice of state courts. Whatever solution the legislator makes, no matter how many courts are created, it all depends on the interaction of arbitration and state courts, and their mutual understanding. Perhaps it is good that the law currently allows retired judges to be arbiters – because it is another bridge for understanding.

Professor Elena Nosyreva (Voronezh State University, Russia) made a presentation entitled "The Impact of the Russian Arbitration Reform on Procedural Legislation." She noted that the necessity of harmonization of legislation on arbitration procedure is the first thing we should talk about. In 2002, when the Civil Procedure Code, the Arbitration Procedure Code and the Law on Arbitration Courts of the Russian Federation were accepted and developed (almost simultaneously), such coherence was achieved almost completely, but today we cannot talk about complete harmonization. The norms of the new Law on Arbitration have not been fully reflected in contemporary norms of procedural codes. For example, the terminology is not completely the same. For example – certainly, the most basic term is "arbitration agreement." The Law on Arbitration uses this term ("arbitrazhnoe soglashenie"), but procedural codes still use such terms as "treteyskoe soglashenie"[1] or "soglashenie o treteyskom razbiratelstve" ("agreement on arbitration procedure"), but there is no term "arbitration agreement" as applied in arbitration procedure under the Law on Arbitration.

[1] The term "arbitration" is used in two meanings in Russian language: 1 – system of arbitration courts (those courts who deal with commercial cases); 2 – arbitration ("treteyskoe sudoproizvodstvo"), same meaning as "arbitration" in English, when a case is administrated by an arbitrator.

Professor Askhat Kuzbagarov (North-Western branch of the Russian Academy of Justice, Saint Petersburg, Russia), made a report on the topic "On the Content of International Reputation: The Issue of the Right to the Exercise of the Functions of the Permanent Arbitration Institutions in the Russian Federation." He raised questions such as: what are the opportunities for the resolution of disputes in the courts of integration associations? Which courts are used to resolve economic disputes? What is an independent international arbitration needed for? What is the basis for the enforcement of the decisions of international commercial arbitrations? It was noted that, nowadays, legislation does not provide clear answers to these questions.

Mikhail Schwartz (Saint Petersburg State University, Russia) presented a report on the topic "Arbitration in Russia: Issues of Systematization," and told about the first meeting of the Council for the Improvement of Arbitration:

– he noted that institutions of including arbitration courts into the activities of the Council for the Improvement of Arbitration through licensing arrangements still bring up many questions;

– there is a need to restore the trust of citizens and organizations towards arbitration;

– the International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry is already working on regulations, and of course, as a pioneer, tests these mechanisms. However, it does not see the need to adopt a separate regulation for corporate disputes, thus trying to avoid duplication of the rules and, therefore, the regulation of corporate disputes may appear only as a section of the main (general) regulations (but not as a separate regulation). The topic of feasibility of involvement of specialists in the sphere of criminal law as arbitrators was also discussed.

3. Foreign Experience

Marybeth Sorady (Washington, USA) was the first of foreign speakers and talked about the conceptual framework for measuring the application of rule of law.

According to Sorady, the World Justice Project began in 2006 as an initiative of the American Bar Association to develop methodologies to measure compliance with global environmental initiatives. It is now an independent non-profit, multidisciplinary organization that has developed a methodology for measuring compliance with all facets of the rule of law in more than 100 countries. It has formulated four universal principles of the rule of law, based on international standards nine factors characterizing the rule of law, multiple sub-factors to evaluate in measuring compliance with each factor, as well as measurement methodologies that are applied in a yearly survey of more than 100 countries.

The four universal principles of rule of law are as follows:

– the government and its officials and agents as well as individuals and private entities are accountable under the law;

– the laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property;

– the process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient;

– justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

The nine factors characterizing rule of law are defined as: constraints on government power, absence of corruption, open government, fundamental rights, order and security, regulatory environment, civil justice, criminal justice and informal justice.

The project also formulated 44 sub-factors ranked 1 through 8 from two data sources in each country: a general population poll conducted by leading local polling companies using a representative sample of 1,000 respondents in the three largest cities of each country, and qualified respondents' questionnaires consisting of closed-ended questions completed by in-country practitioners and academics with expertise in civil and commercial law, criminal justice, labor law, and public health.

102 country profiles and description of process (available at http://data.worldjusticeproject.org) were also shaped. Each profile displays:

– the country's overall rule of law score and ranking;

– the score of each of the eight dimensions of the rule of law as well as the global, regional, and income group rankings;

– the score of each of the 44 sub-factors together with the average score of the country's region and the country's income group.

The representative of the delegation of China, *Liu Kexi*, Director of the Institute of Legislative Development in the Institute for Chinese Legal Modernization Studies, Vice-President and chairman of the Academic Committee of the Law Society of Jiangsu Province, had a report entitled "Improvement of the Relations between Arbitration and Litigation in China." By the end of 2015, there are 244 Arbitration Commissions in China. In 2015, the Arbitration Commissions reviewed 136,924 cases in total, which is 1.36% of the total number of civil cases reviewed by courts in the first instance, and 0.007% of all the cases adjudicated by the courts during the same period. In the period from 2012 to 2014, the proportion of the cases considered by the arbitration commissions to the civil cases accepted by the courts in the first instance is the same as the percentage listed above. A few years before 2012, the amount of arbitration cases was even less than 1% of civil cases accepted by the courts in the first instance. For resolving disputes, the arbitration system has the following unique advantage: the autonomy of the will of the parties, flexibility, confidentiality and low cost; however, the indicated number above shows that the Chinese arbitration system is far from perfection. The reason is believed to be the lack of elaboration of the law regulating the relationship between the Chinese arbitration and litigation.

Firstly, the Chinese arbitration should not absolutely follow the judicial interpretation. Secondly, when intermediate courts with jurisdiction make adjudications on permission of the enforcement of the decision of the arbitral tribunal, courts should not start the procedure for the revocation of the arbitral award. Thirdly, except for the courts of the middle level with jurisdiction, the higher courts and the Supreme Court should not have the direct power to make decisions on revocation, non-enforcement or temporary respite of arbitration award. Fourthly, if the parties agreed to apply arbitration clauses and indicated 2 or more arbitration commissions, they have the right to address one of the arbitration institutions in the clauses. Fifthly, when the courts of the middle level with jurisdiction make decision to cancel or refuse the enforcement of the arbitration award given by the Chinese arbitration institutions, they should also report to the higher courts and the Supreme Court, just like cancelling or refusing to enforce the arbitration decision made by foreign arbitration institutions. Finally, the arbitration institutions should enhance their own construction and improve the interaction with the judiciary.

Nikola Bodiroga (University of Belgrade, Serbia) was another guest of the Symposium, and he presented a report on the topic "Rule of Law and Enforcement in Serbia." Serbia is in the process of negotiations on joining the European Union and has decided to reform its civil procedure. Decisions in civil cases are the last phase of the right to judicial protection, but since 2004 the Convention for the Protection of Human Rights and Fundamental Freedoms came into effect. The first decision of the European Court of Human Rights against Serbia was related to enforcement. For many years the enforcement procedure has been one of the weakest parts of Serbian judicial system. Enforcement of civil judgments and other enforcement and authentic documents has been organized in a way that prevented enforcement creditors to collect their claims. As a consequence of that, numerous judgments have been rendered against the Republic of Serbia by the European Court of Human Rights and by the Serbian Constitutional Court. In their rulings these two courts have clearly stated that the Republic of Serbia has failed to establish a system of enforcement that would be in accordance with guarantees set by the European Convention for the Protection of Human Rights and Fundamental Freedoms. The enforcement of civil judgments and other enforcement and authentic documents has been in the jurisdiction of civil courts for decades and they have failed to deliver expected results. Bearing that in mind, the Ministry of Justice proposed the delegation of judicial powers in enforcement procedure to new legal professionals – public enforcement agents. The first Law on Enforcement and Security that has introduced public enforcement agents has entered into force in 2011 and first public enforcement agents became operational in 2012. In its decision, the Serbian Constitutional Court has given its clearance for the delegation of judicial powers to public enforcement agents. For most of the enforcement measures this law has created a parallel jurisdiction of courts and public enforcement agents. Following three years of implementation of this law, enforcement by public enforcement agents

has prevailed. A new Law on Enforcement and Security has been passed by the Serbian Parliament in 2015 and has entered into force on July 1, 2016. This law has widened the competences of public enforcement agents substantially. With few exceptions, carrying out the enforcement is now the power of public enforcement agents, and enforcement courts are in charge for ordering enforcement and for deciding upon legal remedies. This new law has been one of the first significant steps in judiciary reform during the negotiations with the EU.

At the end of this review we would like to note that a full stenographic record of the Symposium in Russian was also published in the Journal "Herald of Civil Procedure," which contains the full speeches of all participants, including those not mentioned in this review.[2]

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[2] Стенограмма III Ежегодного симпозиума журнала "Вестник гражданского процесса" "2016 – Казанский арбитражный день: развитие верховенства права и региональные проблемы," 6 Вестник гражданского процесса 202 (2016) [Shorthand Report of the III Annual Symposium of the Journal "Herald of Civil Procedure" "2016 – Kazan Arbitration Day: The Rule-of-Law Development and Regional Problems," 6 Herald of Civil Procedure 202 (2016)].