Arbitration clause providing for ad hoc arbitration invalid where arbitral institution not specified (Russian Ninth Commercial Court of Appeal)

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In *Case No. #40-130828/16, Ninth Commercial Court of Appeal No. 09##-48750/2017 of 9 February 2018*, the Russian Ninth Commercial Court of Appeal considered the validity of an arbitration agreement providing for arbitration under the UNCITRAL Rules in London.

Speedread

The Russian Ninth Commercial Court of Appeal has ruled that an arbitration agreement, providing for ad hoc arbitration, was invalid because it was not possible to identify any arbitral institution to administer the dispute.

The decision contradicts the position of the Supreme Commercial Court. Parties to arbitration agreements in the Russian Federation would be well advised to identify any arbitral institution that will either administer the case, or that will act as designating and appointing authority, in the clause. While the ruling appears to continue Russian state courts' recent anti-arbitration approach, there is hope that the courts of higher instances will reverse this ruling. (*Case No. A40-130828/16, Ninth Commercial Court of Appeal No. 09АП-48750/2017 of 9 February 2018.*)

Facts

Italian company SIRA INDUSTRIE S.p.A. (claimant) brought a claim before the Commercial Court of Moscow against Russian company LLC GL TERMO (respondent) alleging breach of a supply agreement by the respondent.

The claim was granted without the respondent's participation in the court hearing, although, as stated in the court decision, the respondent was duly notified of the proceedings.

Later the respondent filed an appeal disputing, among other things, the jurisdiction of the Russian state courts due to the existence of an arbitration agreement between the parties. Indeed, clause 13.4 of the supply agreement provided for arbitration under the UNCITRAL Rules in London.

Decision

The Ninth Commercial Court of Appeal found that the arbitration agreement was invalid because it did not specify any arbitral institution to administer the dispute. In particular, the appeal court noted that there are at least three courts in London that the agreement could be referring to: the High Court, the London Court of Arbitration and the London Court of International Arbitration (LCIA).

The appeal court also underlined that the respondent's address did not correspond to the one mentioned in the supply agreement and in the State Register. This allowed the court to conclude that even if arbitration proceedings were initiated, it would not be possible to notify the respondent in accordance with clause 3 of the UNCITRAL Arbitration Rules.

Comment

The appeal court's conclusion that the clause was invalid contradicts the position of the Supreme Commercial Court, which is that a claim brought before a Russian state court should be left without consideration if an arbitration agreement provides for the resolution of disputes by ad hoc arbitration (*paragraph 19, Informational letter of the Presidium of the Supreme Commercial Court of RF of 18 January 2001 No. 58*).

Due to the risk that the appeal court's approach will be accepted by other courts, parties to agreements, where one of them is a Russian-based company, are advised to pay close attention to the wording of any arbitration agreement providing for ad hoc arbitration. In particular, parties should specify an arbitral institution to administer the case, or to act as appointing authority.

The court's reasoning regarding the impossibility of notifying the respondent did not prevent the Russian state courts from considering that the respondent had been duly notified in the Russian court proceedings, even though the notification was sent to the respondent's registered address.

It seems that this latest appeal court ruling continues Russian state courts' recent anti-arbitration approach. However, there is hope that the courts of higher instances will reverse this ruling.

Case

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