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Assistance to Arbitration by Courts

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The institute of arbitration proceedings could not exist and develop without assistance by legislators and courts. The foundation of such assistance was mainly laid many decades ago by the regulation introduced by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Despite its title apparently related to the effect of arbitral awards only, it contains fundamental provisions concerning the autonomy of an arbitration clause that is binding upon both parties even if the underlying contract has some legal defects and its derogative legal effects take the form of a prescription for state courts to waive their competences and refer the parties to arbitration. The current Russian laws, primarily codes, also contain other accompanying measures of judicial assistance.

Article 6 of the UNCITRAL Model Law on International Commercial Arbitration says that any state should have bodies authorised to perform arbitration assistance and control functions. Those functions can be performed not only by courts but also by other bodies. Since the Russian law governing international commercial arbitration is based on the provisions of the UNCITRAL Model Law, there was such body in this country – President of the Russian Chamber of Commerce and Industry. However, until the Arbitration Law and related Law No. 409-FZ dated 29 December 2015 were enacted, there was no assistance mechanism for internal commercial courts. Despite the right of the parties to seek assistance from state courts (e.g., in order to get evidence) under the arbitration law, no corresponding duty to provide such assistance was imposed on state courts. The Russian procedural laws only governed the procedures for enforcement and challenging of those arbitral awards handed down in the Russian Federation.

The new laws expressly oblige state courts to assist arbitration proceedings. Accordingly, the following two new concepts were introduced into the procedural laws:

- “proceedings on those cases related to the performance by commercial courts of assistance functions in respect of an arbitration tribunal;” and
- “proceedings on those cases related to the performance by courts of assistance functions in respect of arbitration tribunals.”

State courts will ensure continuity of arbitration proceedings if any faults therein occur.

The court of the constituent entity of the Russian Federation in whose territory such arbitration proceedings are held is the competent body authorised to provide such assistance.

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That court performs the following assistance and control functions with respect to the procedures for appointment and removal of arbitrators:

- appoint an arbitrator upon request of either party, unless both parties have agreed on a special procedure for arbitrator appointment (e.g., by an authorised body of an arbitration institution) and (1) the other party has appointed an arbitrator within one month of such request; (2) the two arbitrators so appointed have elected the third one within one month; or (3) both parties have agreed on the sole arbitrator. The competent court may also appoint an arbitrator unless the applicable appointment procedure has been observed by both parties, the arbitrators or any third parties, including any arbitration institution;
- recuse an arbitrator, unless the recusing party files the relevant statement with the court within one day of the receipt of a notice of denial of such recusation; and
- remove an arbitrator upon request of either party, unless such arbitrator recuses himself or herself because of his or her inability to take part in the dispute or because he or she has not been doing so for an unreasonably long period of time (according to Article 14 of the new Arbitration Law).

Therefore, the new functions to be performed by state courts to assist arbitration proceedings comply with those provisions of the UNCITRAL Model Law on International Commercial Arbitration concerning the powers and authorities of the bodies responsible for assisting arbitration proceedings, i.e. the arbitrator appointment, recusation and removal provisions.

Nevertheless, the Russian legislators refused to establish the most principal institution contained in the updated UNCITRAL Model Law of 2006 — the obligation of state courts to enforce any injunctive relief that may be granted by an arbitration tribunal. The pre-reform legal regulations making no provisions for the enforcement of any Russian or foreign arbitration awards granting any injunctive relief have remained intact.

However, assistance by state courts in evidence collection will greatly increase the prestige and effectiveness of arbitration procedures.

The competent court is the court of the constituent entity of the Russian Federation in whose territory the evidence requested is located.

Any request to provide evidence must be granted within 30 days of the date received. It may only be rejected on the grounds provided by law.

No ruling rejecting any such request may be appealed.

Recognition and Enforcement of Foreign Arbitral Awards

The other notable novelties concerning the interaction between state courts and arbitration tribunals include the shortening of the period of time allowed for state courts to decide whether they will enforce an arbitral award, from three months to one month and the express general rule that no state court may revise any arbitral award on its merits.

Arbitral award enforcement proceedings will be tried in the first instance by district and commercial courts of the constituent entities of the Russian Federation, and the parties will have the right to enter into agreements specifying the territorial jurisdiction of such proceedings.

When deciding whether to recognise and enforce a foreign arbitral award, each court should also take into account any explanations that may be provided by the arbitration tribunal that has handed down such award, if requested by such court.

In addition, both procedural codes now contain provisions to resolve enforcement matters concerning the enforcement of foreign arbitral awards that have been reversed or suspended from being enforced in foreign jurisdictions. After a foreign court has resolved an application for reversal of a foreign arbitral award or suspension of its enforcement, the court where an application for recognition and enforcement of that award has been filed, should consider that application with due regard to the relevant foreign arbitral award. Some lawyers have found those general wordings to contain a loophole that permits a reversed arbitral award to be enforced – a situation that can be equally important for Russian companies.

In conclusion, it should also be mentioned that the new law also contains a provision that allows objecting to recognising a foreign arbitral award that does not need to be enforced in the Russian Federation. Any interested parties may file with the Moscow state commercial court their objections to recognising a foreign court judgment or arbitral award within one month of the date on which they became aware of such judgment or award. That said, the Russian Commercial Procedure Code requires the relevant provisions of the International Commercial Arbitration Law to be observed when establishing any grounds for not recognising such foreign arbitral award. However, we cannot help but note that the International Commercial Arbitration Law (as amended and restated) also contains a provision that allows objecting to recognising a foreign arbitral award that does not need to be enforced (according to Article 35.3 of the International Commercial Arbitration Law); however, said law grants that right only to the party against which such award has been handed down.

As follows from the foregoing, while the new law increases the status and role of the institute of arbitration proceedings in the Russian Federation and makes it more attractive, the only considerable threat to the stability of an arbitral award in this country is still the provision that such award may be reversed upon request of those persons whose substantive rights it allegedly infringes.