PROBLEMS OF IMPLEMENTATION OF LEADERSHIP IN DISPUTE RESOLUTION OF THE BRICS COUNTRIES (ON THE EXAMPLES OF THE RUSSIAN FEDERATION, CHINA, INDIA)

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Abstract

One of the highlights of recent decades was the creation of BRICS - an association of countries that vividly reflects the integration processes that occur in the world. Despite the geopolitical nature of the association, the agreements concluded affect many areas of public relations. The introduction of new methods of using means of production, the improvement of technology leads to the active development of the economy.

The increasing degree of complexity and even the sophistication of financial markets and commercial products along with the lessons taught by the 2008 financial crisis have led to the need to apply more sophisticated dispute resolution methods that arise in the course of cross-border banking and financial transactions.

The above-mentioned modernisation of commercial disputes resolution entails many problems of a legal nature, namely the need to specify internal rules for resolving disputes adopted by arbitration institutions in order to take into account the specificity of disputes arising among BRICS countries.

This article analyses and compares the legal regulation of court proceedings, as well as other alternative ways of resolving disputes in the Russian Federation, China and India. The findings of the study made it possible to identify the problems and prospects for the implementation of the task set in these countries to become leaders in the resolution of disputes.

The goal is achieved by solving a number of tasks:

- To investigate the peculiarities of the disputes resolution both in the framework of the judicial procedure and through the use of alternative methods in foreign jurisdictions in the BRICS countries (for example the Russian Federation, China, India);

- Analyse the problem of arbitrability of disputes in the BRICS countries;

- Pay attention to the problems of recognition and enforcement of foreign arbitral awards in the Russian Federation, China and India.

- Identify and analyse promising opportunities for the implementation of leadership in resolving disputes of the BRICS countries;

The results of the study are of both practical and scientific-theoretical importance. They can be useful in the course of further improving the legal acts of the BRICS member - states, which can be used for their future implementation in the national systems of member - states, in determining key objectives and tasks of a procedural nature, improving the functioning of judicial and extrajudicial organizations, law enforcement,

research activities, as well as in teaching activities, in lectures and seminars on the courses of private international law, arbitration process, copyright and patent law.

Keywords: arbitration process, civil procedure, international commercial arbitration, enforcement of judicial and arbitral decisions, arbitration agreement, judicial system, competence, BRICS.

1 INTRODUCTION

One of the priorities of the Russian Federation at present is the preparation for the chairmanship of the BRICS in 2020, the goal of which will be to increase cooperation of the BRICS countries in the trade and economic sphere. [1] The study of the possibility of unifying private-law ways of settling disputes that are necessary for the implementation of trade and economic cooperation carried out by Brazil, Russia, India, China and South Africa is of both theoretical and practical interest. One of the platforms for cooperation in the trade and economic field seems to be such a private-law way of settling a dispute as commercial arbitration, since uniform national rules in civil and commercial law that could be applied in the national courts of the BRICS member states today does not exist. Despite close cooperation in these areas, some countries such as Russia, China and India have adopted many programs aimed at achieving leadership in resolving disputes, not only within the framework of the BRICS but also in the Asia-Pacific region.

2 METHODOLOGY

The research methodology is based both on the general scientific methodology of cognition of reality and private-scientific methods: historical, system-structural analysis, comparative legal analysis, analysis of judicial practice data. The study of procedural legislation, arbitration regulations, as well as a number of national sources and other regulatory acts was carried out using the methods of specific research, logical and statistical analysis. In the work, the authors relied on the results of research by Russian and foreign legal theorists in the considered and related fields of knowledge.

3 RESULTS

3.1 General Characteristics of the Proceedings in Russia, China and India

It is necessary to take into account the fact that the countries represented belong to different legal systems, since Russia and China are representatives of the continental legal system, and India gravitates towards the Anglo-American one. However, despite the legal certainty from first glance, all these countries have specific features. However, one thing is common to all these countries: the change in procedural legislation.

In Russia, the highest judicial authority is the Supreme Court of the Russian Federation, which has the right to consider all civil cases, cases of resolving economic disputes, criminal, administrative and other cases that are subject to all courts established following the Law on the Judicial System and other federal laws. The Supreme Court of the Russian Federation is entrusted with the constitutional duty to carry out in procedural forms, judicial supervision over the activities of all courts established in the above procedure, considering civil cases, cases of resolving economic disputes, criminal and civil cases, jurisdictional to the courts of general jurisdiction. [2] The Supreme Court is the highest court concerning the system of courts of general jurisdiction and arbitration courts.

On November 28, 2018, the President of the Russian Federation signed the law, which was called the “procedural revolution”, which fundamentally changed the court proceedings: there are new judicial instances (Court of Cassation of General Jurisdiction and Court of Appeal of General Jurisdiction); abolishes the institution of jurisdiction, instead the term competence appears; terms of consideration of cases were changed; the list of cases for consideration in simplified proceedings was increased; qualification requirements for representatives in court appeared and some others. However, despite this, the attractiveness of the trial has not increased; it is due to the long periods of consideration and the possibility of reviewing the case again if the cassation instance reversed the case to the first instance.

In addition, in the Russian Federation there is the problem of determining the jurisdiction of courts of general jurisdiction and arbitration courts caused by the insufficiently clear wording of paragraph 1 of article 27 of the Arbitration Procedure Code (APC RF), according to which the arbitral tribunal considers cases on economic disputes and other cases related to entrepreneurial and other economic activities. The lack in the law of

formal criteria for the qualification of a particular activity as an economic one creates uncertainty when choosing a competent court.

China is implementing a new economic strategy “One Belt and One Road”, the main idea of which is to create all the necessary conditions for attracting foreign investment and economic development of the country. This strategy also influenced all spheres of public life, including the methods of resolving disputes.

China has a four-tier judicial system: it is headed by the Supreme People's Court, then comes the provincial level: the High People's Courts; then the Intermediate People's Courts and the lower level are the central People's Courts.

Besides, in China, there are railway transport courts, maritime courts and intellectual property courts at the level of people's courts of medium level. As a rule, the majority of civil lawsuits of the first instance is submitted to the main people's courts and can be appealed to the intermediate people's court. However, intermediate courts and high people's courts have first instance jurisdiction over certain types of disputes, for example, when the amount of the claim exceeds specific threshold values or when the case is of a political or social nature.

Foreign law firms may open offices in China. However, foreign lawyers are prohibited from representing clients on Chinese law issues, including attending court hearings. The general term of consideration of the case is six months; however, this rule does not apply to cases involving a foreign element. The trial consists of two parts: the investigation of the facts and the presentation of arguments. These procedures are carried out in strict order under the control of the court. The court has an active role in the process; this is manifested in the fact that the court itself can seize the debtor’s property.

Chinese law allows for disputes complicated by a foreign element the use of foreign law, but the content of the legal instrument should not violate the sovereignty of China. [3] Obtaining testimony from a witness in China for use in proceedings in another jurisdiction is more governed by international or bilateral treaties.

China, as a member of the Convention on Collecting Evidence Abroad in Civil and Commercial Matters of 1970 (The Hague Convention on Evidence), made a reservation regarding articles 23 and 33, as a result of which pretrial collection of documents in China is impossible. A diplomatic official or consular representative may collect evidence only concerning their citizens (provided that the action does not contradict Chinese legislation and no coercive measures are taken), but not Chinese citizens or citizens of a third country.

Chinese law explicitly prohibits foreign lawyers and other foreign individuals from taking legal action (for example, taking testimony) in China that goes beyond China’s obligations under the Hague Convention on Evidence.

In India, the judicial system has an vital peculiarity, as it relates to the "common law system". In the common law system, judges have the exclusive right to create a new rule of law in their decisions, the so-called judicial precedents. Unlike the British legal system, which is completely based on the common law system from which it originated, the Indian system includes the common law system along with statutory law and national law. In practice, there are often situations where it is impossible to predict how relations should be settled and what rule should be applied.

The highest judicial authority is the Supreme Court, followed by the various high state courts serving one or more states. Below the high courts, there are lower courts, consisting of district courts and other lower courts.

The Supreme Court and the High Courts have supervisory powers. Under the concept of judicial supervision, legislative and executive bodies are subject to control by the judicial authorities, and judicial authorities may invalidate the actions of legislative and executive bodies if they contradict constitutional provisions. In other words, laws adopted by the legislature and the rules adopted by the executive branch must comply with the Constitution of India, which is characteristic not only of common law legal systems but also of the continental legal system.[4]

Despite this, the judicial form of resolving disputes requires reforming, since it does not comply with modern principles of justice: independence, impartiality of judges, equality of parties.The text included in the sections or subsections must begin one line after the section or subsection title. Do not use hard tabs and limit the use of hard returns to one return at the end of a paragraph. Please, do not number manually the sections and subsections; the template will do it automatically (Einstein, 1916, p. 245).

3.2 Disputes Settlement through International Commercial Arbitration in Russia, China and India

3.2.1 Russian Experience

The economy of the Russian Federation, in particular, its foreign trade, as evidenced by statistics, indicates an active development and a tendency to further growth among the BRICS countries. For the representatives of member-countries, international commercial arbitration is the most appropriate way to resolve disputes in the framework of strategic cooperation. Virtually all domestic and foreign researchers agree that the primary criterion for attracting investment is not only its self-sufficiency and profit but also the possibility of protection, which is directly related to the development of a dispute resolution mechanism, including through international commercial arbitration. The global practice has developed methods of extrajudicial settlement of disputes that are most acceptable under international law, including the ICA.

In the Russian Federation, this procedure is regulated by the Federal Law of 07.07.1993 N 5338-1 “On International Commercial Arbitration” when considering international commercial disputes, the recent amendments to which were made in December 2018. The law expanded the competence of the ICA and made this law more pro-arbitration, and the international treaties of the Russian Federation in this area make this method of dispute resolution more attractive. Now some corporate disputes may be subject to arbitration. However, the adoption of the Federal Law “On Arbitration in the Russian Federation” of 2015 complicated the procedure for the emergence of arbitration institutions; now we need to receive a Resolution of the Government of the Russian Federation. The result was a severe reduction: instead of more than a thousand and a half, there are about dozens of them left. This was done in order to eliminate dubious arbitration. Now state courts are obliged to assist and control the activities of arbitration institutions.

The parties to the arbitration must know the legislation governing the arbitration, especially if the decision is to be executed in Russia. One of the crucial ones is a adequately filed arbitration agreement: the requirements for it are more stringent than in other countries, so the presence of the word "arbitration" will not be enough to recognise the validity of such an arbitration clause. Next, you need to pay attention to the nature of the dispute, since not every dispute can be arbitrable. Besides, there is the problem of determining "public order" in the Russian legislation, and therefore there is a negative practice of not recognising and enforcing foreign arbitral awards by the violation of "public order" in the Russian Federation.

3.2.2 China Experience

China has adopted the most critical economic development strategy of the country, "One Belt and One Road," the goal of which is to form the Silk Road Economic Belt and to form a new economic model. For China, it is necessary to strengthen economic ties and cooperation with other countries in order to continuously improve the level of China’s policy of openness.[5] Therefore, within the framework of the "One Belt and One Way" concept, it is necessary to present to our strategic partners the possibilities of obtaining natural mechanisms for resolving disputable situations. The fairest and popular is the international commercial arbitration. The spread of arbitration led to the fact that even financial disputes became subject to regulation in this way.[6] China can be stated as a pro-arbitrage country.[7] In 2018, the position of the Supreme People’s Court of the People’s Republic of China on the establishment of the International Commercial Tribunal (International Commercial Tribunal), a committee of international trade experts, and professional international mediation and arbitration institutions was adopted to achieve the global goal of becoming the leading arbitration centers throughout the Asia-Pacific region.

The most crucial problem is the procedure of international arbitral awards. For foreign awards and decisions of international arbitration, there is the following procedure: the court, deciding the refusal to execute the arbitral award must inform the High People’s Court, and the court must obtain agreement with the arguments and approve such a decision by the Supreme People’s Court. This procedure results in long terms and high costs.

Besides, the Supreme People's Court is able to exercise a supervisory function over the activities of the courts in recognition and enforcement of not only foreign court verdicts and arbitral awards of international arbitrations but also domestic arbitration. In practice, there is a considerable number of disputes, on which decisions of international arbitrations are simultaneously recognised and enforced, and their contradiction to each other often leads to confusion at least, and even worse, the China’s arbitration prestige, trust and reputation suffer.

The adoption of the Law “On Arbitration” in 1994 was a breakthrough at that time, and the consolidation of generally accepted international principles in practice is still very difficult to implement. The principle of

independence of arbitration has not received the proper level of application in practice. The arbitration institutions have the status of official or semi-official institutions, the complexity of the arbitration procedure inhibits the entire economic development of the country. Therefore, the reform of the arbitration procedure continues.

3.2.3 India Experience

The dynamically developing economic situation in India requires the creation of mechanisms for the prompt resolution of disputes, one of which is the creation of an institutional arbitration institution. To implement it, the Government of India adopted a "roadmap" to support institutional arbitration. However, the problem is creating such arbitration to which the persons who applied for protection would have confidence and authority. The International Center for Alternative Settlement of Disputes in India did not cope with such a task, so the New Arbitration International Arbitration Center came to replace it. The main problem is the complicated procedure of arbitration, the dependence of it on state bodies and courts, and the failure to observe the principle of confidentiality. The primary goal is to create an autonomous and independent institution, as well as the effective management of arbitration in India.[8] The main objectives of the Center are: developing mechanisms for promoting arbitration, providing services and administering arbitration, mediation and other conciliation procedures; creation of a group of accredited professionals to conduct these procedures.

Also, the existing Arbitration and Conciliation Act of 1996 was amended by Act no.100 on Arbitration and Conciliation 2018 (Amendment). According to these amendments, the Supreme Court and the State High Court have the right to create arbitrations, provided that ten arbitrations do not fall under the jurisdiction of the State High Court. In the absence of arbitration, the President of the relevant High Court may form a panel of arbitrators to fulfil their functions and responsibilities of the arbitral institution. Therefore, the Chief Justice may periodically review the panel of arbitrators. The appointment of an arbitrator occurs at the request of the party to arbitration by the Supreme Court in the disputes of international commercial arbitration and the High Court in other cases, not within the competence of international commercial arbitration.

All the changes in arbitration are far behind the existing realities.[9] India has taken a prolonged and exceptional way to reform legislation.

4 FINDINGS

Despite the ongoing legislative changes in Russia, China, India as the leaders of the BRICS association, they still have not achieved their goals. This is due to many factors: political, economic, legal and many others.

The most effective seems to create their unique dispute resolution mechanisms, rather than dragging the rope to your side: for example, the International Commercial Arbitration of the BRICS countries, with branches in all member-countries, which would deal with economic, investment and other disputes between the participants of the BRICS; the creation of a single procedure for the consideration of disputes, recognition and enforcement of arbitral awards of the International Commercial Arbitration of BRICS; introduction of a single list of arbitrators from among representatives of the member countries.

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