A CONSERVATIVE MODEL OF ARBITRATION: THE RUSSIAN EXPERIENCE

Prof. Oleg Skvortsov[*]

Abstract

Between 2015-2019, large-scale arbitration reforms were carried out in Russia. As a result of these reforms, a conservative model of arbitration emerged. Simultaneously, Russian lawmakers rejected the liberal approach to arbitration that had prevailed in Russia for the previous 25 years. This article analyses the reasons and prerequisites for the reform and its consequences. In particular, it investigates the widespread phenomenon which has received the name "pocket arbitration". The role of the higher state courts that fought against pocket arbitration as well as anti-arbitration judicial practice resulting from the confrontation between the courts and arbitration are noted in this article. Special attention is paid to the ideology of conservative reform and its legal technique. The author assumes that each legal technique can be applied to regulate arbitration even within the framework of a liberal model, but it is their combination that creates a conservative model in the form of an integral regulatory system. The analysis results in the conclusion that an unfavourable atmosphere has been created in Russia for the consideration of disputes through arbitration.

I. Introduction

Despite the relatively recent history of commercial arbitration[1] in Russia, being less than three decades old;[2] this institution has undergone such drastic changes that its new appearance is radically different from what was created in the early 1990s. Arbitration in Russia has evolved from an extremely liberal model to an extremely conservative model in which the State, having completed the reform of private justice, exercises total control over the activities of arbitral institutions. This supervision is carried out at all stages, beginning at the moment of their creation, continuing throughout the course of their activities, and even during the execution of arbitral awards.

Many reasons led to this sharp change in government policy as well as to the conservative ideology of the Russian legislature in relation to commercial arbitration. In order to identify these reasons and analyse the current regulatory model, this article in Part I provides a classification of

* Prof. Oleg Skvortsov (oleg.skvortsov@dlapiper.com) is a Counsel with DLA Piper, Professor at the Commercial Law Department of the St. Petersburg State University, Doctor of Law, and Member of the Council on Arbitration Development of the Russian Ministry of Justice.

1 This term is used in Russian law in two ways: (1) arbitration as state courts that consider economic disputes between entrepreneurs; (2) arbitration as a private court alternative to state courts or, in other words, classical arbitral tribunals in a way that they are understood worldwide. This double use of words often misleads lawyers who are not familiar with the legal system of the Russian Federation. In situations where we are talking about state arbitration courts, foreign lawyers may think that we are talking about private arbitration. Without going into explanations about the historical reasons that influenced this bilingual situation, we note that in this article, the author will try to explain each time, when it does not follow from the context, which body we are talking about – the state arbitration court or private commercial arbitration.

2 In this article, we consider Russian arbitration, starting from the 1990s, when Russia made the transition from a socialist economic model to a market economy. At the same time, we leave aside the previous Soviet period during which international commercial arbitration, which was under the control of the State, operated in the Union of Soviet Socialist Republics (USSR) to a limited extent. *See* ANDREY KOTELNIKOV, SERGEY KUROCHKIN & OLEG SKVORTSOV, ARBITRATION IN RUSSIA 1–7 (Andrey Kotelnikov, Sergey Kurochkin & Oleg Skvortsov eds., 2019) [*hereinafter* "KOTELNIKOV ET AL."].

arbitration into liberal, neutral, and conservative models. Part II describes the reform of arbitration from 2015 to 2019 and the reasons behind the creation of a conservative model of arbitration in Russia. Part III analyses anti-arbitration court practice and its impact on arbitration legislation. Part IV identifies the main ideas and legal techniques involved in the introduction of a conservative model of arbitration. Part V draws conclusions about the consequences of introducing a conservative model of arbitration in Russia.

II. Three models for the regulation of arbitration

In general, the practice of countries with developed market economies and well-established legal orders indicates a tendency to unify the national regulation of arbitration with generally recognised acts of international law. At the same time, national jurisdictions, depending on various objective and subjective factors, also contain very significant differences in the regulation of arbitration. Such differences determine national models of arbitration regulation.

Classifying on the basis of these differences allows us to identify three distinct models of arbitration regulation, with a certain degree of conditionality. These are the liberal, neutral, and conservative models. This classification is based on the degree of state control over arbitration activity and consequently, the degree of freedom enjoyed by arbitral institutions operating in a particular legal order.

In the liberal model, issues relating to arbitration are resolved by conditions prevailing objectively in the free market, whereas the conservative model is characterised by the free discretion of officials relying on a paternalistic approach to the sphere of private law in general and private justice in particular.

A. The liberal model

The harmonisation and unification of arbitration legislation in developed countries is generally based on the United Nations Commission on Intertional Trade Law ["**UNCITRAL**"] Model Law on International Commercial Arbitration ["**Model Law**"],[3] which is generally liberal in its approach.[4] However, even if a national law does not reproduce the literal provisions of the Model Law, its liberalism is ensured as long as it enshrines the principles and ideals of party autonomy and free will of the arbitrating parties. Under the liberal model of arbitration, the State entrusts private arbitrators with the right to resolve private law disputes, and this trust involves giving arbitrators a broad discretion as well as giving up the day-to-day supervision of arbitration institutions.

---

[3] United Nations Commission on Intertional Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, 1985 U.N.G.A. Res. 40/72 (Dec. 11, 1985), as amended by U.N.G.A. Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006) [*hereinafter* "Model Law"].

[4] However, it should be borne in mind that the mere reproduction of the Model Law in national legislation does not make the arbitration system of a particular state liberal. It also requires an arbitration-friendly application of the law, a well-developed infrastructure that ensures the application of the law (including a community of lawyers with the appropriate skills, experience, and traditions) as well as the State's rejection of preferences in favour of certain arbitrations related to the authorities. For example, in Ukraine, the arbitration law is based on the Model Law; but in 1995, the law "on foreign economic activity" was adopted, according to which all disputes arising from foreign economic activity must be referred to the International Commercial Arbitration Court or the Maritime Arbitration Commission at the Ukrainian Chamber of Commerce and Industry. Thus, the legislation introduced a monopoly of these arbitral institutions for the resolution of foreign economic disputes, which undermines the liberal idea behind the Model Law. *See* Law of Ukraine on International Commercial Arbitration 1994 (Ukr.); Law of Ukraine on Foreign Economic Activity 1995, art. 38 (Ukr.).

In other words, the liberal model of arbitration regulation assumes minimal control over private justice by the State. State courts are usually only involved when enforcement is sought or an award is challenged. The powers of the court include refusing recognition if the award does not comply with minimum standards of the judicial procedure or violates public order. The grounds for setting aside an award usually coincide with the narrow list of grounds for refusing to enforce a foreign award established by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"].[5] Thus, state courts do not interfere in the substance of the dispute.[6]

Lastly, the liberal model does not assume control of arbitration by executive authorities. In addition, the liberal model of arbitration does not require permission from the executive authorities to establish arbitral institutions and the creation of such organisations remains entirely in the power of interested persons independent of the state.

B. The neutral model

The neutral model of arbitration regulation is based on the principle that in addition to the limited supervisory role of state courts, self-regulation of arbitration institutions is carried out by the arbitration community. For this purpose, self-regulating organisations are created, whose members must be permanent arbitration institutions.

This model allows the State to exercise control over arbitral tribunals, not only through state courts, but also through the self-governing bodies of the arbitration community, which significantly saves the resources of the public authorities required for control.[7]

As a result of the implementation of the ideas of a neutral model of arbitration, a self-regulating organisation is responsible for the activities of arbitration institutions in place of the State. Thus, the neutral arbitration model creates a two-stage control system: the State controls the self-regulating organisation, while the self-regulating organisation oversees its members i.e. the arbitral institutions.

It is believed that the professional community is more effective in ensuring regulation as it has a greater capacity to combat abuse in the field of arbitration and a tangible interest in fighting for the purity of its ranks.

C. The conservative model

Conservative arbitration models are based on strict control of private justice by the State. According to research, Costa Rica, Ecuador, Nicaragua, Panama, Peru, Angola, Mozambique,

---

5 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3.

6 The examples for implementing a liberal arbitration model are the legislations of Sweden, Great Britain, France, and Austria.

7 An example of implementing a neutral arbitration model is the legislation of Kazakhstan. In 2016, the Law of the Republic of Kazakhstan No. 488-V was adopted, which established the Arbitration Chamber of Kazakhstan, a non-profit organization that unites permanent arbitral institutions and arbitrators. The Arbitration Chamber organises the activities of arbitral institutions based on the principle of self-regulation and maintains a register of arbitrators of permanent arbitrations. *See* Arbitration Law, No. 488-V, (2016) Cap. 2 (Kaz.).

Zambia, Uganda, Bahrain, Ukraine, and Uzbekistan are examples of countries with a conservative model of arbitration.[8]

The conservative model of arbitration regulation assumes that the executive authorities (usually the Ministry of Justice), in addition to the judiciary, have control over the administrative admission of arbitral institutions (including foreign arbitral institutions) to operate in the territory of a State or in respect of disputes between residents of that State. At the same time, the authorities, when allowing arbitration institutions to operate in the territory of the State, have broad and virtually unlimited discretion. For example, in Zambia, the Ministry of Justice has the power to refuse to register an arbitral institution if it finds that the number of such organisations is sufficient for the jurisdictional needs of the State.[9]

Among other things, the conservative model of arbitration prohibits residents of the State from applying to foreign arbitration centres for the resolution of domestic disputes.[10] As it is known, the Model Law, as well as the national laws of the countries where the most recognised arbitration centres are located, do not contain restrictions on the possibility of submitting domestic disputes to foreign arbitral institutions. The conservative model of arbitration usually excludes this possibility, leaving the resolution of disputes under the control of the internal State jurisdiction.[11]

In some cases, the conservative model of national arbitration may mimic the liberal model. This is the case when a national law reproduces the provisions of the Model Law textually, but distorts its spirit and principles. This situation arises because many provisions of international law that are reproduced in national laws contain "*rubber*" concepts,[12] and make it possible to expand the boundaries of these concepts excessively. The most striking example is the concept of 'public order,' the boundaries of which are very mobile and can be extended very widely.[13] In States with a paternalistic approach to arbitration, it is through the immeasurable extension of

---

8 *See* Galina Zhukova, *Arbitration institutes: legal status, creation, binding requirements and oversight*, 2/3 TRETEISKY SUD 55, 55–75 (2016) [*hereinafter* "Zhukova"]; *See also* Vladimer Khvalei, *Why Arbitration Reform in Russia Failed*, 11 ARB. J. 4 (2019), *available at* https://journal.arbitration.ru/upload/iblock/cc2/Arbitration.ru_N7_11_August2019_upd.pdf#page=6 [*hereinafter* "Khvalei"].

9 *See* Zhukova, *supra* note 8, at 74; *See also* Khvalei, *supra* note 8, at 7.

10 Alexander Katzendorn, *Arbitration in the Russian Federation – Latest amendments to the federal law*, LEGALMONDO (Apr. 9, 2019), *available at* https://www.legalmondo.com/2019/04/arbitration-russian-federation-latest-amendments-federal-law.

11 For example, after the 2019 Amendment, foreign arbitral institutions can administer local disputes between Russian companies only if they have a branch in Russia. *See* Federal'nyi zakon O vnesenii izmeneniy v Federal'nyy Zakon o Arbitrazhe (Arbitrazhnoye Razbiratel'stvo) v RF i Federal'nyy zakon RF o Reklame [Federal Law No. 531-FZ "On the Incorporation of Amendments to the Federal Law 'On Arbitration in the Russian Federation' and to the Federal Law 'On Advertising'"], SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation], Dec. 27, 2018 (Russ.) [*hereinafter* "2019 Amendment"]; *see also* Vladimir Khvalei & Irina Varyushina, *Baker McKenzie International Arbitration Yearbook 2019-2020*, GLOB. ARB. NEWS (Jan. 1, 2020), *available at* https://globalarbitrationnews.com/baker-mckenzie-international-arbitration-yearbook-2019-2020-russia.

12 Raymond W. Mack & Richard C. Snyder, *The analysis of social conflict—toward an overview and synthesis*, 1(2) J. CONFLICT RESOL. 212 (1957), *available at* http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.817.4778&rep=rep1&type=pdf.

13 Matthew Gearing, *The Public Policy Exception – Is the Unruly Horse Being Tamed in the Most Unlikely of Places?*, KLUWER ARB. BLOG (Mar. 17, 2011), *available at* http://arbitrationblog.kluwerarbitration.com/2011/03/17/the-public-policy-exception-is-the-unruly-horse-being-tamed-in-the-most-unlikely-of-places-4/?doing_wp_cron=1596455474.7694749832153320312500.

the concept of 'public order,' that the meaning of the Model Law and the New York Convention is perverted. This is possible as there are no formal criteria that would restrict courts in interpreting this concept.

III. Russia's adoption of a conservative model of arbitration

Russia's arbitration laws have evolved in three phases. The Interim Regulation on Commercial Arbitration for the Resolution of Economic Disputes[14] regulated domestic arbitration from 1992 to 2002. From 2002 to 2015, arbitration was regulated by the Federal Law on Arbitration Courts in the Russian Federation ["**Law on Arbitration Courts**"].[15] Since 2015, the Federal Law on Arbitration in the Russian Federation ["**Law on Arbitration**"] has been in force.[16] In addition, the Federal Law on International Commercial Arbitration ["**Law on ICA**"] has been in force since 1993 and has been amended in 2013, 2015, and 2017.[17]

Until 2015, Russia had an extremely liberal model for regulating arbitration. This led to the mass-creation of permanent arbitral institutions. According to experts' calculations, several thousand arbitral institutions were created in Russia by 2015.[18] At the same time, pocket arbitral institutions became widespread.

"*Pocket*" arbitral institutions are arbitral institutions that are created by commercial organisations to resolve disputes involving them or their affiliates. The founders of the commercial organisation directly fund pocket arbitrations, provide them with premises and necessary equipment, appoint the arbitrators and assign them cases that should be considered. Thus, the founders have the opportunity to influence the outcome of the arbitration.[19]

One of the types of pocket arbitral institutions were institutions created by large corporations[20] that imposed arbitration agreements on their counterparties, which mandated consideration of disputes by pocket arbitral institutions. Such pocket arbitration institutions were financially and organisationally dependent on the companies that created them. The founders of such arbitral

---

14 Supreme Council of Russian Federation, Resolution on the Adoption of the Interim Regulation Commercial Arbitration for the Resolution of Economic Disputes, No. 3115-1, June 24, 1992 (Russ.).

15 ARBITRAZHNO-PROTSESSUALNYI KODEKS ROSSIISKOI FEDERATSII [APK RF] [Code of Arbitration Procedure] (Russ.) [*hereinafter* "Law on Arbitration Courts"].

16 Federal'nyy Zakon o Arbitrazhe (Arbitrazhnoye Razbiratel'stvo) v RF [Federal Law On Arbitration (Arbitral Proceedings) in the Russian Federation], SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ (Russ.) [*hereinafter* "Law on Arbitration"].

17 Federal'nyy Zakon RF o Mezhdunarodnyy Kommercheskiy Arbitrazh [Federal Law of the Russian Federation Law on International Commercial Arbitration], SOBRANI AKTOV PRESIDENTA I PRAVITELSTVA ROSIISKOI FEDERATSII [SAPP] [Collection of Acts of the President and Government of the Russian Federation] 1993, No. 5338-1 (Russ.) [*hereinafter* "Law on Interantional Commercial Arbitration"]; Oleg Skvortsov & Leonid Kropotov, *Arbitration Changes in Russia: Revolution or Evolution?*, 35(2) J. INT'L ARB. 253, 254 (2018) [*hereinafter* "Skvortsov et al."].

18 Ministry of Justice of the Russian Federation, Report on the activities of the Council for the improvement of arbitration proceedings for 2017 (July 13, 2016), *available at,* http://minjust.gov.ru/ru/deyatelnost-v-sfere-treteyskogo-razbiratelstva/otchety-o-deyatelnosti-soveta-po-sovershenstvovaniyu; K. E. Dobrynin, Topical issues of the development of the Institute of arbitration courts in the Russian Federation, Round Table, Federal Assembly of the Russian Federation, Federation Council (Apr. 17, 2014), *available at* http://council.gov.ru/activity/activities/roundtables/51077; Skvortsov et al., *supra* note 17, at 255.

19 RUSSIAN ARBITRATION CENTRE, ANNUAL REPORT 2017-18 51 (2018), *available at* https://centerarbitr.ru/wp-content/uploads/2018/08/Annual_Report17_18-1.pdf; Skvortsov et al., *supra* note 17, at 254–255.

20 Lorenzo Sasso, *The Russian Arbitration Reform: Between Lights and Shadows*, 8(2) RUSS. L. J. 79, 83–84 (2020) (arbitral institutions created by large Russian corporations such as Gazprom, Sberbank, Rosatom, LUKOIL, etc. were also called corporate arbitral institutions).

institutions and their managers were able to appoint arbitrators and distribute cases among the arbitrators.[21]

These institutions were often used to implement illegal schemes that circumvented the prohibitions established by law. Such negative situations were especially frequent in the sphere of land and real estate turnover, as well as in corporate disputes. In addition, fictitious decisions made by arbitrators were used in bankruptcy cases to facilitate procedures for recognising the debt of an insolvent debtor.[22]

All these phenomena discredited the idea of arbitration and had a very negative impact on the attitude of public officials and judges to private justice.

Thus, one of the main reasons for the radical reform of arbitration and the creation of a conservative model of arbitration in Russia was the mass spread of pocket arbitration. This was facilitated by excessively liberal legislation, the almost complete refusal of the State to control arbitral institutions, and the absence of long-standing traditions that promote self-regulation in the field of arbitration. For example, the Law on Arbitration Courts allowed commercial organisations to create arbitral institutions.[23] This gave such commercial organisations the opportunity (directly or indirectly through their affiliates) to influence the formation of the arbitral tribunal and, ultimately, the adoption of the arbitral award.

The need to reform arbitration became particularly obvious to the Russian expert community in 2011. One of the main ideologists of the reform was the Russian journal, "*Arbitration court*" (*Treteiskiysud*), on the pages of which the first proposals for changing the system of arbitration regulation were formulated. At the initiative of the journal, an expert community was formed from among the leading experts in arbitration, which influenced the formation of public opinion. A survey conducted among the journal's readers showed that more than 80% of respondents were in favour of large-scale and radical changes to the existing arbitration system.[24]

Even the President of the Russian Federation joined the discussion on arbitration reform. He instructed the Government, together with business associations, to develop a set of measures for the development of arbitration.[25] Based on instructions from the President and the Government, the Ministry of Justice developed a concept for arbitration reform, which was formulated in the document entitled 'Complex of measures for the development of arbitration in the Russian Federation'.[26]

In the end, after lengthy discussions on various versions of the text of the draft laws, the Law on Arbitration was prepared, which was approved by the Federal Assembly and signed by the President of the Russian Federation. The new law was designed to eliminate the pocket arbitral

---

21 Skvortsov et al., *supra* note 17, at 255.

22 *VS gave an algorithm for checking an arbitration award for fictitious debt*, PRAVO.RU (May 11, 2017), *available at* https://pravo.ru/review/view/140583; *The arbitration court was suspended from bankruptcy*, PRAVO.RU (Nov. 14, 2012), *available at* https://pravo.ru/news/view/79735.

23 Law on Arbitration Courts, [APK RF] [Code of Arbitration Procedure], art. 3 (Russ.).

24 KOTELNIKOV ET AL., *supra* note 2, at 8.

25 *List of instructions for the implementation of the Address to the Federal Assembly - cl. 3.1*, PRESIDENT OF RUSSIA (Dec. 22, 2012), *available at* http://www.kremlin.ru/acts/assignments/orders/17248.

26 Zhukova, *supra* note 8, at 27–49.

institutions and the numerous abuses using arbitration that were taking place prior to the reforms.

As part of the implementation of this idea, it was decided that existing arbitral institutions would be abolished and only new arbitration institutions with permission from the executive power (Ministry of Justice) would be allowed.[27]

Another idea that was implemented during the reform process was to concentrate arbitration proceedings in a small number of arbitration centres. According to the reformers, the idea was for such centres to become arbitration hubs for international disputes. Therefore, all arbitration institutions that had received permission to operate were expected to focus on resolving both international and domestic disputes.[28] Moreover, it was the responsibility of the State to support the establishment of such arbitration centres as well as to encourage the business community to support them. However, the State has not done so very proactively and hence there are very few arbitral institutions in Russia today.[29] The 2019 amendments to the Law on Arbitration have also reinforced the conservative approach to arbitration in Russia in some ways.[30]

These changes have led to a significant restriction on the possibility of establishing arbitral institutions. Ultimately, they have led to the creation of a conservative model of arbitration in Russia, which is largely under the control and management of the State.

IV. Anti-arbitration court practice and its impact on arbitration legislation

The policy of the state courts in relation to arbitral institutions is no less important for the development of the latter than the legislation on arbitration. In this sense, it is customary to distinguish between pro-arbitration and anti-arbitration judicial policy, depending on how state courts support or restrict arbitration.

In the period up to 2006, the practice of Russian state courts was generally pro-arbitration, despite the fact that within the framework of liberal legislation, there were many abuses by arbitral institutions and arbitrators, such as partiality, breach of laws, and manipulation.[31] The approaches formulated by the higher courts created a favourable atmosphere in which state

---

27 One of the main ideologists of the arbitration reform, Deputy Minister of Justice, Elena Borisenko, at a speech in the Federation Council directly stated that one of the goals of the reform was to reduce the number of arbitration courts. *See* E. A. Borisenko, Deputy Minister of Just., Current issues of the development of the institution of arbitration courts in the territory of the Russian Federation, Round Table, Federal Assembly of the Russian Federation, Federation Council (Apr. 17, 2014), *available at* http://council.gov.ru/activity/activities/roundtables/51077 [*hereinafter* "Borisenko"].

28 Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 44(18) (Russ.). In Russia, as in many other countries, there is a dualistic system of arbitration regulation, which separately regulates international commercial arbitration and domestic arbitration. For this purpose, as already mentioned, the Law on International Commercial Arbitration and Law on Arbitration were adopted. KOTELNIKOV ET AL., *supra* note 2, at 15.

29 Alexander Vaneev, Dimitriy Mednikov & Maxim Kuzmin, *Russia*, EUROPEAN ARB. REV. 66 (2020).

30 Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 44(1) (as amended by the 2019 Amendment) (Russ.). *See* 2019 Amendment, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] Dec. 27, 2018, art. 1(4)(a) (Russ.). However, not all changes brought by this amendment can be considered conservationist in nature. *See* Marina Akchurina, *Changes to Russia's Arbitration Law Will Come Into Effect on 29 March 2019*, CLEARLY GOTTLIEB 1 (2019), *available at* https://www.clearygottlieb.com/-/media/files/alert-memos-2019/changes-to-russias-arbitration-law-eng.pdf [*hereinafter* "Akchurina"].

31 Skvortsov et al., *supra* note 17, at 255.

judges sought to support[32] arbitral institutions. The situation changed quite dramatically in 2006 with the arrival of the new leadership of the Supreme Arbitration Court of the Russian Federation.[33] The Supreme Arbitration Court of the Russian Federation, on the one hand, fought against pocket arbitration, and on the other hand, actively restricted the possibility of arbitration of various categories of civil disputes. Therefore, state courts have thus far resisted the arbitration of disputes on real estate;[34] corporate disputes;[35]certain disputes on procurement of products for the State's needs;[36] investment disputes;[37] disputes on the lease of forest plots,[38] among others. The apotheosis of the confrontation between state courts and arbitration was the appeal of the Supreme Arbitration Court of the Russian Federation to the Constitutional Court of the Russian Federation with an application for recognition of the unconstitutionality of several provisions of Russian law permitting arbitration of real estate disputes.[39] The Constitutional Court of the Russian Federation rejected this application and, pointing to the constitutional nature of arbitration, recognised the right of arbitral tribunals to consider disputes about real estate.[40] However, the fact that the Constitutional Court of the Russian Federation 'came to the defence' of arbitration did not fundamentally affect the practice of the Supreme Arbitration Court of the Russian Federation and the Supreme Court of the Russian Federation,

---

[32] During this period of time, the higher courts adopted many judicial acts in support of arbitration: (1) Postanovleniye Plenuma Vysshego Arbitrazhnogo Suda RF [Decree of the Plenum of the Supreme Arbitration Court of the Russian Federation] June 11, 1999, No. 8 (Russ.); (2) Postanovleniye Verkhovnogo Suda RF [Decree of the Supreme Court of the Russian Federation] Feb. 16, 1998, No. 29 (Russ.); (3) Postanovleniye Prezidiuma Vysshego Arbitrazhnogo Suda RF [Decree of the Presidium of the Supreme Arbitration Court of the Russian Federation] Dec. 22, 2005, No. 98 (Russ.), etc.

[33] From 1992 to 2014, the Supreme Arbitration Court of the Russian Federation was the highest judicial instance of one of the branches of the Russian judicial power – the system of state arbitration courts (the other highest instance was the Supreme Court of the Russian Federation). The Supreme Arbitration Court of the Russian Federation considered cases as a supervisory instance and also summarised judicial practice and made recommendations to lower courts. In 2014, the Supreme Arbitration Court of the Russian Federation was abolished and its functions were transferred to the Supreme Court of the Russian Federation. At the same time, the entire system of arbitration courts (first instance arbitration courts, appellate arbitration courts, and cassation arbitration courts) was preserved and reassigned to the judicial and administrative control of the Supreme Court of the Russian Federation.

[34] Postanovleniye Prezidiuma Vysshego Arbitrazhnogo Suda RF [Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation] Nov. 13, 2012, No. 6141/2012 (Russ.).

[35] Postanovleniye Prezidiuma Vysshego Arbitrazhnogo Suda RF [Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation] Jan. 30, 2012, No. 15384/2011 (Russ.).

[36] Postanovleniye Prezidiuma Vysshego Arbitrazhnogo Suda RF [Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation] Jan. 28, 2014, No. 11535/2013 (Russ.). Amendments to the law on arbitration allowed the consideration of some types of procurement disputes by arbitration, but not all. *See* O. Yu Skvortsov, *Dispute on Purchase and Problem of Arbitrability*, 3/4 TRETEISKY SUD 25 (2018) [*hereinafter* "Skvortsov"].

[37] Postanovleniye Prezidiuma Vysshego Arbitrazhnogo Suda RF [Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation] Apr. 3, 2012, No. 17043/2011 (Russ.).

[38] Postanovleniye Prezidiuma Vysshego Arbitrazhnogo Suda RF [Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation] Feb. 11, 2014, No. 11059/2013 (Russ.).

[39] Request of the Supreme Commercial Court of the Russian Federation to the Constitutional Court, at 12 (July 29, 2010). The request of the Supreme Arbitration Court of the Russian Federation, the case materials and expert opinions are published in the journal TRETEISKY SUD 74 (2011). *See* Dmitry Davydenko, *Arbitrability of Real Estate and Corporate Disputes under Russian Law: The Problem and its Context*, *in* ARBITRATION IN CIS COUNTRIES: CURRENT ISSUES 91–94 (2012).

[40] Postanovlenie Konstitutsionnogo Suda RF ot 26 maya 2011 g. [Ruling of the Russian Federation Constitutional Court of May 26, 2011 on case about check of constitutionality of provisions of paragraph 1 of article 11 of the Civil code of the Russian Federation, paragraph 2 of article 1 of the federal Law on Arbitration Courts in the Russian Federation, article 28 of the federal law on state registration of rights to immovable property and transactions therewith, paragraph 1 of article 33 and article 51 of the Federal law on mortgage (pledge of real estate) in connection with the request of the Supreme Arbitration Court of the Russian Federation], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2011 (Russ.).

which continued their anti-arbitration approach in deciding disputes arising from challenges to arbitral awards and enforcement actions.[41]

In the anti-arbitration practice of the Supreme Arbitration Court of the Russian Federation, the concept of concentration of publicly significant elements should be given special significance. To some extent, this judicial theory has replaced the doctrine of public order. Its essence is that if there is any public element in the relations between the parties (a company established by the State,[42] financing from the State's budget funds,[43] socially significant goals of the contract, etc.), then such a dispute cannot be submitted to arbitration.[44] State courts have de facto considered the existence of public elements in the relationship between the parties as rendering the dispute inarbitrable under the public policy exception. This concept has been fiercely debated,[45] and many law professors and legal practitioners have expressed opinions about its unfairness. Nevertheless, the theory of concentration of publicly significant elements has been firmly held and continues to be held by state courts.[46]

Thus, the Supreme Arbitration Court of the Russian Federation has adopted anti-arbitration policy and practice, and the approaches formulated by it have perpetuated the ideology of a conservative model of arbitration. This ideology was adopted by the Ministry of Justice, which

---

41 There are many examples of absurd anti-arbitration practices of state courts. For example, a model arbitration clause recommended by the International Court of Arbitration at the International Chamber of Commerce ["**ICC**"] was declared illegal by the Russian courts. In the opinion of the Russian state court, this clause is ambiguous and does not allow defining a forum for resolving the dispute, which is why it is defective. This decision of the state court is an indicator of ill-will towards arbitration on the part of state judges. In connection with this court decision, ICC President Alexis Mourre was even forced to write to the Chairman of the Supreme Court of the Russian Federation, Vyacheslav Lebedev, expressing his concern about the current situation and pointing out that this approach raises serious concerns about the violation of the rights of Russian individuals to justice. *See* Postanovlenie Plenuma Verkhovnogo Suda RF Priznaniye I Ispolneniye Resheniy Inostrannykh Sudov I Inostrannykh Arbitrazhey ot 21 sentyabrya 2017 g. [Russian Federation Supreme Court Ruling on the recognition and enforcement of decisions of foreign courts and foreign arbitral awards of Sept. 21, 2017] Biulleten' Verkhovnogo Suda RF [BVS] [Bulletin of the Supreme Court of Russian Federation] 2017, No. A40-176466 (Russ.), *available at* http://kad.arbitr.ru/Card/e14833d5-67ca-48a9-adff-78c46640dabe; CMS Russia, *Russian Courts point out flaws in ICC Standard Arbitration Clause*, LEXOLOGY (Dec. 18, 2018), *available at* https://www.lexology.com/library/detail.aspx?g=a57e928e-a06b-4557-bfc2-cc18d3236d1f.

42 Different courts have taken different views on this particular issue. *See* Ilya Kokorin & Wim A. Timmermans, *Arbitration Reform in Russia: Will Russia Become More Arbitration-Friendly?*, 22(2) TIJDSCHRIFT VOOR ARBITRAGE 50, 52 (2017).

43 Postanovleniye Prezidiuma Vysshego Arbitrazhnogo Suda RF [Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation] Nov. 17, 2014, No. A40-188599/2014 (Russ.), *available at* http://kad.arbitr.ru/Card/965d6ab2-6d63-49e6-99db-46101c6f1b44.

44 For a concentrated form presentation of this theory. *See* Skvortsov, *supra* note 36.

45 *See* M. S. Kalinin, *Arbitrability of disputes in the light of the Russian concept of* "*concentration of socially significant public elements*", *in* NEW HORIZONS OF INTERNATIONAL ARBITRATION 58–85 (A.V. Asoskov, A.N. Zhiltsov & R.M. Khodykin eds., 4th ed. 2018); O. Skvortsov, *Arbitrability of procurement disputes: the struggle of the civil approach and the theory of* "*accumulation of the public element*", 1(2) TRETEISKY SUD 113, 114 (2018); A. I. Muranov, *Public and private in arbitration. Analysis of the request of the Supreme Court of the Russian Federation to the Constitutional Court of the Russian Federation about the non-arbitrability of disputes in connection with the procurement by certain types of legal entities* 16 (2018).

46 Postanovleniye Verkhovnogo Suda RF [Decree of the Supreme Court of the Russian Federation] Mar. 3, 2015, No. 305-ЭС14-4115 (Russ.); Postanovleniye Verkhovnogo Suda RF [Decree of the Supreme Court of the Russian Federation] July 28, 2017, No. 305-ЭС15-20073 (Russ.); Postanovleniye Verkhovnogo Suda RF [Decree of the Supreme Court of the Russian Federation] Feb. 25, 2020, No. 305-ЭС19-19555 (Russ.).

subsequently implemented a reform based on the approaches developed by the Supreme Arbitration Court of the Russian Federation.[47]

V. Russia's conservative model: Legal techniques and methods

The creation of a conservative model of arbitration is based on a number of specific legal techniques characterised by the paternalistic influence of the State. Each of these legal and technical methods can be applied to regulate the liberal model, but it is their combined use that makes it possible to create a conservative model of arbitration.

A. Regulation of the internal organisation of arbitral institutions

The Law on Arbitration established provisions prescribing the procedure for organising the internal activities of arbitral institutions. As is known, the Model Law does not contain such provisions. Therefore, the provisions of Russian legislation have become novelties in the regulation of arbitration. Mandatory requirements were established in relation to (1) the procedure for establishing an arbitral institution; (2) a list of documents (list of arbitrators, rules, and regulations) to be adopted by the administrative body; and (3) the internal structure of the arbitral institution (including officers and committees that must be established).[48] The law also provides many formal requirements for the internal organisation of an arbitral institution, which must be met by the founders (for example, the recommendation list must include at least 50% of arbitrators who have ten years of experience in civil disputes as state judges or arbitrators; among the arbitrators must be at least 30% persons with PhDs or doctor of law degrees, and so forth).[49] Compliance with a huge number of bureaucratic requirements creates almost insurmountable difficulties in the formation of arbitral institutions.[50] Further, setting such strict requirements for the experience of arbitrators included in the recommendation lists, among other things, undermines the future of Russian arbitration, since it prevents the involvement of young lawyers in arbitration proceedings who need to gain experience in this field.

B. Restrictions on establishing arbitral institutions

The Law on Arbitration prohibits commercial organisations from creating arbitral institutions. Since the law came into force, only non-profit organisations have the right to establish

---

47 A kind of program document that combines the ideology of the Supreme Arbitration Court of the Russian Federation and the Ministry of justice was an article written for the magazine "The Law" jointly by the Deputy Minister of Justice Mikhail Galperin (an official responsible for arbitration reform) and a judge of the Supreme Court of the Russian Federation, Natalia Pavlova (who was also a former judge of the Supreme Arbitration Court of the Russian Federation, which formed the judicial policy on arbitration issues). *See* Mikhail L. Galperin & Natalia V. Pavlova, *What's Ahead for Arbitration?*, 8 ZAKON MAGAZINE [THE LAW] 126–139 (2019).

48 Ukazy RF o Utverzhdeniye Pravil Predostavleniya Prava na Ispolneniye Funktsiy Postoyannoye Arbitrazhnoye Uchrezhdeniye I Polozheniya o Deponirovanii Reglamenta Postoyanno Deystvuyushchego Arbitrazhnogo Uchrezhdeniya [Decree of the Russian Federation on Approval of the "Rules on Granting of the Right to Perform the Functions of a Permanent Arbitral Institution" and of the "Regulation on Depositing of the Rules of a Permanent Arbitral Institution"], SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] June 25, 2016, No. 577 (Russ.); Sergey Anatolievich Kurochkin, *Arbitration Reform in Russia: A General Overview*, 2017(1) INT'L COM. ARB. BULL. 180, 185 (2017).

49 Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 47(3) (Russ.).

50 For example, the world's leading arbitrators, such as Pierre Tercier, Sigvard Jarvin, Karl-Heinz Böckstiegel, and John Beachy, refused to fill out the papers that were requested by the Ministry of Justice to confirm their seniority when they were included in the list of arbitrators of various Russian arbitral institutions. *See What do foreign arbitrators think about the requirements of the RF Ministry of Justice*, KOMMERSANT (Nov. 1, 2017), *available at* https://www.kommersant.ru/doc/3455596?from=doc_vrez.

permanent arbitration institutions.[51] These non-profit organisations have special (limited) legal capacity and are entitled to carry out activities only for the organisation of arbitration proceedings. In addition, the creation of arbitral institutions by federal and regional state authorities, local governments, state and municipal institutions, state corporations and companies, political parties and religious organisations, as well as chambers of lawyers and notaries is prohibited.[52]

Another method of conservative regulation is to restrict international arbitral institutions that have not received permission from the Ministry of Justice of the Russian Federation to operate in Russia.[53] When establishing an arbitral institution, obtaining a permit for its activities from the Ministry of Justice is mandatory. Granting the Ministry of Justice the right to issue such permits is an extreme form of regulatory paternalism. The law also gives the Ministry of Justice a wide discretion. For example, when issuing an activity permit, the Ministry of Justice assesses "*the reputation of a non-profit organisation that creates an arbitration*",[54] "*the scale and nature of its activities that allow for a high level of organisation of the arbitration, including in terms of financial support for the creation and operation of an arbitral institution*",[55] *"a widely recognised reputation*"[56] (the only criteria for foreign arbitration institutions). All these concepts, being "*rubber*", allow unlimited discretion in decision making.

The decision of a foreign arbitral institution that has not received a business permit is equivalent to that of an ad hoc arbitration,[57] which, as discussed below, has a very narrow scope of competence. As a result of restrictions on the legal regime, such foreign arbitral institutions are also not entitled to consider, for instance, certain corporate disputes seated in Russia.[58]

C. Licensing system of the arbitration establishment

Under the conservative model, the clear notice system for creating arbitral institutions that existed from 1992 to 2015 was rejected, and a permissive system for the implementation of dispute resolution activities was introduced. Before the reform, the creation of arbitral institutions was based on the decision of the founders, who only had to notify the state court. The fact of notification legitimised the newly created institution. After the reform, the procedure for creating arbitral institutions has become extremely complicated. The process of granting a license for establishing an arbitral institution goes through several stages. At the first stage, the officials of the Ministry of Justice carry out the verification of documents and evaluate them from the point of view of formal requirements. At the second stage, the documents are reviewed by the Council for Improvement of Arbitration at the Ministry of Justice of the Russian

51 Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, arts. 2(9), 44(1) (Russ.); Kokorin et al., *supra* note 42, at 51.

52 Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 44(2) (Russ.).

53 *Id.* art. 44; Skvortsov et al., *supra* note 17, at 257.

54 Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 44(8)(4) (Russ.).

55 *Id.*

56 *Id.* art. 44(12).

57 Kokorin et al., *supra* note 42, at 50–57.

58 *Id.* at 51.

Federation ["**Council**"],[59] which issues a recommendation to the arbitration institution to conduct dispute resolution activities. At the third stage, the final decision is made by the Ministry of Justice of the Russian Federation, which issues the activity permit.[60]

D. Limitation on arbitrability of disputes

In the opinion of the author, the reform has narrowed the scope of arbitrability of disputes.[61] As known, determining arbitrability is one of the main instruments of the State's policy in relation to arbitration. By establishing a list of disputes that arbitral tribunals are allowed to decide upon, the State determines the scope of their activities.[62] Within the framework of the liberal model of arbitration, not only "*classic*" commercial disputes, but also disputes with a certain social significance such as disputes about real estate, public procurement, labour, inheritance and family disputes, and even disputes about compensation for damages caused by the violation of antitrust laws are recognised as arbitrable.[63] "*This differs from state to state reflecting the political, social and economic prerogatives of the state, as well as its general attitude towards arbitration.*"[64] As for the conservative model of arbitration, the State restricts the possibility of arbitration of many private (including commercial) disputes. At the same time, consideration of certain categories of disputes is possible only if special rules for their consideration are adopted. Thus, in Russia, consideration of certain categories of corporate disputes is possible only if the arbitral institution has separate rules for the consideration of corporate disputes (at the same time, the arbitration institution must develop and adopt general rules for the consideration of disputes).[65] The absence of such rules makes it illegitimate for arbitral institutions to consider corporate disputes.

E. The Prosecutor in the arbitration

Prosecutors have been granted the right to participate in arbitration proceedings, even if they did not participate in the conclusion of the arbitration agreement.[66] In addition, the Prosecutor has the right to challenge the arbitration decision in the state court, even if they did not participate in

---

59 The Council for the Improvement of Arbitration Proceedings has been established under the Ministry of Justice, which approves its composition. The Council is a public body and its members work free of charge. The Council consists of 50 members – representatives of state authorities, law professors, practicing lawyers, retired judges, and young professionals who have proven themselves in the legal field. The main function of the Council is to make recommendations on granting or refusing to grant the right to resolve disputes to arbitral institutions.

60 Until March 2019, the Government of the Russian Federation issued a permit for the activity of arbitral institutions. Since March 2019, the level of decision-making has been reduced and this function has been transferred to the Ministry of Justice of the Russian Federation. Akchurina, *supra* note 30, at 3; Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 44 (Russ.).

61 However, this position is not undisputed. *See* Skvortsov et al., *supra* note 17, at 260; The Code of Commercial Procedure and the Code of Civil Procedure list non-arbitrable disputes; *See* Kommercheskiy Protsessual'nyy Kodeks Rossiiskoy Federatsii [KPK RF] [Commercial Procedure Code], art. 33(2) (Russ.); GRAZHDANSKII PROTSESSUAL'NYI KODEKS ROSSIISKOI FEDERATSII [GPK RF] [Civil Procedural Code], art. 22.1 (Russ.).

62 Kokorin et al., *supra* note 42, at 51.

63 *See*, *e.g.*, Olesya Petrol, *Arbitrability of Matrimonial Disputes*, *in* NEW HORIZONS OF INTERNATIONAL ARBITRATION 332-346 (A.V. Asoskov, A.N. Zhiltsov & R.M. Khodykin eds., 5th ed. 2019).

64 JULIAN DAVID MATHEW LEW QC, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 199 (2003).

65 Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, arts. 44(6.2)(4), 45(2) (Russ.).

66 ARBITRAZHNO-PROTSESSUALNYI KODEKS ROSSIISKOI FEDERATSII [APK RF] [Code of Arbitration Procedure] art. 40 (Russ.).

the arbitration proceedings.[67] Prior to the reform, since 2012, state courts assumed that the Prosecutor had the right to challenge the decision of the arbitration institution if it affected the interests of public legal entities that did not participate in the arbitration.[68] As part of the reform, the Prosecutor was given the opportunity to participate in arbitration proceedings even if the parties object to it and the Prosecutor is not a party to the arbitration agreement.[69] Participation of the Prosecutor in arbitration is conditioned on the possibility of filing claims for invalidation of transactions made by state authorities of the Russian Federation, state authorities of subjects of the Russian Federation, local self-government bodies, state and municipal unitary enterprises, state institutions as well as legal entities in whose authorised capital (fund), there is a share of participation of the Russian Federation, subjects of the Russian Federation, or municipalities.[70]

F. Control by the Ministry of Justice

One of the most important elements of the conservative model of arbitration is granting the Ministry of Justice the right to exercise control over the activities of a permanent arbitration institution, including the possibility of applying to courts for the abolition of arbitral institutions that violate the requirements of the law. The Ministry of Justice is empowered to monitor the activities of a permanent arbitration institution. If gross repeated violations of the law are detected in the activities of the arbitral institution, the executive authority has the right to issue an order to terminate the activity within one month.[71] In case of failure to comply with this order, the executive authority has the right to apply to the court for termination of the arbitral institution.[72] However, it is not clear from the current regulations as to what is meant by "*gross violation of the law*". Thus, the Ministry of Justice still has broad discretionary powers that allow them to exercise significant supervisory power over arbitral institutions.

G. Restriction of ad hoc arbitration

As a result of the reform, the capacity of ad hoc arbitrations was significantly limited in comparison to institutional arbitration.[73] In the pre-reform period, ad hoc arbitrations were mostly beyond the control of the State. As a result, it was the ad hoc arbitrators who committed a significant number of violations of the law and caused the greatest distrust among the reformers.[74] During the reform process, it was decided to introduce different modes of institutional and ad hoc arbitration. At the same time, the scope of and the legal possibilities available for ad hoc arbitrations were reduced – especially in comparison with permanent arbitral institutions.

---

67 *Id.* arts. 40, 230(3) (Russ.).

68 Postanovleniye Plenuma VAS RF po Otdel'nym Voprosam Uchastiya Prokurora v Arbitrazhnom Protsesse [Resolution of the Plenum of the Supreme Commercial Court of the Russian Federation "On certain issues of participation of the Prosecutor in the arbitration process"], SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] Mar. 23, 2012, No. 15, Item 6 (Russ.).

69 Boris Romanovich Karabelnikov, *National Report for Russian Federation (2020)*, *in* ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 93 (Lise Bosman ed., 2020).

70 Law on Arbitration Courts, [APK RF] [Code of Arbitration Procedure] art. 52(1) (Russ.).

71 Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 48(3) (Russ.).

72 *Id.* ¶ 4.

73 The lack of confidence in *ad hoc* arbitration on the part of conservative reformers was so great that during the discussion of the draft law, proposals were made to completely ban *ad hoc* arbitration. *See* Borisenko, *supra* note 27.

74 Skvortsov et al., *supra* note 17, at 255.

In particular, parties or arbitrators in ad hoc proceedings, unlike arbitral institutions, were not given the right to apply to a state court for assistance in administration, for example, in appointing arbitrators, for interim measures, or securing evidence.[75] In respect of a decision made by an ad hoc arbitral tribunal, an agreement of the parties on its finality (prohibition on right to challenge) has not been allowed.[76] Further, ad hoc arbitrators do not have the right to consider corporate disputes.[77] In addition, there are legal restrictions on advertising ad hoc arbitration. Lastly, the Law on Arbitration also prohibits organisations that are not permanent arbitration institutions from performing administrative functions for ad hoc arbitrations.[78]

H. Prohibition on international arbitration between domestic parties

One of the elements of the conservative arbitration model is to limit the possibility of submitting domestic disputes between residents to international commercial arbitration located outside the Russian Federation. In Russia, in the pre-reform period, there was a contradictory practice[79] on this issue. However, after the reform, on the instructions of the Ministry of Justice, one of the leading experts in this field prepared an expert opinion which concluded that it was unacceptable to submit disputes between Russian companies to international arbitration seated outside Russia, without permission from the Ministry of Justice.[80] It is obvious that this conclusion will be used for the ideological justification of conservative policy on this issue.

I. Inapplicability of antitrust law

As a result of the reform, there was a refusal to consider the activities of bodies that administer arbitration as a type of service provision. This entailed a refusal to apply competition law to their

---

75 Law on Interantional Commercial Arbitration, SOBRANI AKTOV PRESIDENTA I PRAVITELSTVA ROSIISKOI FEDERATSII [SAPP] [Collection of Acts of the President and Government of the Russian Federation] 1993, No. 5338-1, art. 27 (Russ.); Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 30 (Russ.); Skvortsov et al., *supra* note 17, at 261.

76 Law on Interantional Commercial Arbitration, SOBRANI AKTOV PRESIDENTA I PRAVITELSTVA ROSIISKOI FEDERATSII [SAPP] [Collection of Acts of the President and Government of the Russian Federation] (1993), No. 5338-1, art. 34(1) (Russ.); Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 40 (Russ.); Skvortsov et al., *supra* note 17, at 261.

77 Law on Arbitration Courts, [APK RF] [Code of Arbitration Procedure] art. 225.1(5) (Russ.); Skvortsov et al., *supra* note 17, at 261.

78 Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 44(20) (Russ.). This provision has been amended by the 2019 Amendment, as a consequence of which, awards rendered in violation of the prohibition are at risk of being set aside. *See* 2019 Amendment, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] Dec. 27, 2018. *See also* Taisiya Vorotilova & Vladimir Khvalei, *Russia is now finally closed for arbitration administered by foreign institutions*, ARB. J. (Mar. 12, 2019), *available at* https://journal.arbitration.ru/ru/analytics/russia-is-now-finally-closed-for-arbitration-administered-by-foreign-institutions.

79 *See* Postanovleniye Verkhovnogo Suda RF [Decree of the Supreme Court of the Russian Federation] Mar. 22, 2010, No. 3174/2010 (Russ.); Postanovleniye Verkhovnogo Suda RF [Decree of the Supreme Court of the Russian Federation] June 19, 2012, No. 1831/2012 (Russ.); Postanovleniye Verkhovnogo Suda RF [Decree of the Supreme Court of the Russian Federation] Feb. 10, 2014, No. 17046/2013 (Russ.); *See* Vladimer Khvalei, Andrey Gorlenko, Alexander Muranov, Roman Khodykin, D. Litvinsky, Mikhail Ivanov, Alexei Dudko, Natalia Chumak, G. Zhukova, Gleb Sevastyanov & Sergey Budylin, *Domestic disputes are the domain of national arbitration?*, THE LAW 3, 12–27 (2017); Anton Vladimirovich Asoskov, *Can Purely Domestic Disputes Without a Foreign Element Be Referred to Foreign Arbitration?,* 8 ZAKON 115–123 (2017) [*hereinafter* "Asoskov"].

80 The ideas of this conclusion were outlined in the following article. *See* Asoskov, *supra* note 79.

activities.[81] In conditions where the established arbitral institutions are more or less controlled by the State, this leads to monopolisation in the field of arbitration. Moreover, the law includes provisions prohibiting advertising of arbitration by those who have not received permission to perform the functions of a permanent arbitration institution. This prohibition also applied to ad hoc arbitrations.[82] Such prohibitions made it almost impossible for new arbitration institutions to enter the market unless they were supported by the State. In connection with this regulatory system, lawyers note that such monopolisation of arbitration proceedings severely reduces both administrative efficiency and independence and does not contribute to the creation of a "*world-class arbitration institution*" in Russia.[83]

J. The arbitration decision must be legitimised by a state court

The Law on Arbitration does not consider arbitration decisions as an independent basis for making an entry in public registers that record rights to certain types of property. The law stipulates that entries in legally significant registers (the register of rights to real estate, the register of rights to securities, the register of intellectual property rights, pledge registers, etc.) are made only if there is a writ of execution issued on the basis of a decision made by a state court.[84] Thus, the State's distrust of arbitration takes the form of paternalistic control, which presupposes the legitimation of the arbitration award through its verification by a state court.

K. The rejection of regional arbitration

The abolition of regional arbitral institutions has become one of the ideological goals of the reform, which involves the creation of "*strong, internationally recognized arbitration courts*" in a highly centralised environment.[85] All five arbitral institutions are located in Moscow. At the same time, under the auspices of the Ministry of Justice, these central arbitration institutions with headquarters in Moscow create regional offices, which in practice turn out to be unviable due to the lack of authority of local businesses. At the same time, regional arbitral institutions that existed for decades did not receive permission to operate and ceased their activities.[86]

L. The dependence of the arbitrator from the management

The adoption of these reforms led to the creation of a system of internal organisation in which the arbitrator is significantly dependent on the management of the arbitral institution. The same

---

81 Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 44(1)(1) (Russ.).

82 Federal'nyy Zakon RF o Reklame [Federal Law of the Russian Federation on Advertising], SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] Mar. 13, 2006, No. 38-FZ, art. 30.2 (Russ.).

83 Khvalei, *supra* note 8, at 15, 17.

84 Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 43 (Russ.).

85 In Russia, there is a term that describes this process – 'vertical power'. This term covers centripetal trends in all areas of public relations including arbitration. *See* Hugh Barnes, *Dictating the Law in Putin's Russia: Hyper-legalism and "Vertical Power"*, *in* DICTATORSHIP OR REFORM? THE RULE OF LAW IN RUSSIA 4 (2006); Alena Ledeneva, *Behind the Façade: 'Telephonic Justice' in Putin's Russia*, *in* DICTATORSHIP OR REFORM? THE RULE OF LAW IN RUSSIA 32 (2006).

86 A strong public response was caused by the refusal of the Ministry of Justice to issue a permit to the Siberian arbitration court. This arbitration institution has existed for more than 25 years, considering hundreds of cases a year. Its authority in the business community and among experts in arbitration was not questioned. However, the Ministry of Justice considered that the Siberian arbitration court does not have a generally recognized reputation, and therefore cannot engage in arbitration proceedings. *See* Anna Zanina, *Until the Ministry of justice becomes uncomfortable, nothing will change*, KOMMERSANT (Nov. 1, 2017), *available at* https://www.kommersant.ru/doc/3454660.

can be viewed as a manifestation of a paternalistic approach to arbitration. Among other things, this is reflected in the fact that the Law on Arbitration requires that each arbitral institution must have a committee for the appointment of arbitrators.[87] In this case, the Jesuit method[88] of appointing arbitrators is provided. Herein, the nominating committee is elected by the arbitrators from the recommended list of arbitrators, and the recommended list of arbitrators is formed by the management of the arbitration institution. This allows the management of an arbitration institution to effectively influence arbitrators through their appointment procedures in specific cases.[89]

M. State control and supervisory authorities in arbitration proceedings

Participation of the State and supervisory bodies in cases related to the enforcement of arbitral awards in the territory of the Russian Federation is an extreme method of enforcing a conservative approach to arbitration. At the same time, there has been a clash between the roles of executive and judicial authorities.[90] For instance, the Chairman of the Supreme Court of the Russian Federation formulated a recommendation[91] to lower courts to involve the state service, *Rosfinmonitoring*,[92] in court sessions. The *Rosfinmonitoring* would consider applications for challenging decisions of foreign courts and foreign arbitral institutions and for enforcing such decisions. In addition, in practice, state courts involve the federal tax service as a third party in this category of cases. State courts often involve such authorities on their own initiative.[93] The courts either do not comment on the reasons for involving these authorities or use general wording, such as: "*in order to comply with the control to counteract the legalization (laundering) of proceeds from crime [...]*"[94] or based on the "*suspicious*" procedural behaviour of the applicant in the case.[95]

---

87 Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 47(4) (Russ.).

88 The Jesuit approach involves duplicity in achieving goals.

89 The case of Alexander Muranov, a well-known arbitrator and Professor at the Moscow State Institute of International Relations, was actively discussed in Russia. Muranov very sharply criticised the leadership of the Chamber of Commerce and Industry of the Russian Federation, which created the International Commercial Arbitration Court, and as a result was excluded from the list of arbitrators of this institution. Muranov appealed to the state court for the illegality of his exclusion from the list of arbitrators, but lost the case. Nevertheless, the public feels sympathy for Muranov for his principled position pointing to the abuses committed by the leadership of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation.

90 In this case, the conflict between the executive and judicial authorities is seen in the fact that the court assumes functions that are not typical of it. Thus, the court, rather than the executive, initiates the involvement of state bodies in the judicial process. State authorities are passive. This situation deprives the court of impartiality, since it takes the position of one of the parties.

91 Alexey Chernyshev, *The Supreme Court will streamline the execution of decisions of foreign courts*, KOMMERSANT (Sept. 26, 2018), *available at* https://www.kommersant.ru/doc/3752831.

92 Rosfinmonitoring (federal financial monitoring service) is a federal executive body of Russia that performs functions to counteract the legalisation (laundering) of proceeds from crime and the financing of terrorism.

93 E.O. Kondratenko, *Participation of control and Supervisory bodies in disputes related to the execution of decisions of arbitration courts on the territory of the Russian Federation*, 117/118 TRETEISKY SUD 227, 228 (2019).

94 Postanovlenie VAS RF Chelyabinsk Oblast ot 13 aprelya 2018 g. No. A76-38304/2017 [Ruling of the Highest Arbitration Court of the District of Chelyabinsk of July 7, 2020, No. A76-38304/2017] (Russ.).

95 Postanovlenie VAS RF Mordovia Oblast ot 25 sentyabrya 2018 g. No. A39-4089/2018 [Ruling of the Highest Arbitration Court of the District of Mordovia of Sept. 25, 2018, No. A39-4089/2018] (Russ.).

VI. Conclusion

The reform has caused sharp discussion within the Russian arbitration community. A significant section of lawyers, both academicians and practitioners, disapproved the changes that led to the introduction of a conservative model of arbitration in Russia.[96]

In practice, the reform resulted in the abolition of several thousand arbitral institutions and significant restrictions on international commercial arbitration. In the post-reform period, only five Russian arbitration institutions[97] and two foreign arbitration institutions[98] received permission to operate. The sphere of arbitration has come completely under the control of the Ministry of Justice, which monitors the activities of arbitral tribunals.

While the Ministry of Justice has, by policy, sought to support several arbitral institutions, which, according to the ideologists of the reform, ought to match the level of the world's leading arbitration centres, in practice, the authorised arbitrators are far from the level of leading arbitration centres such as the London Court of International Arbitration, the ICC International Court of Arbitration, Arbitration Institute of the Stockholm Chamber of Commerce, etc.

At the same time, in order to make arbitration available throughout the vast territory of Russia, the Ministry of Justice is encouraging the development of a network of arbitration institutions. Arbitral institutions that have received permission to operate have started opening regional offices that attract leading experts from the region to resolve disputes.[99]

Although the reform has achieved a number of positive results, the negative consequences, according to many academic and practising lawyers, have been much more noticeable. As they say in Russia, "*along with the dirty water from the bath, the child was thrown out*".

Thus, the Russian Federation has created a conservative model for regulating arbitration. The State controls arbitral institutions in the course of all their activities: from the moment of their creation to the execution of the award. At the same time, the main focus is not so much on

---

96 Yu. V. Kholodenko, *Arbitration Proceedings: Reform or Destruction?*, 112 TRETEISKY SUD 28–31 (2017); A. I. Zaitsev, *Cons of the reformed arbitration proceedings in Russia*, 112 TRETEISKY SUD 37–48 (2017); M. E. Morozov, *The Arbitration is dead, long live ad hoc*, 112 TRETEISKY SUD 49–55 (2017); Khvalei, *supra* note 8, at 4–19; Alexander Muranov, "*Russian*" *Institute of Modern Arbitration and* "*Russian*" *Arbitration Center: Examining Their Role in Russian Arbitration, GONGO-Structures?Declarations and Reality, How the Hierarchies of State Power Affect Arbitration in Russia,* ZAKON RU 71 (June 2, 2020), *available at* https://disk.yandex.ru/i/qizc9vyg5VWStQ; G.V. Sevastianov, *The Ups and Downs of Alternative Dispute Resolution in Russia: Key Outcomes of a Difficult Year*, 119/120 TRETEISKY SUD 11–16 (2019); D. N. Volosov, *On the Margins of the Arbitration Reform. Arbitrations to Get a Choice: To Nowhere or to Never*, 2/3 TRETEISKY SUD 26, 36 (2016); M. A. Yaremenko, *Arbitration Law: Practical Issues in the Absence of Practice*, 2/3 TRETEISKY SUD 76 (2016); G. V. Sevastianov, *The Cold Breath of the Arbitration Reform*, TRETEISKY SUD 6–10 (2016).

97 (1) Russian arbitration centre at the Autonomous nonprofit organization "Russian Institute of modern arbitration"; (2) Arbitration centre at the all-Russian public organization "Russian Union of Industrialists and entrepreneurrs"; (3) National centre for sports arbitration of the Autonomous non-commercial organization "Sports Arbitration Chamber"; (4) Maritime Arbitration Commission at the Chamber of Commerce of the Russian Federation; (5) International Commercial Arbitration Court at Trading-Industrial Chamber of the Russian Federation. *See* Karabelnikov, *supra* note 69, at 1–104.

98 The two institutions were the Hong Kong International Arbitration Centre (HKIAC) and the Vienna International Arbitral Centre (VIAC). Jack Ballantyne, *VIAC becomes second institution licensed in Russia*, GLOBAL ARB. REV. (July 15, 2019), *available at* https://globalarbitrationreview.com/article/1195175/viac-becomes-second-institution-licensed-in-russia.

99 However, this practice appears to be temporary. It does not contribute to the stability of arbitration since it is based on the popularity of the capital's lawyers and ignores the authority of local lawyers.

judicial as on administrative control, which also implies broad discretion of the executive authorities.

These circumstances make the Russian jurisdictional system an extremely unattractive forum for resolving private disputes. Foreign companies are reluctant to settle disputes in Russia. On the other hand, Russian companies prefer to look for foreign forums to resolve disputes with their foreign counterparts. The growing criticism following the negative experience of introducing the conservative arbitration model in Russia must serve to alert reform ideologues to reconsider their views. It seems that at this stage of development of Russian arbitration law, the conservative model of arbitration should be abandoned. It would seem that a more rational approach would be based on a neutral model, in which the regulation of arbitration is carried out on the principles of self-regulation and the State has limited control over arbitration through the procedure of enforcement of arbitral awards.