RUSSIA: Optional arbitration clause declared invalid

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Russia's top commercial court has ruled that an arbitration clause granting one party the additional, unilateral option to bring claims in a competent court is invalid under Russian law. **Maria Yaremenko**, a senior associate at Hogan Lovells in Moscow, reports on a decision that makes surprising use of international human rights law.


Maria Yaremenko

Background to the case

The underlying dispute related to a 2009 distribution agreement between Sony Ericsson Communication Rus and Russian Telephone Company (RTC). The agreement, governed by English law, provided that any dispute between the parties was to be settled by ICC arbitration in London. In addition, Sony Ericsson had the option to take action in any court that had jurisdiction. RTC only had the right to arbitrate.

When a dispute arose over telephones supplied by Sony Ericcson, RTC filed a claim with the Moscow Commercial Court rather than filing a request for arbitration with the ICC. The court refused to consider the claim, holding that RTC was bound by the arbitration clause. This decision was upheld by the Ninth Appellate Commercial Court and the Federal Cassation Court of the Moscow Region. RTC then applied to the Supreme Commercial Court for supervisory review of the matter.

On 19 June, the court presidium set aside the three lower-court decisions and sent the case back for reconsideration to the Moscow Commercial Court. The full text of the decision only appeared on 1 September. It is available in Russian here .

The court's conclusions

The presidium found that, based on general principles of protecting civil law rights, the distribution agreement could not grant the right to apply to the courts only to one party and deny the other party the same right.

The presidium said such an agreement is invalid because it violates the balance of rights. The party whose rights are violated is entitled to apply to courts for protection of its rights on terms equal to the ones granted to the counterparty. In coming to its conclusion, the Presidium appears to have concluded that the relevant arbitration clause as a whole was invalid – although its reasoning is very limited on this issue, spanning only a couple of sentences.

International precedents?

The presidium relied on case law from the European Court of Human Rights (ECtHR) relating to violations of article 6 of the European Convention on Human Rights and on resolutions by the Constitutional Court of Russia reaffirming the equality-of-arms and adversarial principles. Unfortunately the presidium did not clarify the basis for applying Russian law and these international norms to the question of the validity of a jurisdiction clause in a contract governed by English law and providing for ICC arbitration.

The main ECtHR case relied upon was *Suda v Czech Republic*, wherethe Strasbourg court considered whether the requirements of article 6(1) of the convention were satisfied in a situation where a Czech citizen was obliged to have recourse to arbitration under an arbitration agreement to which he was not a signatory. The ECtHR confirmed that in those circumstances, a non-signatory was entitled to seek protection of the rights arising from the contract in local courts.

In another case relied upon by the presidium, *Khuzhin and others v Russia*, theECtHRfound a breach of the principle of equality of arms when Russian courts examining a civil claim against Khuzin had refused him leave to appear in the proceedings. The ECtHR reaffirmed that the principle of equality of arms is one of the elements of the broader concept of a fair hearing, which requires that each party be given a reasonable opportunity to have knowledge of and comment on the

observations filed or evidence adduced by the other party and to present their case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent.

The equal treatment of parties to litigation is a fundamental principle of Russian civil law as well as in the cases referred to above. However the choice of parties to opt out from and choose between arbitration or litigation is guaranteed by a different principle – freedom of contract – which has been also supported by the ECtHR in other cases such as *Regent Company v Ukraine*.

Impact of the case

Clauses of the type that was declared invalid in the *Sony Ericsson* case are commonly used in English-law agreements between Russian and non-Russian parties – particularly in financing agreements. From now on, the courts in Russia will be permitted to hear claims under such contracts regardless of what they provide. Therefore, companies negotiating with Russian parties who wish to protect their interests should avoid the optional arbitration mechanism and instead opt for the resolution of all disputes only by means of arbitration or litigation.