

Russian Appetite For Local Arbitration Remains Low, For Now

By **Caroline Simson**

Law360 (August 8, 2019, 4:59 PM EDT) -- A move by Russia to allow arbitral institutions from Hong Kong and Vienna to administer disputes within its borders has expanded the range of options for companies doing business in Russia, but it's unclear whether that will change a deep-seated preference in the country to arbitrate disputes abroad.

Earlier this year, the Hong Kong International Arbitration Centre became the first to be authorized by Russia's justice ministry to administer certain types of international disputes seated in Russia, including a range of corporate matters. That was followed in July by the Russian justice ministry granting permission to the Vienna International Arbitral Centre.

The Vienna and Hong Kong centers now join three institutions in Russia that are able to administer Russian corporate disputes, providing options to international businesses that may be wary of local arbitral institutions with ties to Moscow amid lingering concerns of undue influence and possible corruption.

And there are other benefits as well, according to Dmitry Ivanov, a partner in Morgan Lewis & Bockius LLP's Moscow office.

"This not only broadens the scope of the types of disputes that can be arbitrated, but also ensures that any arbitral award coming out of such a dispute is enforceable in Russia," he said. "This could be appealing from a risk perspective to a foreign company with operations in Russia — especially where its Russian counterparty has no assets, or at least easily attachable ones, outside Russia."

The licensing process is part of Russia's efforts to modernize and reform its arbitration laws. It's meant to address the sense of wariness that has prompted many Russian companies to show a preference for resolving their disputes in foreign institutions like the London Court of International Arbitration and the International Chamber of Commerce.

A recent internal study by Bryan Cave Leighton Paisner LLP of more than 30 corporate transactions conducted by the firm's Moscow office in 2017 and 2018 revealed that two-thirds of these transactions contemplated arbitration before the LCIA, while only one-third provided for arbitration before the International Commercial Arbitration Court in Moscow.

Yury Babichev, counsel in Bryan Cave's Moscow office, said there is some evidence suggesting that trend

may be starting to change.

"It is often said that ICAC is at home with low-value commercial disputes, but I am also aware of a growing number of high-stake arbitrations pending or recently resolved at ICAC, with claims ranging from dozens to hundreds of million U.S. dollars," he said.

But not everyone shares his perspective. Others say that Russian businesses are unlikely to change their preferences, and their foreign business partners will be only too happy to oblige them in many instances.

Although arbitrating in a licensed institution like the HKIAC or VIAC may head off potential arguments that a proceeding violates Russian law, non-Russian parties that avert such complications and prevail in an ICC or LCIA arbitration involving a Russian party won't have to worry about the quirks of Russian arbitration law or Russian courts, so long as their opponent has assets abroad.

"In general, it's nice to have an award that's enforceable in your opponent's jurisdiction, but if your opponent has assets elsewhere you care much less about that," said Noah Rubins, who heads Freshfields Bruckhaus Deringer LLP's international arbitration practice group in Paris and the firm's global Commonwealth of Independent States/Russia dispute resolution practice group.

The unusual move by Russia to require foreign arbitral institutions to obtain permits comes as a result of efforts the country has undertaken over the last few years to root out corruption among its arbitral institutions — many of which were illegitimate — and to increase foreign confidence in arbitrations conducted there.

Several years ago, Russia enacted legislation aimed at modernizing its arbitration landscape. Among the adopted changes was the requirement that foreign arbitral institutions register with and obtain permission from the Russian government, part of an attempt to ensure that the minimum standards in the arbitration laws are being met.

The requirement came about through efforts to stop the practice of so-called "pocket arbitration courts," many of which were linked to large Russian corporations. For example, the Russian natural gas giant Gazprom — which is majority-owned by the Russian government — had its own arbitration court, to which the company referred all of its disputes, according to Roman Zykov, the secretary-general of the Russian Arbitration Association.

But the reform efforts, and particularly the licensing requirements, have been criticized even within Russia. Many stakeholders say that the reform efforts have come up short, and that they may not persuade wary foreign companies, or even Russian companies, to arbitrate their disputes in the country.

"It's a turbulent time. I don't think everyone is satisfied and happy with what's going on," Zykov said.

He noted that of the three domestic institutions allowed to administer arbitrations in the country, two are closely connected to, and perhaps even funded by, the Russian state.

Complicating matters is the fact that enforcing arbitral awards in Russia remains a dicey affair. Although about 80 percent of arbitral awards are recognized and enforced in Russia, most of those are very small cases, according to Zykov.

He noted that of awards valued at more than \$10 million, only about one out of three is enforced in the country.

"Russian courts are still heavy-handed when dealing with arbitration," said Zykov. "I wouldn't say it's crazy to go arbitrate in Russia, but I would say it's safer and more predictable in terms of the results to do it in one of the established jurisdictions."

--Editing by Rebecca Flanagan and Michael Watanabe.