

Derogation Effect of Arbitration Clause
Address at the Workshop Conference “International
Commercial Arbitration in Russia Amid Economic
Development Globalization”, Devoted to the 15th Anniversary
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Recognition and Enforcement of Foreign Arbitral Awards
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1. Importance of arbitration. 1958 UN Convention

Ladies and gentlemen,

Arbitration is the optimum means of having our clients' most complex problems settled according to the most stringent yardsticks of refereeing. The standards and regulatory extents of arbitration provide an environment for also our own professional services. The UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which was signed way back in the 1950s, is a laconic and time-tested document which has fortified the legal foundations of a system for the alternative resolution of international commercial conflicts through the involvement of professionals rather than judges apparently with a view to bringing the parties to economic dealings closer together and overcoming any mistrust in their ranks.

With time, the Convention has only gained in significance, as the role of international commercial arbitration has grown. In our capacity as legal practitioners, we understand that the purpose of the Convention has been to establish a working balance of powers vested in government bodies and arbitral tribunals and in state courts, to define basic principles for judicial oversight in a manner taking account of the degree to which the national legal systems are prepared for it, and to implement a mechanism whereby state courts could be motivated to refer ever more hard cases to arbitration by way of reducing their own docket.

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2. No consensus among authorities dealing with disputes

In the Russian Federation, international commercial arbitration has long-standing and unique traditions, enjoys well-deserved authority, and rests on a solid legal footing. It was pretty early, at the beginning of the 1990s, that the International Commercial Arbitration Law has made its way onto the books here. The umpiring of international economic disputes in Russia, however, has long been hampered by a want of consensus among courts of general jurisdiction and arbitral tribunals on the most crucial matters regulated by the Convention. My point is not at all that the courts in this country are inadequate; that would be an inappropriate thing to claim. The legal reality is such that in addition to the authoritative ICAC, they have to deal with some dark-horse arbitration panels whose awards are used for hostile corporate takeovers, sham prejudgments, and other like abuses. It is imperative to maintain tight judicial supervision within the legal formulas available under the Convention by following uniform approaches to all arbitral tribunals existing in accordance with the International Commercial Arbitration Law.

What is especially important to the international business community is not so much any wide-ranging powers entrusted to arbitral tribunals as certainty and predictability when it comes to the legal networking of the government judiciary and private arbitral authorities. Therefore, the exceedingly long lack of regulation in respect of key issues related to the rights and obligations of arbitrators has resulted in a trend where major disputes with Russian participation are likely to be submitted to refereeing abroad. The situation where the most involved operations of clients, which call for creative exploits on the part of legal thinkers, facilitate the evolution of only foreign laws and legal practices, with Russia's legal practitioners left high and dry, is downright unproductive. The absence of legal material requiring sophisticated juridical support makes for a dearth of proper impulses needed for improvements to legal doctrines and law-making endeavors.

The Russian market which has been gathering momentum makes fertile ground for large-scale ambitious projects and most vigorous legal activities. My fellow practicing lawyers and myself have a vested interest in joining the above processes and pursuits. In this address, I would like to dwell on our recommendations on how certain critical problems encountered in international commercial arbitration could be tackled and resolved by taking advantage of Article II of the Convention, which speaks of the derogation effects of an arbitration clause.

3. Interpretation of Article II of the Convention

Clause 3 of Article II of the Convention spells out the more important conditions under which a court is obliged to refuse to recognize an action to be subject to arbitration upon finding that the parties' arbitration agreement is null and void, inoperative, or incapable of being performed. How the respective paramount legal terms should be properly understood? We are convinced that this should be done in conformity with the will of the United Nations members, as expressed not only in Russian, but also in other languages, considering that, even if the Russian text of the Convention is authentic, it cannot be self-sufficient, by being distinctly different from what is recorded in the English and French languages. Take the phrase "inoperative or not capable of being performed". Its Russian equivalent, we believe, is «неисполнимость» and «нереализуемость» of the arbitration agreement in objective and subjective terms. We take the view that when deciding whether a dispute should be referred to costly foreign arbitration, the court should not only satisfy itself, for example, that the arbitral tribunal named in the parties' agreement actually exists, but also consider diverse other impediments in evidence that may block the parties' access to justice, including, but not limited to, their financial insolvency.

The Russian version of the Convention renders "inoperative" as «утра́та си́лы». One finds it hard to imagine a situation where an arbitration clause "loses force", considering its universal autonomy under the doctrine. Let us consider, for example, cases where the arbitration clause includes a condition subsequent or has been terminated by the parties' agreement. Even then, causing this kind of condition to be included in Clause 3 of Article II of the Convention would be redundant, since the relevant provisions of national contract laws would be perfectly sufficient for the purpose. The idea is that the cumulative meaning of the Russian wording should stem not from any domestic laws, but from its comparison against the corresponding terminology in other languages where unclear on the basis of the 1969 Vienna Convention on the Law of Treaties, P. 4 Article 33 of which speaks of the prevalence of that meaning "which best reconciles" the authentic texts.

This can be illustrated as follows: the Russian text speaks of the parties' «недееспособность» (for individuals) (Clause 1(a) of Article V of the Convention), while the term logically suggested by the combined analysis of the texts in the other languages is "incapacity/incapacité" («неправоспособность» for entities). It is for the same reason, ladies and gentlemen, that «недействительность» ("invalidity" in translation),

as follows from a comparison of the variants of the term in different languages, should be understood as «ничтожность» (“voidance”) – a distinction assuming enormous practical significance where a party cites any flaws in the will before a Russian state court. Why so?

4. Law applicable to Clause 3 of Article II of the Convention

Because we believe that the Russian court seized of an action in a matter covered by an arbitration clause should explore all of its possible defects under *lex fori* rather than *lex arbitri*, although it is the latter that many an esteemed arbitrator has gone on record to favor. Under Russian civil law, invalidity due to defects of the will requires being established through the instrumentality of a lawsuit. This is also true of the lack of authority carried by representatives. Guided by *lex fori*, the court is thus only obliged to check the form of the arbitration clause and to verify that its substance is consistent with the law, and this in principle narrows down perceptibly the range of reasons which may be invoked to substantiate refusal to refer the matter to arbitration. *Lex fori* is applicable pursuant to Article 1186.2 of the Russian Civil Code. We are of the opinion that claims regarding the invalidity of an arbitration clause as a way of causing the matter to be subject to state courts are most closely associated with the Russian Federation. There is no statutory indication or international rule for the choice of laws to such effect in existence other than the respective provision found in Clause 2 of Article VI of the 1961 European Convention (where applicable, i.e. under conditions where arbitration procedures have already been initiated and the parties originate from any of the countries that are parties to the Convention).

5. Arbitrability

Permit me now to proceed to the most datable issue – that of arbitrability, which is a veritable bone of contention for professionals, judges, and scholars. We, practicing lawyers, see our task is coming up with ideas that could reconcile the different views advocated on the matter. One should concede, ladies and gentlemen, that this basic controversy is likewise rooted in the differences between the relevant wordings found in the Convention in the different UN languages (including Russian, Chinese, Spanish, English, and French).

Let us start with the Russian language. Clause 1 says that a dispute should be about «конкретное правоотношение, объект которого может

быть предметом рассмотрения» before an arbitral tribunal. This makes one think of some concrete requirement in relation to assets as the subject matter of civil rights and suggests that there exists a variety of objects which may be subordinate to arbitration – with certain exceptions. The English text says, however, that the matter as a combination of issues raised before the arbitral panel should be capable of settlement by arbitration. Our understanding is that this is whence all matter of misunderstandings originate, because unlike subjective non-arbitrability, objective non-arbitrability is not necessarily obvious and may arise in the course of proceedings in which it becomes essential to invoke such public provisions as arbitral panels are incapable of applying (which should not even be indispensably super-imperative). This is true, for example, of cases where a party claims payment for a provided service, while the other maintains that the disbursement sought is nothing other than a bribe, with the grant of the resulting action being bound to breach competition law, etc. Arbitral panels may apply public provisions where they are trusted by state courts. In the absence of such cooperation, non-arbitrability may be interpreted broadly. Arbitral panels in Western legal systems, in EU countries, are entrusted with bankruptcy, competition, and other like cases. There is a self-governed arbitration community there. Here, ladies and gentlemen, we are only at the start of the road towards a similar set-up. It is not always possible in advance to identify a commercial dispute as arbitrable or non-arbitrable, even though laws do indicate, albeit not always competently and coherently, the range of matters they would like reserved for resolution by state bodies.

Courts should be extra-careful in cases where the parties have entered into an agreement on the choice of foreign arbitration, and should analyze and determine if such foreign proceedings may result in disregard for key public provisions set out in Russian employment, currency, competition, bankruptcy, and other laws. This is not yet the prevalent practice in this country, ladies and gentlemen, although it should catch on. Foreign arbitral tribunals apparently have the experience of applying relevant imperative provisions in effect in other jurisdictions upon finding such stipulates to be super-imperative. However, they, frankly, tend to generally ignore our own public provisions. Reality is such that a sizable share of Russian economic turnover is governed by foreign laws and geared to seeking protection from foreign arbitration.

6. Arbitrability and public policy

We do not believe that arbitrability makes part of the public-policy notion, especially as Article V of the Convention distinguishes them in different clauses as different conditions for the recognition and enforcement of arbitral awards. Arbitrability belongs to the sphere of effect of law and public policy to its results. Public policy deals with such outcome of proceedings to examine differences as makes it impossible to enforce (even if the judicial check has found no defect whatsoever) without rocking the mainstays of our law and order. Russian and foreign scholars wrote about that way back in the 19th century. Public policy is the last protective filter to fend off unacceptable awards, as it is called upon to neutralize the consequences of foreign laws being applied. Since the other like mechanisms designed to disqualify an arbitral award by reason of the matter's non-arbitrability or the arbitration clause's inoperability or incapability of being performed have still to be made functional, public policy as a legal tool intended for a special purpose tends to be overused and deformed in the process. The resulting impression is that of the unpredictability and poor consistency of any, even the best of awards – a failing that is to the detriment of not only our arbitration community, but also the entire system for dispute resolution.

This, ladies and gentlemen, brings me to the end of my statement.