

# Can Corporate Disputes be Referred to Arbitration? Recent Clarifications by Russian Courts

Last week two Russian court decisions were published which are important for the purpose of determining from the standpoint of Russian law whether so-called "*corporate disputes*" can be resolved by arbitral tribunals, including in the framework of international commercial arbitration.

The first of these decisions is the **Ruling of the Constitutional Court of the Russian Federation (the "Constitutional Court") of 21 December 2011,<sup>1</sup>** under which the court refused to accept a complaint filed by Mr Maximov (the "Constitutional Court Ruling").<sup>2</sup> The complainant had challenged the constitutionality of provisions of the Arbitrazh Procedure Code of the Russian Federation (the "APC") which stipulate that corporate disputes are not arbitrable. Earlier, the Arbitrazh Court of the City of Moscow had ruled that corporate disputes are not arbitrable and set aside an award of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (the "ICAC") dated 31 March 2011 in case No. 244/2009, which had been rendered in Mr

Maximov's favour, awarding him part of the purchase price still owed for shares in a Russian company (the "ICAC Award").

The second court decision is the **Ruling of the Supreme Arbitrazh Court of the Russian Federation ("SAC") of 30 January 2012.** Under this decision the request to refer the above-mentioned case, in which the ICAC Award was set aside, to the Presidium of the SAC was denied (the "SAC Ruling").<sup>3</sup>

Both the Constitutional Court Ruling and the SAC Ruling are predicated on the position that corporate disputes are not arbitrable. This of course may have a significant impact on the approach taken by arbitrazh courts in future when hearing disputes over the activities of companies or transactions with shares – a fact that businesses and others doing business in Russia via Russian companies should be aware of.

In particular, this can result in annulment of international arbitral awards rendered in Russia or refusal to issue writs of execution in respect of such awards, and also inability to recognize and enforce arbitral awards rendered abroad.

However, we are of the view that these judicial acts do not definitively settle the issue of whether or not such disputes are arbitrable. The decisions do not clarify precisely which disputes involving company operations or shares should be considered "*corporate disputes*". What is more, the form of the decisions themselves is such that the courts could still come to different conclusions when hearing such cases in future.

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<sup>1</sup> Although the Ruling is dated 21 December 2011, it was published on the official website of the Constitutional Court only at the end of January 2012.

<sup>2</sup> Ruling of the Constitutional Court of the RF dated 21 December 2011 No. 1804-O-O.

<sup>3</sup> Ruling of the Supreme Arbitrazh Court of the RF No. VAS-15384/11 dated 30 January 2012 in case No. A40-35844/2011-69-311.

## Legislative provisions

In 2009 amendments were made to the APC with respect to so-called "*corporate disputes*" (Chapter 28.1 APC). Among other things, Art. 225.1 of the APC defined corporate disputes as disputes connected with the establishment of, management of or participation in a legal entity. The list of corporate disputes set out in Art. 225.1 of the APC is not exhaustive and includes, *inter alia*, (1) disputes connected with the establishment, reorganisation or liquidation of a legal entity; (2) disputes connected with the ownership of shares or participation interests in the charter (share) capital of companies and partnerships, the establishment of encumbrances over them, and the exercise of rights attaching to them; and (3) disputes involving claims by founders, participants or members of a legal entity seeking reimbursement of damages caused to the legal entity, invalidation of transactions performed by the legal entity and/or application of the consequences of invalidity to such transactions.

Until recently, arbitrazh courts did not take a uniform approach to the arbitrability of corporate disputes. One view was that any disputes between the participants of companies and relating to their operations could not be considered by arbitral tribunals (Decree of the Federal Arbitrazh Court of the Moscow District dated 11 October 2006 No. KG-A40/8672-06 in case No. A40-27193/06-30-160). Another view is that the special jurisdiction of arbitrazh courts over corporate disputes provided for by Art. 33.1 of the APC does not in and of itself exclude the possibility of such disputes being heard by an arbitral tribunal. In each specific case the nature of the legal relations between the parties and the consequences of an award being rendered

by an arbitral tribunal must be taken into consideration, and only after that it be surmised whether or not the dispute may be heard by an arbitral tribunal (Decree of the Federal Arbitrazh Court of the Moscow District dated for August 2009 No. KG-A40/4241-09-P in case No. A40-30102/08-69-336; Decree of the Federal Arbitrazh Court of the Moscow District dated 14 December 2006 No. KG-A41/11095-06 in case No. A41-K1-17351/06 (under the SAC Ruling dated 16 February 2007 No. 1557/07 the request to refer this decree to the Presidium of the SAC for review through judicial supervision was denied)).

## Essence of the dispute

### Sale and purchase agreement and proceedings in the ICAC

Mr Maximov, OJSC Novolipetsk Iron and Steel Works ("**NLMK**") and OJSC Maxi-Group (the "**Issuer**") entered into an agreement under which Mr Maximov undertook to transfer title to 50% plus 1 one share in the Issuer to NLMK, and the latter undertook to pay Mr Maximov the purchase price (the "**SPA**"). Under the terms of the SPA the shares were to be paid for in two stages.

Mr Maximov transferred the shares in the Issuer to NLMK and received the first part of the purchase price. NLMK then refused to pay the second part, prompting Mr Maximov to file suit in the ICAC. In its decision the ICAC partially awarded Mr Maximov's claim.

### Setting aside of the ICAC Award

NLMK brought an action in the Arbitrazh Court of the City of Moscow to have the ICAC Award set aside. On 28 June 2011 the ICAC Award was set aside, and on 10 October 2011 the Federal Arbitrazh Court

of the Moscow District ("**FACMD**") upheld the ruling of the Arbitrazh Court of the City of Moscow setting aside the ICAC Award (the "**FACMD Decree**").<sup>4</sup>

The FACMD concurred that the ICAC Award should be set aside on the following grounds: (1) non-arbitrability of the dispute heard by the ICAC; (2) violation of the principle of arbitrator independence and impartiality; and (3) violation of the principle of legality, i.e. inconsistency of the ICAC Award with the fundamental principles of Russian law. Grounds (2) and (3) are undoubtedly deserving of separate analysis, but in this briefing we focus on ground (1).

The FACMD held that the dispute considered by the ICAC was not arbitrable due to the fact that it was not "*only an isolated question of payment of the price of the shares*" but rather was connected with "*establishing the observance of conditions precedent for the transaction and the conduct of the additional issue of shares, observance of the terms of their payment, and consideration of the question of the title to such shares*". As a result, the FACMD found that the "*arbitrable private law dispute on payment of the price of the shares*" was inseparable from the inherent "*non-arbitrable public law disputes on the transfer of title to the shares as a result of performance of the entire set of conditions involved in the transaction... on corporate governance*". The FACMD also cited Art. 33 and Art. 225.1 of the APC, noting that corporate disputes are within the special jurisdiction of arbitrazh courts and therefore are not arbitrable. It should be noted that from the FACMD Decree it does not follow that there was

<sup>4</sup> Decree of the Federal Arbitrazh Court of the Moscow District dated 10 October 2011 in case No. A40-35844/11-69-311.

any dispute between Mr Maximov and NLMK over title to the shares or the share issue which would be heard by the ICAC; the ICAC Award was rendered solely in respect of payment of the outstanding part of the purchase price for the shares.

## The SAC's position

The above-mentioned court decisions were challenged by Mr Maximov in the SAC. Under the SAC Ruling Mr Maximov's request that the case be referred to the Presidium of the SAC was denied.

The SAC concurred with the lower courts' finding that corporate disputes envisaged by Art. 33 and Art. 225.1 of the APC are not arbitrable. The SAC Ruling does not

address why the dispute that arose out of the SPA which was heard by the ICAC is not arbitrable. The SAC also did not indicate whether the presence or absence of a public element is of significance when determining the arbitrability of a dispute, or if any dispute relating to shares in or management of a Russian company is not arbitrable.

Since the SAC's legal position described above was expressed in the form of a ruling refusing to refer the case to the Presidium rather than a Decree of the Plenum or Decree of the Presidium of the SAC, it will not be binding on the lower courts hearing similar cases. Yet at the same time, the significance of the SAC Ruling for the lower courts should of course not be underestimated.

## The Constitutional Court Ruling

Mr Maximov also filed a complaint in the Constitutional Court challenging the constitutionality of Art. 33 of the APC, arguing, among other things, that it violates his constitutional right to judicial protection (Art. 46 of the Constitution of the RF) in that it excludes the possibility of corporate disputes being heard by the ICAC.

Under the Constitutional Court Ruling Mr Maximov's complaint was denied consideration. The Constitutional Court ruled that the legislators has the right to stipulate the specific procedures through which certain categories of disputes are heard, as in Art. 33.1.2 of the APC, which establishes, in conjunction with Art. 225.1 of the APC, that corporate disputes are within the jurisdiction of the arbitrazh courts. Hence the Constitutional Court found that Mr Maximov's right to judicial protection is not infringed by Art. 33 of the APC. However, the Constitutional Court Ruling does not separately address whether the fact that corporate disputes are within the jurisdiction of the arbitrazh courts means that they cannot be referred to arbitration. The Constitutional Court Ruling is final and not subject to appeal only in relation to Mr Maximov's complaint, meaning that a different interpretation of Art. 33 of the APC by the Constitutional Court in future remains a possibility.

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