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Redress Abroad for Local Conflicts Could Be Limited

By Mark H. Gay

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Russia's Supreme Arbitration Court has made a number of rulings that may limit the freedom of companies to regulate contracts under foreign law.

The SAC's chairman suggested that the court could act to prevent judgments by foreign courts that interfere with Russian parties or that conflict with Russian legislation.

Lawyers say foreign firms should not fear a wholesale move against the international arbitration of contracts but they should be ready for their business dealings in Russia to submit to Russian law.

Varvara Knutova, head of international arbitration and litigation projects at Pepeliaev Group, analyzed the cases that came before the Supreme Arbitration Court in 2012 and concluded that the SAC usually tried to find a compromise.

"On the one hand, the Supreme Arbitration Court wants to declare to everybody that it will not allow unfair escape from Russian jurisdiction, and it will not encourage parties to go abroad and feel safe about the enforcement of such foreign judgments here in Russia. On the other hand, the SAC shows that it will not be jealous about the jurisdiction of foreign courts if they see that the case does not fall within the exclusive jurisdiction of Russian courts and if a Russian court would be an inconvenient forum for such a case."

Corporate disputes are the most likely disputes to be exported out of Russia. Many special purpose vehicles are now established in common law jurisdictions not because of the tax planning but because of the opportunity to use common law to regulate the relationship between shareholders. Knutova sees the risk that the SAC will not let through foreign cases, not only those that interfere in the exclusive jurisdiction of Russian courts but also those that fail to apply Russian law to specific issues.

"If the Russian courts take the view that parties intended to avoid the rules of Russian corporate law, antitrust law or the law on foreign investment in strategic sectors, it is likely that the courts will create obstacles to the enforcement of any such awards, she said.

Dimitry Afanasiev, chairman of Egorov Puginsky Afanasiev & Partners, said the SAC has not signaled any major change. He pointed out that corporate disputes in continental Europe are governed exclusively by local law. Similarly, in England or the United States, it is quite frequent that the local judge will prohibit the parties from litigating elsewhere until the dispute is resolved in the United States or the United Kingdom.

"There is a third point, which is a word of caution. The Russian legal system is in a developing stage and there is a careful balance where not giving it enough power will be detrimental to its development such as today where all the major court cases go to the London Court of International Arbitration or the London courts and the Russian courts don't have a chance, frankly, to develop a sophisticated approach."

Raisa Alexakhina, head of legal services at Deloitte CIS, does not see a definite trend of annulling arbitration clauses in contracts that allow foreign companies to resolve disputes abroad. "In fact, the Supreme Arbitration Court merely pointed out that interests of the parties of the relevant contract should be balanced and, if the foreign company (or Russian subsidiary of such foreign company) has the right to sue its Russian counterpart in arbitration tribunal or state court, such possibility should also be granted to Russian company."

The Plenum of the Supreme Arbitration Court is still considering the issue, and Alexakhina says it is likely to confirm contracts may include arbitration clauses that provide for international arbitration.

The problem is the abilities of the Russian court system and the freedom of corporate entities, Pepeliaev's Knutova said. The Russian legal system is under pressure to become more transparent, but it is not good for business to be forced to use Russian courts.

"Nobody forces business to go to common law jurisdictions, no one forces business to go to the London Court of International Arbitration, or to the High Court of Justice. It is a voluntary decision by parties because they feel that such a forum could guarantee fair judgment and greater possibilities for evidence, like e-mails and witness statements that do

not work properly here in Russia."

It would be better, said Knutova, to improve the courts first: "If the procedure is transparent, if the judges are professional, those responsible for corporate disputes or those with a foreign element, and there is no corruption risk, then maybe business will go to Russian courts.

"No business wants enormous litigation costs but they choose these costs because they think it is still cheaper than to go to Russian courts, take the risk and lose everything because somebody is not really well-qualified, not really smart or corrupted."

Afanasiev agreed that SAC would like to see greater oversight of corporate disputes by Russian courts however he advised a step-by-step approach. "Giving them too much power creates a risk of abuse and based on the record as it stands today, obviously, the fairness of judgments in the United States or England generally attracts more confidence from business people than it does in Russia. That is why business people often vote with their feet and choose English law over Russian law whenever they can to resolve their disputes. My view is, let's improve the system first or at least concurrently."

Contact the author at m.gay@imedia.ru

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