BOOK REVIEW NOTES

IS THERE A FUTURE FOR THE FURTHER DEVELOPMENT OF INTERNATIONAL COMMERCIAL ARBITRATION IN RUSSIA?[1]

NATALIA KUZNETSOVA,
Russin & Vecchi LLP
(Moscow, Russia)

DOI:10.17589/2309-8678-2015-3-2-137-141

'Arbitration Law in Russia: Practice and Procedure,' written by Roman Khodykin, one of the leading Russian-speaking specialists in the commercial arbitration sphere, is a distinctive overview of arbitration law with the focus on its application in Russia. Throughout the book, the core principles of the international arbitration procedure are supported, explained and illustrated by the comments of Russian scholars and practitioners.

The book is organized into 22 thematically related Chapters, following the chronology of arbitration, covering: arbitration agreements; arbitrability; assistance by the courts; appointment of the arbitral tribunal and arbitrator status; arbitration procedure; applicable substantive law (including the possible application of general principles of law); the most important features of the arbitration procedure; technical and procedural requirements of the arbitral award; recourse against the award; and recognition and enforcement of international and domestic arbitration awards. It draws on examples of the rules and practice of institutional arbitrations at the Russian Federation Chamber of Commerce and Industry, such as ICAC and MAC.

Roman Khodykin begins by quoting Dr. Julian Lew, QC, who in his well-known speech noted that arbitrations that once would have been held in Europe were increasingly taking place in other regions, and the focus was shifting to the BRICS countries, of which Russia is a member. Today's whirlwind political environment strengthens the author's argument that state-owned companies would probably prefer to opt for the dispute resolution mechanism provided by the Moscow-based arbitration institutions, or including Moscow in their arbitration agreements as the

---

[1] Reviewed book: Roman Khodykin, Arbitration Law of Russia: Practice and Procedure (Juris Pub. 2013).

place of arbitration. The author's view is supported by the statistics of the major Russian-based institutional arbitrations ICAC and MAC, demonstrated by the charts in Ch. 3, showing, year upon year, the subject matter of the disputes, the disputed amount, the nationality of the parties and the number of cases that are adjudicated by ICAC and MAC.

The book provides a fascinating, comprehensive foray into the history of the arbitration procedure in Russia, going back to medieval times and one of the oldest examples of arbitration between Grand Duke Dmitry Donskoi and Duke Vladimir the Brave of Serpukhov. This is alongside a focus on the contemporary developments and amendments of arbitration law. The author expresses concern over the initiative driven by the Russian Supreme Commercial (Arbitrazh) Court to amend Russian legislation such that the Russian courts would have the power to set aside foreign court judgments and international arbitration awards that 'prejudice the interests of the Russian parties.' The future tendencies show whether it also becomes the history. At present the Russian arbitration lawyers' initiative group has prepared alternative amendments which are now under consideration.

The author thoroughly explains all the relevant international treaties and national legislation which constitute the legal background for resolving international commercial disputes by arbitration. The translation of the relevant provisions of the Arbitration Act 1996, the Private Arbitral Tribunals Act 2002 and two Russian procedural codes (the Commercial (Arbitrazh) Procedure Code and the Civil Procedure Code) can be found in the appendices to the book. The book also provides for the updated texts of the Rules of ICAC and MAC.

Roman Khodykin covers the key features of the arbitration procedure starting with the parties' consent as a crucial point for the existence of the arbitration agreement through to the enforcement of the award. All the topics, including judicial assistance in the arbitration or the proceedings for enforcing or setting aside an award, are handled in the same thorough, pragmatic manner, with the reader directed to key commercial (arbitrazh) court cases, Russian Constitutional Court cases, and views of leading Russian scholars for further guidance.

Of particular interest is the representation of the views of different scholars on the validity of the alternative arbitration clause. The author gives a thorough analysis of the related practices of ICAC and MAC, and the commercial (arbitrazh) court practice, and comes to the conclusion that, at the moment, asymmetrical clauses under which both parties could arbitrate their disputes but only one party has a right to opt for a state court are held invalid by the Russian courts. However, contracts that contain a symmetrical agreement empowering any party to choose between arbitration and litigation are still valid and binding.

Another point addressed by the author, which holds interest from a practical perspective, is whether the legal successor to the signatory which has not signed the arbitration agreement may nonetheless be a party to an arbitration proceeding. In

the author's opinion, the view that the tribunal should not assume jurisdiction if the award would likely affect the rights of a third party that is not party to the arbitration agreement should be encouraged. The author argues further that under certain circumstances an arbitration agreement may be binding for a party that has not signed it, and introduces as particular examples assignments and bank guarantees. The commentary and possible legal solutions that are provided are useful tools for the law practitioner.

Another topic the author draws particular attention to, and which is currently an issue of great interest in the legal community, is the arbitrability of the dispute. The author gives a thorough analysis of the disputes which are not arbitrable under Russian law, such as disputes arising out of bankruptcy legal relations, real estate disputes, subsoil and privatization issues. There is also a discussion of the most controversial issue for Russian legal doctrine; the arbitrability of corporate disputes. The author summarizes the most persuasive arguments, widespread among Russian legal scholars, in favour of arbitrability of corporate disputes, and supports the idea that corporate disputes should not be excluded from the ambit of the arbitral tribunal.

One of the most useful aspects of the book is the author's treatment of the arbitral proceedings, including selection and function of the arbitral tribunal, status of the arbitrator, rights and liabilities, and grounds and procedure for challenge. The author draws the reader's attention to the fact that, as case law shows, the Russian courts are not inclined to grant injunctive relief in the absence of *prima facie* evidence that there is a claim, to which end the party must provide either a contract or evidence of title over the disputed property or similar. With the support of case law the author asserts that in some cases the Russian courts apply different standards of proof with respect to the arbitral proceedings, on the one hand, and the court proceedings, on the other.

As to the arbitrator status, it is correctly stated that Russian legal theory and case law has not developed new concepts which would vary significantly from worldwide ideas. Therefore the status of the arbitrators is contractual and involves rights and obligations towards the parties, its representatives, institutional arbitrations and others. As the author points out further, the Russian Arbitration Act does not provide for liability of arbitrators and the ICAC Rules state that the arbitrators bear no liability for their actions or failure to act in connection with the arbitration proceedings, unless they acted (or failed to act) intentionally (Sec. 47). As to the author's evidence, there are no publicly available Russian court decisions under which the arbitrators have been held liable for the improper conduct of their functions.

As to impartiality and independence, which are inseparable, and I would even say synonymous, with the arbitrator's status, the author refers to some commercial (arbitrazh) court case law which, in the author's opinion, is cause for alarm. The first group of cases involve a challenge on the grounds that the arbitrator lacked independence and / or impartiality, one of the examples being where the arbitrator worked at the same law school as the expert who submitted a report in the case.

The second group of cases relate to institutional arbitrations established under corporations such as *Gazprom*, *Sberbank* and others, and which awards the Russian Supreme Commercial (Arbitrazh) Court ultimately held the arbitration clause null and void on the grounds of lack of independence and impartiality. While the first group of cases, as the author fairly emphasizes, has been cleared out by the enacting Russian Chamber Conflict Rules, the future of the second group related to the institutional arbitrations established under some corporations, is still questionable.

Chapter 11, devoted to multi-party arbitration, is relatively short, however, the issue is one of the most complicated, challenging and thorny in contemporary international arbitration for both arbitrators and parties. The principal reason could be that neither the ICAC Rules nor the MAC Rules provide for a comprehensive dispute resolution mechanism for the multi-party arbitration. The same could be said about Ch. 12, dedicated to such procedural issues as submission, deadlines and default. The terms of reference and / or procedural orders which are aimed at organizing the hearing or arranging the pre-hearing procedural steps of the parties, are still not widely used in arbitration in Russia.

The Chapter on presenting evidence is especially useful to experienced practitioners as the procedure is very dependent on the rules of institutional arbitrations and place of arbitration, and obviously is dissimilar for common and civil law countries. The author deliberates the rules on evidence under Russian arbitration law and its current application. The author points out that there are no mandatory provisions in the Arbitration Act concerning the preparation of witnesses or the limits on doing so. If neither party makes a request to call a witness to justify the facts, the tribunal will rely on the written witness statements submitted by the parties without asking them to appear and confirm what they have written. In the author's experience, witnesses are usually heard without being sworn in before the tribunal, and Russian arbitrators tend to be more inquisitorial than in common law countries, asking more questions of their own in an attempt to establish the facts. Further, the author alleges that Russian-based arbitrations tend to give more weight to documents than witness evidence, therefore it should be taken into account by practitioners that the content of written documents is often crucial to the outcome of the dispute.

In addition, the book provides an in-depth examination of the arbitral award itself including the challenge, recognition and enforcement of the arbitral awards, and gives insightful commentary on the special considerations as to applicable substantive law. In the author's experience, the choice of applicable rules of law, instead of the legal system as a whole, is rarely used by Russian parties. The author asserts, relying on relevant ICAC cases and legal theory, that the parties are not prevented from doing so. Further, the author states that in accordance with a number of Russian scholars, even if the parties have agreed upon the 'general principles of trade law' as the governing law, this does not bar the arbitral tribunal from applying the relevant rules of the national law, in which case the mandatory provisions of the

applicable law would prevail. It is also worth mentioning that, in the author's opinion, arbitration case law is not uniform with regard to the ability of the arbitral tribunal to use *lex mercatoria* in a situation where the parties have failed to determine the law applicable to the substance of the dispute.

The final point of interest I would like to mention, which was the focus of the author's comprehensive analysis, is the definition of 'public policy' in Russian legal theory and its practical application. While analysing the issue of public policy the author relies on the cases of the Moscow City Commercial (Arbitrazh) Court where the defendant party was trying to set aside the ICAC award on the grounds, *inter alia*, violation of public policy (*LLC 'Spetscontract' v. OJSC 'Dzerzhinskoye orgsteklo,' Company 'Interland Finance Holdings Limited' v. LLC 'Rating-Invest'*). The issue of what constitutes public policy is quite notorious but, being one of the grounds for setting the arbitral award aside, should be given detailed and comprehensive consideration by judges and scholars in order to define it as a legal concept, so as to ensure predictability of the outcome of an award challenge. The author points out that, for the majority of Russian scholars, the concept of public policy is limited to the fundamental principles of Russian law, *i.e.* the 'fundamental principles of Russian law' and 'public policy' are synonymous. The Presidium of the Supreme Commercial (Arbitrazh) Court, in its judgment in the case of *Company 'Interland Finance Holdings Limited' v. LLC 'Rating- Invest'* also held that public policy of the Russian Federation is based on the fundamental principles of Russian law, including the principle of adequacy (in other words, proportionality) of civil liability. It is clear that in some cases Russian commercial (arbitrazh) courts could overrule the powers of arbitrators and consider the concept of public policy broad enough to make judgments with regards to the merits of the case. In my opinion, the public policy concept should be given further study and consideration.

In conclusion, Roman Khodykin successfully provides the reader with a comprehensive understanding of the application of the Russian Arbitration Act and related case law of the ICAC, the MAC and the commercial (arbitrazh) courts, clarifying and elaborating on the most crucial points of the arbitration procedure. The style is clear and concise and the book is an exhaustive treatment of the subjects covered in relation to Russian arbitration practice. Law practitioners who diligently read the book will have a complete understanding of what should be expected when choosing to arbitrate in Russia, whilst experienced scholars or accomplished students will see the potential for further improvement of Russian arbitration law.

Information about the author

Natalia Kuznetsova (Moscow, Russia) – Local Partner at *Russin & Vecchi* LLP (35-37 Sadovnicheskaya str., bldg. 2, suite 406, Moscow, 115035, Russia; e-mail: natalia.kuznetsova@rusinvecchi.com).