



**ARBITRATION IN
CIS COUNTRIES:
CURRENT ISSUES**
Brussels, June 21, 2012





**ARBITRABILITY OF REAL ESTATE
AND CORPORATE DISPUTES UNDER
RUSSIAN LAW**

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This report examines:

- the position of Russian state courts with regard to the arbitrability
 - of disputes concerning the transfer of title to real estate;
 - of corporate disputes.
- possible concerns underlying their position.

Steps to the recognition and/or enforcement of the arbitral awards in Russia

- Apply for recognition and/or enforcement of an arbitral award to a state commercial court of a constituent of the Russian Federation where the debtor resides (is registered) or, if the debtor's place of residence (registration) in Russia is unknown, where his assets are located.
- A party may appeal to one of the 10 federal state commercial courts constituting the cassation instance.
- The last resort: apply to the Supreme Commercial Court of the Russian Federation for review.

- A judgment may be set aside by the Supreme Commercial Court in exceptional cases:
- if it goes against uniformity of interpretation and application of legal provisions by the state commercial courts, and/or
- infringes upon the rights and legitimate interests stipulated by the international treaties of the Russian Federation and by *jus cogens*, and/or
- violates public interests.

The law applicable to recognition and/or enforcement of international arbitral awards in Russia includes:

- the New York Convention,
- the Russian Commercial Procedure Code,
- the Russian Civil Procedure Code,
- the Federal Law “On International Commercial Arbitration”.

Russian legal rules on the arbitrability of disputes

- There is no list of (non)arbitrable disputes.
- Some Russian laws provide that certain disputes are non-arbitrable:

Federal law “On Insolvency (Bankruptcy)”:

A bankruptcy case shall not be submitted to arbitration tribunal;

After a bankruptcy procedure is initiated by the court, any claim against the debtor can be filed and heard only within the bankruptcy procedure and is not arbitrable anymore.

Some statutes provide that certain disputes are arbitrable:

- The Land Code of the Russian Federation: the parties to a land dispute may submit it to arbitration (Article 64.2);
- The Federal Law “On the State Registration of Rights to Real Estate and Related Transactions”: the rights to real estate ascertained by *an arbitral award* are to be state-registered (Article 28);
- The Federal Law “On Mortgages (Pledges of Real Estate)”:
 - a mortgage registration entry should be cancelled on the basis of *an arbitral award* (Article 25);
 - an action may be brought against the mortgagor in arbitral tribunal for the recognition of ownership rights to the mortgaged real estate (Article 33.1).

Arbitrability of real estate disputes

What is real estate under Russian law:

- land parcels;
- subsoil resources parcels;
- objects firmly connected with land: buildings, structures, objects of incomplete construction;
- air and watercraft subject to state registration;
- space objects subject to state registration.

Russian Commercial Procedure Code Article 248: some disputes relate to exclusive jurisdiction of Russian state commercial courts, such as:

- the disputes on the title to real property located in the Russian territory;
- the disputes relating to the registration of intellectual property rights;
- public law disputes.

For years Russian state courts interpreted these rules so that these disputes were not arbitrable.

However Russian Constitutional Court in 2011 explained: the provision means merely that such disputes may not be heard by foreign state courts.

Russian Supreme Commercial Court tried to reserve certain kinds of disputes for state commercial courts.

In July 2010 the Presidium of the Russian Supreme Commercial Court (“the SCC”) challenged the constitutionality of provisions of

- the Russian Law “On International Commercial Arbitration” and the Federal Law “On Arbitration Tribunals in the Russian Federation”;
- the provisions of the laws related to arbitrability of disputes on real property rights;
- Article 11.1 of the Russian Civil Code: *“Protection of violated or disputed civil-law rights shall be conducted [...] by a court, commercial court, or arbitration tribunal (hereinafter - court)”*.

The SCC argued that:

- these laws do not contain an exhaustive list of arbitrable or non-arbitrable disputes and, hence, they make this matter uncertain;
- arbitration tribunals are not equal to state courts and do not belong to Russian state court system. Thus their awards may not have the same public effect as judgments of state courts;
- Therefore arbitration tribunals may not hear disputes having public importance, in particular, those relating to immovable property,
- an arbitral award is not a ground for the state bodies to register the transfer of rights to immovable property in public register.

The alleged uncertainty was detected during the consideration in 2009–2010 of two cases with identical facts on the enforcement of Russian arbitration awards.

Subject matter of the case:

The arbitration tribunal resolved the dispute on recovery from the pledgor in favour of the pledgee of a credit debt and on levying execution on the pledged property.

Conclusions of the court:

- matters involving transfer of property rights relate to the domain of public interest and for this reason are not arbitrable.
 - certain provisions of Russian law allow arbitral tribunal to levy execution on the subject of pledge.
- SCC questioned the constitutionality of such legal rules.

The pro-arbitral decree of the Constitutional Court of the Russian Federation.

On May 26, 2011 Constitutional Court:

- confirmed competence of arbitration tribunals to hear disputes concerning rights to immovable property;
- found that no provisions of law challenged by the SCC contravene the Constitution;
- refused to evaluate the conformity with the Constitution of the Law “On International Commercial Arbitration” because this law did not apply in case heard by the SCC.

The Constitutional Court made a number of vital findings for arbitration.

- arbitration tribunals are institutions of civil society endowed with functions of public importance;
- Arbitration expresses tendency towards consolidation of democratic principles of justice and as such does not contradict the Constitution.
- Any dispute arising out of civil-law relations is arbitrable unless otherwise specifically provided by federal law.
- any legislative modifications as to the arbitrability of disputes may not randomly reduce the current level of guarantees of rights to arbitration by participants of civil law relations.

- The legal requirement of state registration of transfer of rights to immovable property by no means excludes the civil law nature of disputes relating to such rights. Therefore they are arbitrable.
- An arbitral award may constitute ground for a state body to register transfer of rights to immovable property.
- Arbitration tribunals may award the levy of execution on mortgaged property.
- If an arbitral award infringes the rights of a non-party to arbitration, then this party may challenge such award in state court.

Consequences:

The legal status of arbitration, arbitration tribunals and arbitral awards was strengthened.

The conclusions of the Constitutional Court may be extended to international arbitration:

- they were reached upon scrutiny of the rules of the Civil Code and the law on pledge which are applicable to international arbitration.

The conclusions of the Constitutional Court of the Russian Federation may be extended to any real estate regardless of its place of location, *i.e.* also outside Russia.

The SCC complied with the Constitutional Court decree and upheld the lower courts' judgments granting enforcement of the arbitral award.

The SCC referred to the Constitutional Court's position that the public nature of the dispute, which causes its non-arbitrability, depends solely on the nature of the legal relationship.

However, the SCC did not apply this approach to the issue of arbitrability of corporate disputes.

Arbitrability of corporate disputes

“Corporate disputes” falling within the competence of state commercial courts:

Disputes as to the creation of a legal person, its management or participation in it, including the disputes over:

- 1) the establishment, reorganization and liquidation of legal entity;*
- 2) the shares in the business entities,*
- 3) claims of the members of the legal entity for damages caused to the legal person, invalidating transactions conducted by the legal person;*
- 4) the appointment, termination, suspension of office of the bodies of legal persons;*

- 5) *the issue of securities;*
- 6) *convening a general meeting of members of the legal entity;*
- 8) *challenging the decisions of the management entity.”.*

This list is non-exhaustive.

As can be seen, Russian state commercial courts may hear a wide variety of corporate disputes.

A large-scale case on arbitrability of corporate disputes: Novolipetsky Metallurgicheskiy Kombinat v. Nikolay Maksimov

Commercial courts denied the arbitrability of corporate disputes:

- they do not relate to the domain of civil law relations
- they involve public interest.

NLMK is one of the largest steel producers in Russia.

In 2007 Maksimov, sold 50 percent plus one share of Maxi Group holding company to NLMK.

The contract provided for conditions of sale:

- an agreement on corporate governance,
- an additional issue of shares
- The terms of payment of the shares of such additional issue were included.

The stipulations of the agreement, as well as its performance, provoked multiple controversies.

Moscow Commercial Court on June 21, 2011 annulled an ICAC award of March 31, 2011. According to that award, NLMK was ordered to pay 9.5 billion roubles (approximately 237 million euro) to Maksimov.

The court found that the subject matter of the dispute was not capable of settlement by arbitration and consequently the award contravened Russian public policy.

The court of cassation instance upheld this decision: corporate disputes are not arbitrable as they belong to exclusive competence of state commercial courts.

In January 2012 the panel of three SCC judges upheld this.

In another case NLMK applied to Moscow Commercial court to invalidate the agreement with Maksimov and to order restitution of the amount paid under such agreement (some 7 bln rubles).

The court left the case without consideration: the parties provided in their contract for arbitration. However, the court of appeal instance vacated its ruling finding that the dispute was non-arbitrable, as:

- the dispute was not “international”;
- Articles 33.1.2 and 225.1.3 of the Commercial Procedure Code establish exclusive competence of state commercial courts over commercial disputes. Therefore under the existing legislation corporate disputes could not be referred to arbitration for resolution.

On December 6, 2011 the court of cassation instance set aside both rulings and remanded the case for a new trial:

The “exclusive” jurisdiction under article 38 of the Commercial Procedure Code distinguished the competence of state commercial courts within their own system as provided in article 3 of the Federal Constitutional Law “On Commercial Courts of the Russian Federation”.

At the new trial the court of first instance would have to decide whether the “special” jurisdiction of state commercial courts over corporate disputes as set in Article 33.1.2 of the Commercial Procedure Code excludes the possibility of resolution of such disputes by arbitration.

Maksimov applied to the Constitutional Court:

Article 33 (1)(2) in combination with Article 225.1 of the Commercial Procedure Code of the Russian Federation, interpreted by the SCC as prohibiting arbitration of corporate disputes, violates his right to judicial protection and his freedom to choose how to protect his rights.

However, the Constitutional Court refused to consider the application on formal grounds:

“CPC rules cannot be regarded as violating the constitutional rights of the applicant...

The right to judicial protection does not imply a choice of specific forms and methods of implementation of such right”.

An ambiguous answer.

Probably this question will be submitted to the Constitutional Court in some other form and context, considered and decided by the court in close future.

Is the Supreme Commercial Court generally hostile to arbitration?

Case studies show it is not. Thus, SCC:

- reconfirmed that the state courts may not review the merits of the cases while dealing with enforcement of the awards;
- consistently denied the opportunity of challenging international arbitral award where the parties expressly agreed on its finality;
- approved assisting international arbitrations taking place abroad (in UK), by granting interim measures at the party's request;
- consistently avoids application of public policy clause except extraordinary situations.

“the SCC is on the crossroads and in process of a tormented self-identification, throwing itself from side to side and suffering from birthmarks of Soviet and recent past”.

Alexander Muranov

Concerns underlying the position of the Supreme Commercial Court with regard to (non-)arbitrability of real estate and corporate disputes

- real property is expensive and valuable;
- Such disputes, as well as corporate disputes can infringe upon rights of non-parties (dwellers; minority shareholders) and are sensitive to public interest.
- Arbitration is not immune from abuse. (All legal and social institutions are not.)

Other important issues:

Russian regulation on establishing arbitration institutions is quite liberal.

- All arbitration tribunals enjoy equal status in Russia, but are in fact very different.
- More than 500 permanent arbitration courts have been set up in Russia.

Conclusion:

- The position of SCC may have been based on legitimate concerns.
- But the chosen method was non-adequate.
- The SCC is not generally hostile to allow to arbitration courts to resolve important disputes.
- It is against the possibility of granting such rights to all arbitration institutions.

Solutions?

- To allow third parties to challenge the awards which infringe their rights (as the Constitutional Court explained with regard to real estate disputes).
- To amend Russian regulations by introducing qualifying requirements for establishing / running the arbitration institution?

However, this issue is very sensitive.

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