STATE COURTS AND ARBITRAL TRIBUNALS
RUSSIA’S PERSPECTIVE – LEARN TO LOVE THEM

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Is Russia arbitration-friendly?

- About 500 active arbitral institutions (c. 2,500 in total)
- About 4,000 court cases per year in re setting aside and enforcement
- About 10% annual growth
- About 80% enforced
All this is about to change soon

From unlimited freedom to a “license” to arbitrate
Trend 1 – Court’s Oppose to “Pocket” (Affiliated) Arbitral Institutions

Case law concept of “objective impartiality”: affiliation between a party to arbitration and organization (or its member), which created the arbitral institution, renders a lack of “objective impartiality” (independence)

2011 – Sberbank case
2012 – Lukoil case
2013 – Gazprom case

De facto block for operation of arbitration institutions acting under various business associations

2014 – Constitutional Court: “Affiliated” does not necessarily mean prejudiced
2015 – Supreme Court: affiliation with the institution does not as such render a lack of impartiality of a specific tribunal
Trend 2 - Increasing Control over Establishment and Operation of Arbitral Institutions

All permanent arbitral institutions:

✓ Can be established by noncommercial organizations only
✓ Subject to a special permission by the Federal Government based on a recommendation of a special advisory board (2/3 of which representing private sector).
✓ Arbitrations rules are subject to deposition (de-facto registration) with the Ministry of Justice
✓ Shall comply with a set of rather detailed and mandatory requirements (re procedure, recommended list of arbitrators etc.)
✓ If an arbitral institution fails to meet the obligatory requirements, the Ministry of Justice will have the right to: (i) issue a warning; and (ii) apply to state court for compulsory liquidation

*in force starting from September 2016
**Trend 3 – Increasing Courts’ Involvement and Assistance in Arbitration Proceedings**

Competent court will:

- Serve as an appointing authority when a party, co-arbitrators and, in certain cases, arbitral institution fail to appoint the arbitrator
- Hear a challenge of an arbitrator
- Hear a challenge of a preliminary ruling on jurisdiction
- Have the right to suspend annulment or enforcement proceedings and give the arbitral tribunal an opportunity to rectify possible grounds for refusal or annulment
- Have the right to order a disclosure of evidence under a request of a party or tribunal
Trend 4 – A Growing Appetite to Grant Interim Measures

New law reinforces the court’s authority to grant interim measures in support of *pending and future* arbitration proceedings

Recent case law shows that courts:

*Display a growing appetite to grant interim measures:*  

*And sometimes even get carried away:*  
✓ Commercial court grants interim measures in parallel court proceedings on the merits factually blocking pending arbitration - *LLC Autoproject v Sberbank and Independent Arbitration Chamber*, no A53-23688/2015, 6 October 2015
Trend 5 – Increasing Flexibility (Autonomy) for Parties to Arbitration Proceedings

Parties will have the right by way of “direct agreement”*:  

- Exclude court’s assistance as an appointing authority  
- Exclude court’s authority to hear a challenge of arbitrators  
- Exclude court’s authority to hear a challenge of a preliminary ruling on jurisdiction  
- Exclude court’s authority to hear an application for annulment of award  

* not applicable to ad hoc arbitrations
Trend 6 – Arbitrability: More Certainty and Expansion

✓ The list of non-arbitrable disputes
✓ Real estate disputes ARE ARBITRABLE
✓ Corporate disputes ARE GENERALLY ARBITRABLE
✓ Corporate disputes with an impact on a greater number of parties ARE CONDITIONALLY ARBITRABLE
✓ Corporate disputes with a public element and a certain list of related disputes ARE NOT ARBITRABLE

No *ad hoc* arbitration for corporate disputes
Refusal for Recognition and Enforcement of Foreign Judgments and Arbitral Awards

Procedural Violations: Notification, Going Beyond Scope, Composition of Tribunal (approx. 48%)

Contradiction to Public Policy (approx. 41%)

Invalidity of Arbitration Agreement/Clause (approx. 11%)
Trend 7 – Changes to Setting Aside and Enforcement

- Domestic arbitration: grounds for annulment to bring in line with UNCITRAL Model Law
- Parties can agree on the finality of the award in international arbitration
- Foreign declaratory arbitral awards are recognized without court proceedings, unless challenged by an interested party
- Procurator (state attorney) will have a limited right to challenge a “Russian” arbitral award in court if “such award concerns interests of Russian Federation, its federal units and municipalities whose were not parties to arbitral proceedings”
- Changes in public registers upon court’s review only
- Quick vs good: reduced term to consider application by court – 1 (one) month!
Temperature of Public Policy Approach

New law perfected the test to “public policy” excluding “basic principles of Russian law”

No merits review when assessing public policy compliance

Application of substantive or procedural rules unknown to Russian law

Liquidated damages and penalties unless clearly excessive

Casual willingness to review on the merits and application of “Surprise Decision” Doctrine

“Torpedo” claims: arbitral award shall not contradict a judgment by Russian court
Recent Lessons: Court’s Approach Can Be Unpredictable

- Be careful with anything that may even remotely refer to government’s money – state owned companies, publicly funded works, concessions
- Make sure all corporate approvals by a Russian counterparty are obtained
- Authority to conclude an arbitration agreement must be expressly articulated in the power of attorney
- Avoid optional and asymmetrical arbitration clauses
- Unclear arbitration clauses continue to cause problems
- Commencement of insolvency proceedings may frustrate ongoing arbitration