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B2B: Challenging International Commercial Arbitral Awards

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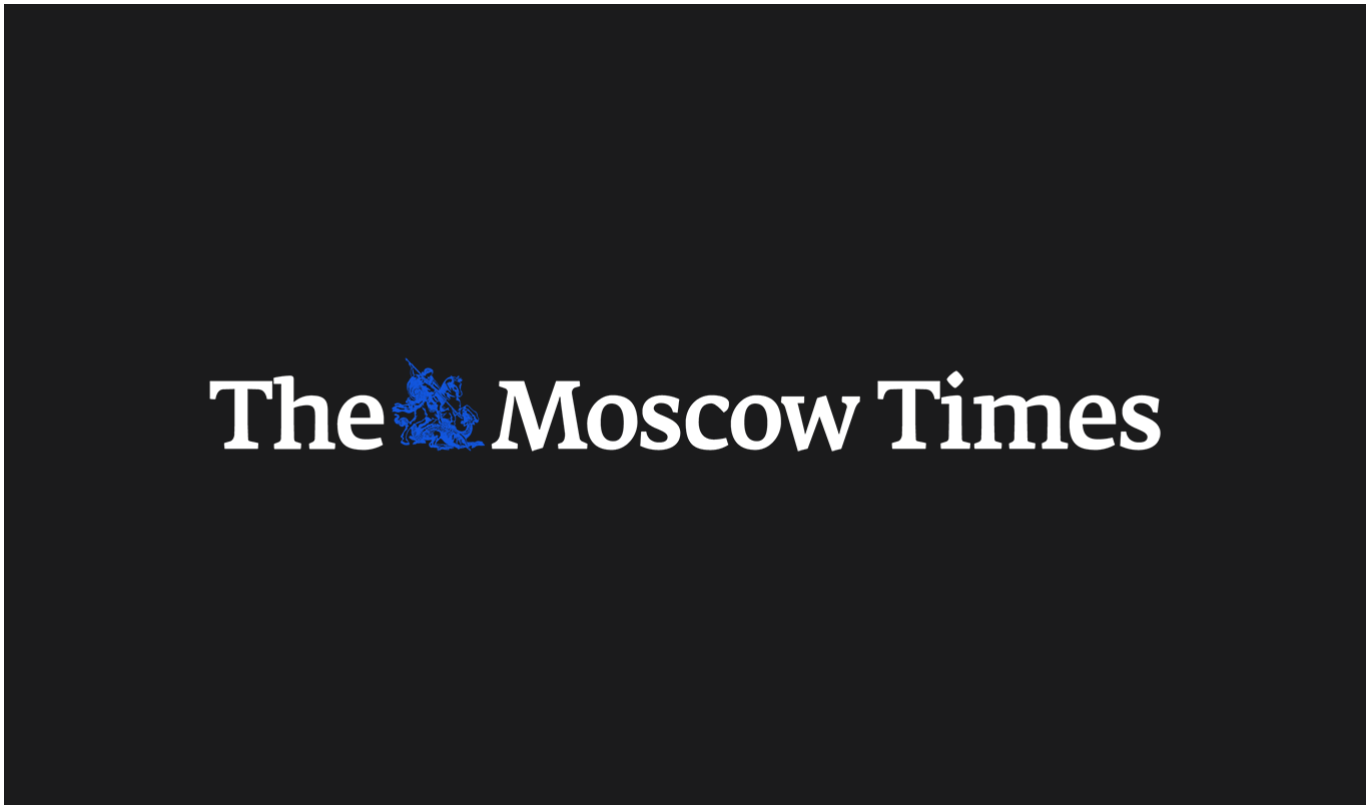

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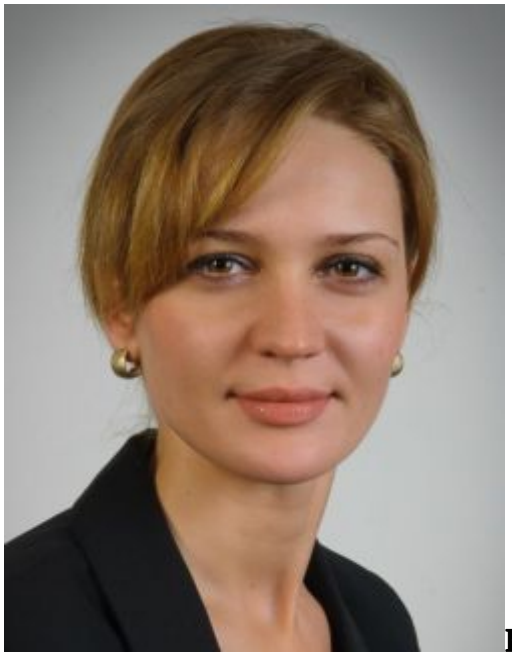

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Whether, by analogy, the provisions of the law on domestic arbitral tribunals may be applied.

Russian legislation has accepted the idea of an alternative to dispute resolution methods through the state courts, in particular through arbitration. To this end, it distinguishes between two types of arbitration governed by separate laws: international commercial arbitration, within the scope of which fall disputes with a foreign element (when parties are located in different countries, or when foreign substantive law is to be applied) considered in Russia, regulated by Law No. 5338-1 dated 7 July 1993 "On international commercial arbitration" (the "ICA Law"), and domestic arbitration under Federal Law No. 102-FZ "On arbitral tribunals in the Russian Federation" (the "AT Law"), which covers internal commercial disputes without any foreign elements.

Regardless of the fact that an award of international commercial arbitration ("ICA") is decisive for the parties from the date when it is handed down, the ICA Law contains in section VII rules that provide for the possibility of and a procedure for challenging ICA awards. The AT Law contains similar provisions in relation to purely domestic disputes resolved with recourse to arbitration.

A material distinction between the provisions of the AT Law and the provisions of the ICA Law in terms of challenging awards and decisions is the provision contained in article 40 of the AT Law that the decision of an arbitral tribunal may not be challenged if an arbitration agreement provides that the arbitral tribunal's decision is final.

Relying on the above provision, courts, when they examine cases challenging the decisions of arbitral tribunals under the regime contained in § 1 of Chapter 30 of the Russian Arbitration Procedure Code (the "APC"), terminate proceedings in relation to an application to cancel a decision of an arbitral tribunal based on article 150(1)(1) of the APC — case is not subject to consideration by state arbitration court (see Ruling No. VAS-1895/13 of the Russian

Supreme Commercial Court dated 6 March 2013, the Resolution of the Federal Commercial Court for the Moscow Circuit (FCC MC) dated 27 September 2013 in case No. A40-54715/13-68-545, the Resolution of the FCC MC dated 11 September 2013 in case No. A40-20459/13-69-5, the Resolution of the FCC MC dated 5 August 2013 in case No. A40-153066/12-29-1542).

The ICA Law contains no direct prohibition on ICA awards being challenged, further stating that an award is final (article 32(1) of the ICA Law); further to this, it is a fully justified and logical conclusion that an ICA award may be challenged under the established regime despite the fact that it is final. In this regard, it is also correct to conclude that even if an arbitration agreement or arbitration clause states that an ICA award will be final for the parties, the parties are not deprived of the right subsequently to challenge that ICA award.

However, the current case law makes clear that courts, when they hear cases seeking to set aside ICA awards, often terminate proceedings in the case on the grounds of article 150(1)(1) of the APC if an arbitration agreement or arbitration clause states that an ICA award will be final for the parties. Further, courts rely on article 40 of the AT Law (see Ruling No. VAS-6353/13 of the Russian Supreme Commercial Court (SCC) dated 10 June 2013, Ruling No. VAS-11366/13 of the SCC dated 2 September 2013, the Resolution of the Federal Commercial Court for the Moscow Circuit (FCC MC) dated 27 March 2013 in case No. A40-126833/12-143-605, the Resolution of the FCC MC dated 18 March 2013 in case No. A40-125006/12-25-589, the Resolution of the FCC MC dated 25 June 2013 in case No. A40-173567/12-50-1732, and the Resolution of the FCC MC dated 16 September 2013 in case No. A40-44852/13-69-208).

In the author's view, such an approach of the courts is erroneous when they examine cases in which ICA awards are challenged, and in particular it is wrong to apply it by analogy with the provisions of the AT Law (since, in court acts, as a rule, the need to apply the provisions of the AT Law has not been substantiated, the most logical explanation is the provisions of the above law being applied by analogy). This directly contradicts the rules established by law.

As a matter of general legal theory, the analogy of the law which, it seems to the author, the courts use when they examine cases challenging ICA awards, involves applying to an unregulated legal relationship a specific legal provision that governs similar relationships.

However, the regime for challenging ICA awards is clearly regulated by a special law — the ICA Law. This contains a rule that any ICA award may be appealed and it does not directly rule out the possibility of appealing an ICA award which has been established to be final by agreement of the parties (an arbitration agreement / arbitration clause). Moreover, as stated above, the ICA Law directly establishes that an ICA award is final (article 32(1) of the ICA Law).

Thus it follows from a literal systemic interpretation of the provisions of the ICA Law that even if there is an agreement of the parties that an ICA award is final, this does not mean that an interested party may not apply to a competent state court with an application to have such award set aside under the procedure of § 1 of Chapter 30 of the APC. A similar approach is contained in particular in the Resolution of the FCC MC dated 6 October 2011 in case No. A40-7186/11-50-55 and the Resolution of the FCC MC in case No. A40-54535/07-69-510.

In view of the above, when courts examine cases where ICA awards are challenged, it is an error if the courts, along with the rules of the APC which establish a procedural regime for this type of case to be examined, apply the provisions of AT Law, since it contradicts the principle established by the Russian legal doctrine that general and specific legislation should be applied.

When cases are examined which challenge the decisions of arbitral tribunals and ICA awards, the general rules to be applied are those of § 1 of Chapter 30 of the APC. However, the AT Law stipulates specific rules that are to be applied when cases are heard which challenge the decisions of arbitral tribunals, while the rules of the ICA Law are the specific rules that should be applied when ICA awards are challenged.