State Interests and Arbitration: The Russian Model

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I. INTRODUCTION

The mythology of arbitration holds that this method of settling disputes is "private," "informal" (even when arbitration is institutionalized), "effective," "expedient," "neutral," "flexible," "confidential," "expert," "fair," and "inexpensive."[1] This is widely believed to remain the case even though these days arbitrations are "held

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1. *See*, among others, THOMAS E. CARBONNEAU, CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION 1-3 (3d ed. 2003).

in place by a complex system of national laws and international treaties."[2]

The mythology of arbitration extends not only to its essential features, but also to its presumed origins. The characterization of arbitration offered by Lord Mustill would feel at home in any treatise on the history of public international law:

> Commercial arbitration must have existed since the dawn of commerce. All trade potentially involved disputes, and successful trade must have a means of dispute resolution other than force. From the start, it must have involved a neutral determination, and an agreement, tacit or otherwise, to abide by the result, backed by some kind of sanction. It must have taken many forms, with mediation no doubt merging into adjudication. The story is now lost forever. Even for historical times it is impossible to piece together the details. . . .[3]

This is precisely the argument or assumption made on behalf of the origins of public international law. The analogy is more compelling since one presumes that disputes in those early times were between either individuals or communities of individuals (tribes, clans, guilds, cities, etc.), that is, pre-State entities. Whether the dispute was over a commercial matter or a boundary may have made little difference. Lord Mustill may be too pessimistic about reconstructing the historical record, for the related social sciences of archaeology, anthropology, history, and others continue to offer new data and insights on the behavior of our forefathers.[4]

II. RUSSIAN APPROACHES TO ARBITRATION

The development of arbitration in Russian practice and doctrine awaits its historian. In the second half of the nineteenth century Russian international lawyers made substantial, internationally-acknowledged contributions to the institutionalization of peaceful methods of dispute settlement. The French translation of L.A. Kamarovskii's detailed proposal for the establishment and structure of an international court made a provision for a special chamber dedicated to private international law and the resolution of cases concerning conflicts of law, execution of foreign judgments, and extradition.[5] The French version[6] of the treatise

2. ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 2 (3d ed. 1999).

3. Michael John Mustill, *Arbitration: History and Background*, 6 J. INT'L ARB. 43 (1989).

4. *See, e.g.*, DOUGLAS M. JOHNSTON, THE HISTORICAL FOUNDATIONS OF WORLD ORDER: THE TOWER AND THE ARENA (2008).

5. *See* William E. Butler, *Kamarovskii, L. A.*, *in* WILLIAM E. BUTLER, RUSSIA AND THE LAW OF NATIONS IN HISTORICAL PERSPECTIVE 514 (2009). The reference is to: L.A.

brought Kamarovskii (1846-1912) a European reputation, and, in due course, the Chair of International Law at the Imperial Moscow University. His St. Petersburg colleague, Professor F.F. Martens (1845-1909), led the campaign on the diplomatic front by persuading Tsar Nicholas II to take the initiative for the Hague peace conferences and support the formation of the Permanent Court of Arbitration at The Hague. Martens himself was a renowned arbitrator who acted in a number of major international disputes.

In sum, Russia was favorably disposed to mediation, conciliation, and international arbitration at the inter-State level and played a preeminent role in persuading the international community to move in the direction of institutionalized arbitration and adjudication.

The Revolution of October 1917 in Russia brought ambivalence with respect to informal methods of dispute settlement. At the inter-State level, Russia was instantly suspicious that there could be any truly "neutral" or "impartial" third person capable of fairly settling disputes. The Soviet regime was accordingly deeply skeptical of and hostile towards any of the informal schemes for the settlement of disputes (mediation, conciliation, arbitration) and categorically opposed to an international court. During the 1930s, the Soviet Union was more favorably disposed to peaceful methods of dispute settlement and included the possibility of recourse to them in bilateral treaties negotiated with neighboring countries. On the other hand, internally the Soviet Government was prepared to consider less formal approaches to dispute settlement outside the ordinary courts, as evidenced by early experimentation with comrades' courts and their antecedents.[7]

At the international commercial level, principally merchant shipping, the Soviet Union found itself at a decided disadvantage. Little remained of the Russian merchant fleet, and Soviet foreign trade was almost entirely dependent upon foreign bottoms for carriage by way of charter contracts. Charters routinely made provisions for arbitration abroad, commonly in London. Throughout the 1920s Soviet organizations, mostly in State ownership, found themselves as claimants or respondents in foreign arbitral tribunals with no forum of its own to offer as an alternative.

These circumstances were expressly cited when the decision was taken in 1930 to establish the Foreign Trade Arbitration Commission (BTAK) and Maritime Arbitration Commission (MAK) as permanently-

Kamarovskii, О международном суде [On an International Court] (1881; reprinted with an Introduction by W. E. Butler, 2007).

6. L.A. KAMAROVSKII, LE TRIBUNAL INTERNATIONAL (S. de Westman trans., 1887).

7. Harold J. Berman & James W. Spindler, *Soviet Comrades' Courts*, 38 WASH. L. REV. 842, 842-910 (1963).

operating arbitration courts based in Moscow.[8] Both exist to this day. The BTAK has been renamed the International Commercial Arbitration Court (MKAC), with full legal succession, while the Maritime Arbitration Commission remains as before. Both courts have post-Soviet rules of procedure.[9]

The 1964 Code of Civil Procedure of the RSFSR contained rudimentary provisions for *ad hoc* arbitration, but so far as can be determined, no one took advantage of these, at least so far as doctrinal writings are aware. On the other hand, other informal methods of dispute settlement were positively encouraged, most notably the comrades' courts. These were not considered to be either arbitration or adjudication in their heyday, although they shared elements of similarity with both.[10]

In the post-Soviet era, arbitration has increased exponentially. Hundreds of permanently-operating arbitration courts have been created, some of which are prepared to consider the settlement of disputes with foreign parties.[11] Others are limited by their regulations solely to domestic Russian disputes. "State interest" has been expressed in a variety of ways, principally in the form of three enactments addressed solely to arbitration and a number of others which regulate aspects of arbitration as part of their larger purpose.

III. STATE "INTERESTS" IN ARBITRATION

"State interests," or the "interests of the State" (which are not necessarily the same), are expressions that raise special concerns in the Russian context for several reasons. First, during the Soviet period the very rationale for creating MAK and BTAK suggested that the Soviet authorities were far from persuaded that third-party dispute settlement

8. WILLIAM E. BUTLER, ARBITRATION IN THE SOVIET UNION 5 (1989).

9. On the 2006 Rules of MKAC, see Alexander S. Komarov, *Overview of the Revised Rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (the ICAC)*, I THE JOURNAL OF EURASIAN LAW 129-36 (2008); Ivan Marisin and T. Aitkulo, *The New Russian International Arbitration Rules*, *id.* at 137-48.

10. *See* William E. Butler, *Comradely Justice in Eastern Europe*, 25 CURRENT LEGAL PROBLEMS 200-18 (1972).

11. As of 1 January 2009 there were more than 550 arbitration courts operating in the Russian Federation. In addition to MKAC and MAK, several by their formal names offered international arbitration services, among them the International Arbitration Court attached to the European Institute of Independent Expertise (Moscow); the International Fund of Entrepreneurs of the Commission for International Links of the Council of Entrepreneurs attached to the Mayor and Government of Moscow; and the International Fund for Arbitral Examination (Moscow); in Rostov Region, the International Commission for the Regulation of Nongovernmental Disputes; in the Republic Tatarstan, the International Arbitration Court; and in St. Petersburg, the International Arbitral Arbitration Institute and the St. Petersburg International Commercial Arbitration Court.

outside the USSR could ever be "neutral" or "impartial" and was therefore inherently biased against Soviet interests. The implication would be that Soviet institutionalized arbitration would be more inclined to favor Soviet interests, and that very implication would deter foreign parties from preferring dispute settlement in Soviet arbitration.

Second, there was the concern that even if the Soviet arbitral framework was well-balanced, the possibility was real that Party and/or State authorities would nonetheless seek to intervene in individual arbitrations in order to protect what they perceived as overriding "State interests" in the outcome of the proceeding.[12] This perception of "State interests" might reside in the simple fact that the State was the owner of the instruments and means of production on the balance sheet of any Soviet claimant or respondent and of the claimant itself as a juridical person. The State, in other words, in its capacity as the owner of socialist property had a stake in individual proceedings that would be, if not unknown, then comparatively unusual outside the Soviet bloc.

These factors taken together gave international arbitration a distinctive configuration throughout the Soviet era. On one hand, foreign contracting parties were urged to accept an arbitration clause binding them to submit disputes to a permanently-operating arbitration court formed under Soviet law, manned entirely by Soviet jurists as secretariat personnel and arbitrators who routinely applied Soviet law as the applicable law. They were not well-equipped by training and experience to apply foreign law (although that was permitted), with Soviet organizations as claimants or defendants on, so to speak, their home ground and sometimes administratively subordinate to State institutions or enterprises, with proceedings normally conducted in the Russian language. Against these considerations were a Soviet interest in demonstrating the integrity and impartiality of their arbitral institutions, encouraging the expansion of foreign commerce, and imposing contractual discipline upon State enterprises, organizations, and institutions that did not always comply with Soviet law.

The post-Soviet system has moved substantially away from the previous model of arbitration in many respects. The legislation on international commercial arbitration mirrors virtually verbatim the 1985 UNCITRAL Model Rules on international arbitration.[13] Qualified

12. The interest of the Communist Party and the Government of the USSR in the Lena Goldfields arbitration is documented in V.V. Veeder, *The Lena Goldfields Arbitration: The Historical Roots of Three Ideas*, 47 INT'L & COMP. L.Q. 747, 747-92 (1998).

13. *See* CARBONNEAU, *supra* note 1, at 928-40. "Ratification of the law amounts to incorporating a sophisticated statutory framework on arbitration into national law." *Id.* at 927.

foreign jurists who have a command of the Russian language have been included on the panel of arbitrators to such an extent that they now number about half of the total number of names on the panel. Russian doctrinal writings follow closely foreign developments in the field. Nonetheless, just as the Soviet legal legacy continues to inform the development of Russian legal doctrines, legislation, and judicial practice, so too does the concept of "State interest" in Russia reflect shadows of the past together with the continuing international dialogue on the issue.

IV. RUSSIAN ARBITRATION LEGISLATION

From the standpoint of legal regulation, Russian arbitration divides neatly into two categories: international commercial arbitration (including maritime) and domestic arbitration. The former is regulated principally by the Law of the Russian Federation on International Commercial Arbitration of 7 July 1993[14] and by the Statutes on the individual arbitration courts and their respective rules of procedure. In the case of MKAC and MAK, the Statutes are incorporated as annexes to the Law on International Commercial Arbitration and constitute an integral part of that Law.

Domestic arbitration falls under the Federal Law on Arbitration Courts in the Russian Federation of 24 July 2002. This Law expressly does not extend "to international arbitration."[15] Nonetheless, domestic arbitration is of interest to foreign citizens and foreign investors who have formed Russian juridical persons, for insofar as their disputes are not "international", they may take advantage of the domestic system. A foreign citizen also could be appointed an arbitrator by the parties to a domestic arbitration *ad hoc*.

One constant source of confusion should be noted at the outset. Russia has, as did the former Soviet Union, a separate system of State courts called "arbitrazh courts" for the consideration of economic disputes between juridical persons and/or individual entrepreneurs. The arbitrazh courts are an integral part of the Russian judicial system and have nothing to do with arbitration as such, although parties may turn to them for the enforcement of arbitral awards. The confusion originates in the English translation of "arbitrazh" as "arbitration," a mistake widely committed in the media and even on the English-language version website of the Supreme Arbitrazh Court of the Russian Federation. The

14. Ведомости СНД и ВС РФ (1993), no. 32, item 1240; transl. in WILLIAM E. BUTLER, RUSSIAN COMMERCIAL AND COMPANY LAW 839-57 (2003); *id.*, RUSSIA & THE REPUBLICS: LEGAL MATERIALS (looseleaf service, 2006-).

15. СЗ РФ (2002), no. 30, item 3019; transl. in Butler, note 9 above, pp. 859-880; *id*, looseleaf service.

present writer routinely encounters contracts in which the parties have incorporated a dispute settlement clause that in Russian refers disputes to the "arbitrazh courts of Moscow" and in its English version speaks of the "arbitration courts of Moscow." When a dispute actually occurs, neither party is confident as to what they originally decided, if they were even aware of the distinction.[16]

Although permanently-operating arbitration courts in Russia have their own rules of procedure, they fall back in the event of gaps upon the Code of Civil Procedure of the Russian Federation and/or the Code of Arbitrazh Procedure of the Russian Federation. These two codes of procedure also govern any proceedings before their respective court systems relating to arbitral matters, including requests for security and any enforcement actions. They are consequently central to the law of arbitration in Russia, although their principal concern is procedure within the courts of ordinary jurisdiction or the arbitrazh courts. For the purposes of this article, their provisions often express or reflect the essence of State "interest" in arbitration.

V. STATE INVOLVEMENT IN ARBITRATION

As regards the relationship between the State and the efficacy of arbitration one Russian jurist has put the matter as follows:

> The effectuation by arbitration courts and international commercial arbitrational tribunals of jurisdictional activity is impossible without participation on the part of the State. The examination of the case itself occurs on sovereign territory, and the law-application act rendered with regard to the results must be incorporated in the legal order of the State where the dispute is considered, and often at the place where the award is executed.[17]

The issue is not therefore whether the State is involved in arbitral proceedings because of a State interest, but how and why expression is given to that interest. If this is a more candid and explicit statement of State interest than one might find in the doctrinal writings from other jurisdictions, Russian arbitration law specialists nonetheless consider Russian law and practice in the field of arbitration to be consistent with modern world trends.

An analysis of Russian arbitration legislation and codes of procedure shows that the "private-law conception of arbitration has been

16. On the system of arbitrazh courts, see WILLIAM E. BUTLER, RUSSIAN LAW 184-90 (3d ed. 2009).

17. S. A. Kurochkin, Государственные суды в третейском разбирательстве и международном коммерческом арбитраже [State Courts in Arbitral Examination and International Commercial Arbitration] 1 (2008).

realized in the Russian Federation. . . ."[18] Evidence of this is found in the facts that an arbitral award may not be reviewed in a Russian court in substance, that control by State courts over an arbitral award is confined to the stage of contesting the enforcement of an award, that the powers of Russian courts have been severely limited with respect to the formation of an arbitral tribunal, and that an award may be vacated only on public policy grounds. Domestic Russian arbitral tribunals are limited, though, in their ability to render awards *ex aequo et bono*, as the Federal Law on Arbitration Courts requires that arbitration courts settle disputes on the basis of normative legal acts and international treaties[19]; international arbitration courts enjoy broader latitude, being empowered to settle disputes in accordance with such norms of law as the parties have chosen,[20] which implies the right to choose no applicable law and to instruct the arbitrators to apply what rules they deem to be relevant, including equity.

A. *The Role of State Courts*

Although this article uses the term "involvement" of State courts in arbitration, many Russian jurists would prefer a softer expression and refer in their writings to the "interaction" of State courts and arbitral tribunals. Professor Boguslavskii has identified five domains of interaction between arbitration and State courts which amount to forms of State "control" over the arbitral process:[21] (a) determination of the competence of an arbitration court; (b) determination of the validity of the arbitration clause; (c) participation of State courts in forming the membership of an arbitral tribunal; (d) security measures; and (e) vacating and enforcement of arbitral awards.[22]

Judge Reshetnikova has found it instructive to distinguish the interaction between arbitrazh and arbitration courts in two respects: "procedural" and "organizational." By "procedural" involvement of

18. *Id.* at 2.
19. Law of the Russian Federation on International Commercial Arbitration, art. 6 (1993).
20. *Id.* at art. 24.
21. "Control" in Russian is used in the French sense of "supervision" and not the harsher English-language connotation.
22. *See* Mark M. Boguslavskii, «Связь третейских судов с государственными судами» [Link of Arbitration Courts with State Courts], *in* Alexander S. Komarov (ed.), Международный коммерческий арбитраж: современные проблемы и решения? Сборник статей к 75-летию Международного коммерческого арбитражного суда при Торгово-промышленной палате Российской Федерации [International Commercial Arbitration: Contemporary Problems and Awards: Collection of Articles Devoted to 75th Anniversary of International Commercial Arbitration Court Attached to the Chamber of Commerce and Industry of the Russian Federation] 67-73 (2007).

State courts in arbitrations she has in view proceedings to contest the awards of arbitral tribunals or to issue writs of execution for arbitral awards, security measures, or judicial reaction to the existence of an arbitration agreement between the parties. These are familiar arenas of State involvement. Her identification of "organizational" measures, however, is original and perhaps without precise parallel in Anglo-American jurisdictions: training seminars for arbitrators arranged by arbitrazh judges; joint round tables and similar events attended by judges and arbitrators; and the provision of arbitration courts with summaries of judicial practice relating to arbitrations.[23]

Interaction sometimes takes formal procedural form. When a permanently-operating domestic arbitration court is formed in the Russian Federation, it is required to send to the competent State court exercising jurisdiction on that territory where the arbitration court is located copies of the documents attesting to the formation of the arbitration court.[24] However, it is generally accepted in Russian legal doctrine that the "interaction" of courts and arbitral tribunals is not intended to imply a hierarchical relationship of "superior" and "inferior" courts.

Interaction also may involve more than the courts and arbitral tribunals. Either others are involved (for example, the parties in dispute), or the arbitral tribunal is not one of the subjects of legal relations encompassed within the concept of "interaction." An example is measures to secure a suit taken by an applicant who intends to proceed to arbitration but has not yet done so. The applicant in this example pursues security measures in an arbitrazh court. Moreover, if a court is the forum for contesting an arbitral award or for the issuance of a writ of execution, unless the case is returned for further arbitral consideration, it is difficult to see the elements of interaction, for the arbitration tribunal simply does not participate in proceedings of this nature.

Notwithstanding criticisms made of the concept of "interaction," Russian legal doctrine distinguishes between two basic groups of functions performed by State courts with respect to arbitration: assistance and control functions. Each of these is further subdivided into functions

23. *See* Irina V. Reshetnikova, «Взаимодействие арбитражных и третейских судов» [Interaction of Arbitrazh and Arbitration Courts], in Reshetnikova (ed.), Арбитражный суд Свердловской области в 2004 г. [Arbitrazh Court of Sverdlovsk Region in 2004] 574 (Ekaterinburg, 2005).

24. Art. 3(4), Federal Law on Arbitration Courts in the Russian Federation. The reason for such notification is not clear, for it is not constitutive and apparently merely a courtesy of notification. The requirement does not extend to *ad hoc* arbitral tribunals. Additionally, there are no legal consequences for failure to make the notification, including a refusal to execute awards of a permanently-operating arbitration court not duly notified.

performed during an arbitral examination and those performed after the arbitral award is rendered. We consider several of these below, turning first to functions of assistance:

1. Formation of Arbitral Tribunal

The approaches available under Russian legislation differ depending upon whether domestic or international arbitration is involved. In the case of domestic arbitration the parties to a transaction would be well advised to consider the inclusion in the transaction documents of an alternative procedure for forming an arbitral tribunal if one party is reluctant to be cooperative. The Federal Law on Arbitration Courts in the Russian Federation provides that if one of the parties does not select an arbitration judge within 15 days after receipt of the request to do so from another party or if the two arbitrators chosen do not within 15 days after their selection choose the third arbitrator, consideration of the dispute in the arbitration court terminates and the dispute may be transferred for settlement by a competent State court.[25]

The outcome is different for an international commercial arbitration in Russia. If a party does not comply with the procedures for appointing an arbitrator or if the parties or the two appointed arbitrators cannot agree to make an appointment, or a third person designated to make appointments does not do so, any party may request the Chairman of the Chamber of Commerce and Industry of the Russian Federation to take necessary measures. His decision is not subject to appeal.[26] However, the parties would be at liberty to designate a court to act as the agency empowered to perform actions with a view to overcoming obstructions or difficulties in forming the arbitral tribunal, although Russian procedural legislation, it should be acknowledged, does not expressly regulate how such a proceeding should be conducted.

2. Assistance in Obtaining Evidence

The Russian Law on International Commercial Arbitration (Article 27) provides that either the arbitration court or a party with the consent of the arbitration court may apply to a competent court of the Russian Federation with a request for assistance in obtaining evidence. The court has discretion whether to fulfill this request or not, being guided by the rules affecting the securing of evidence, including judicial commissions. MKAC has had occasion in practice to invoke Article 27. In one case,

25. *See* art. 10(4)(1), Federal Law on Arbitration Courts in the Russian Federation.
26. Law of the Russian Federation on International Commercial Arbitration, art. 11(4), (5) (1993).

consent was given to apply to a State court for this purpose,[27] and in another case the proceedings were actually postponed so that a party could avail itself of this right.[28]

There is, however, an alternative route for State assistance—to utilize the services of a notary for this purpose under the 1993 Fundamental Principles of Legislation of the Russian Federation on the Notariat, of which Chapter XX is devoted to the "Securing of Evidence." If this route is used, the request to the notary needs to be made before the arbitral proceedings commence.[29]

3. Security Measures

In Russia the procedural mechanism for taking security measures in arbitral proceedings is set out in the Code of Civil Procedure of the Russian Federation and the Code of Arbitrazh Procedure of the Russian Federation. In principle, the reasons for which the provision of security may be authorized in a judicial proceeding also apply to an arbitral proceeding. In a domestic arbitral proceeding an arbitration court may at the request of any party, unless the parties have agreed otherwise, order that security measures be taken by any party with respect to the subject-matter of the dispute which the court considers to be necessary.[30] If a party applies to a competent court for security measures to be taken, this is not regarded as being incompatible with the arbitration clause or as a renunciation of the clause.

In an international commercial arbitration the parties have two possibilities. The first is to apply to a court either before or during an arbitration for security measures to be taken, the ruling of the court to do so not being regarded as incompatible with the arbitration clause. The second is to request MKAC or MAK to take security measures, unless the parties have agreed otherwise. The arbitration court may require of any party the provision of proper security in connection with such measures.[31]

In either of the above situations, the principles of security apply: such measures are urgent, provisional, protective of the property interests of the applicant, and commensurate with the demands filed in the arbitration. There is a wide spectrum of doctrinal opinion in Russian

27. Award of 21 March 2002, No. 100/2001 (Consultant Plus).
28. Award of 27 February 2002, No. 244/2000 (Consultant Plus).
29. Art. 102, Fundamental Principles of Legislation of the Russian Federation on the Notariat, of 11 February 1993, as amended. Transl. in WILLIAM E. BUTLER, RUSSIAN PUBLIC LAW 747, 774 (2005).
30. Law of the Russian Federation on International Commercial Arbitration, art. 25 (1993).
31. *Id.* at art. 9, 17.

writings with regard to the procedure for setting security measures in place.[32] That subject is beyond the scope of the present article.

4. Control over Enforcement of Arbitral Awards

In Russia the exequatur system is used as a method of judicial control over arbitral awards, that is, the party who has received an award in its favor from an arbitral tribunal applies to a court for recognition and enforcement of the award. An exequatur procedure imparts executory force to an arbitral award, making it capable of enforcement with the use, when necessary, of enforcement measures on the part of State agencies with respect to the person obliged or his property.[33] The rules applicable to execution proceedings in force when the court recognizes the arbitral award will govern the execution process. In the case of Russia, this is the Federal Law on an Execution Proceeding.[34]

The possibility of remission exists in Russian legislation. Remission would arise when an arbitral award contains defects or shortcomings that would otherwise result in its being vacated. A party may petition to a Russian court to request that the proceedings be suspended for a period to allow the arbitral court the opportunity to resume the arbitral examination or undertake other actions that would enable the grounds for vacating the arbitration award to be eliminated.[35] An analogous mechanism exists for domestic arbitrations in Russia. As a rule the matter is returned to the same arbitral tribunal which issued the award, along with the same arbitrators. Russian doctrine strongly resists the proposition that different arbitrators should be permitted unless for weighty reasons this is absolutely impossible.

Review of an arbitral award on the grounds of newly discovered circumstances is not permitted at present in the Russian Federation. The Supreme Arbitrazh Court of the Russian Federation has twice considered whether an arbitral award either upon the application of a party to the arbitration or at the initiative of a court may be reviewed on these grounds. In the first case an arbitral tribunal considered a case concerning a contract of delivery and confirmed an amicable agreement and a waiver by the claimant not to pursue further demands under the contract. In 2005 an arbitrazh court issued a writ of execution for the arbitral award. The claimant then pointed out to the arbitral tribunal that

32. *See* Kurochkin, *supra* note 17, at 44-46.

33. Paraphrasing the definition given in SERGEI N. LEBEDEV, Международный торговый арбитраж [International Commercial Arbitration] 20 (1965).

34. *See* The Federal Law on an Execution Proceeding, of 2 October 2007, in force as of 1 February 2008. СЗ РФ (2007), no. 41, item 4948, as amended.

35. Law of the Russian Federation on International Commercial Arbitration, art. 34(4) (1993).

its representative was not empowered to conclude an amicable agreement, and the arbitral tribunal revoked its award in the case, reconsidered the matter, and found in favor of the claimant in its new award. The respondent then applied to the arbitrazh court and requested that the writ of execution under the first award be reviewed on the basis of newly discovered circumstances. The request for review was denied on the grounds that an arbitral tribunal did not have the right to reconsider its first award and issue a second one. Consequently, the court issued the writ of execution properly under the initial award, having no statutory grounds for refusing to do so.[36]

The second case is even more interesting. The Supreme Arbitrazh Court of the Russian Federation refused to review by way of supervision a ruling of a first instance arbitrazh court which declined to review an arbitral award even though the rules of the permanently-operating arbitral court provided that the parties in arbitration had the right to seek review and reversal of an arbitral award rendered by that court. The Supreme Arbitrazh Court observed that under the 2002 Federal Law on Arbitration Courts (Article 31) the parties had agreed voluntarily to execute the award rendered. Consequently, the ruling issued by the arbitral tribunal to reverse its previous award is not binding on other persons or agencies, including arbitrazh courts, and may not serve as grounds for the review of a ruling on the grounds of newly discovered circumstances.

These positions would not preclude, in the view of some Russian jurists, the parties agreeing to the possibility of subsequent revision or to the possibility of the party against whom the award was rendered arguing at the enforcement stage against a writ being issued on the basis of a violation of public policy.

VI. CONCLUSION

Russian arbitral experience suggests that the question for Russia, as for other countries, is what constitutes the optimal level of State supervision over arbitral proceedings rather than whether there should be any supervision or not. The issues discussed above are central to a larger Russian dialogue about the appropriate relationship between the State and arbitration. The considerable body of arbitral and judicial practice that informs that dialogue is a subject for separate consideration. While Russian doctrine remains acutely aware of and sensitive to international trends in arbitration, the Russian context is different from its European and American counterparts, sometimes for the better and sometimes not.

36. *See* Ruling of the Supreme Arbitrazh Court of the Russian Federation, 29 October 2007, No. 3055/07 (Consultant Plus).

No foreign investor who considers whether to incorporate arbitral dispute settlement clauses in his transaction documentation in preference to judicial remedies can fail to be aware of those differences.