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A. LEGISLATION, TRENDS AND TENDENCIES

Russia's Law On International Commercial Arbitration, enacted on 7 July 1993, is based on (and indeed almost identical to) the UNCITRAL Model Law provisions. Russia is also a party to the European Convention on International Commercial Arbitration of 1961 and the New York Convention. Domestic arbitration is governed by the 2002 Law on Arbitration Courts in the Russian Federation, which is also based on the UNCITRAL Model Law. No amendments were made to the abovementioned laws in 2009.

B. CASES

B.1 Enforcement of an Arbitral Award against a Non-Signatory to an Arbitration Agreement

Freddy Raif v. Time LLC (RF) and Kaeler SNG (RF)

A citizen of Austria, Freddy Raif, held a 100 percent stake in the charter capital of the company Kaeler SNG (Kaeler CIS). In August 2006, Mr. Romanin claiming that he had purchased Mr. Raif's stake under an agreement dated 10 July 2006, formally dismissed him from his position of general director of the company, appointed himself

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to that position, and made changes to the Unified State Register of Legal Entities.

Mr. Raif brought a criminal action, in which it was established that this agreement had been forged, and in May 2007, the Tverskoy District Court of the City of Moscow issued a decision reinstating Mr. Raif as the company's general director as of 19 August 2006.

On 6 July 2007, according to the company register, a certain Mr. Schelkunov was appointed manager of the company and dismissed Mr. Raif once again.

On 31 August 2007, the Tverskoy District Court of the City of Moscow again reinstated Mr. Raif as general director, effective as of 3 September 2007.

Until the District Tverskoy Court issued its first decision to reinstate Mr. Raif to his position, the official director of Kaeler SNG was Mr. Romanin. On 5 April 2007, he entered into an agreement for the supply of equipment on behalf of Kaeler SNG with the Russian company Time.

When the equipment was not paid for on time, Time initiated an arbitration under the Rules of the Permanent Court of Arbitration at the Non-Profit Partnership of Bankruptcy Receivers of the Central Federal District. Kaeler SNG's interests were represented in the arbitration by Mr. Shabrov, based on a power of attorney issued by Mr. Schelkunov.

On 12 September 2007, the arbitral tribunal issued an award to recover from Kaeler SNG 61,137,263.17 rubles in debt, 100,000 rubles in arbitration fees and expenses and 30,000 rubles for payment of arbitrators' fees.

On 27 March 2008, the Rostov Region Arbitrazh Court handed down a ruling to issue a writ of execution for the arbitral award. Kaeler SNG and Mr. Raif filed a cassation appeal, arguing that Time has failed to engage Mr. Raif as founder and general director of Kaeler SNG in the arbitration proceedings. On 28 May 2008, the Federal Arbitrazh Court of the Volga-Vyatsk District terminated the proceeding related to Mr. Raif's appeal, holding that the disputed reso-

lution of the court of first instance did not have impact on Mr. Raif's rights and legal interests, because he was not an interested party in the dispute under consideration: the case files lacked evidence confirming that as of the date when Kaeler SNG appealed to the arbitrazh court, Mr. Raif was its founder and general director.

On 29 July 2008, the cassation court upheld the decision of the court of first instance concerning Kaeler SNG's appeal.

Mr. Raif appealed to the Supreme Arbitrazh Court of the Russian Federation for review of both rulings of the cassation court.

The Supreme Arbitrazh Court overturned all the decisions of the lower-ranking courts[3] and referred the case for new trial to the court of first instance, which in the end refused to issue a writ of execution.[4]

The highest court stated:

> The arbitrazh court refuses to recognize and enforce the arbitral awards if they are made outside the scope of the arbitration agreement against parties who were not party to the arbitration agreement and did not participate in the hearing of the case.

B.2 Formation of Arbitration Agreement

VALARS S.A. (Switzerland) v. Agro-Holding LLC (RF)

On 26 April 2007, the joint-stock company VALARS S.A. and Agro-Holding LLC signed a contract via exchange of signed fax copies. The contract stipulated that an agreement transmitted by fax is considered valid before the parties exchange the originals.

The contract likewise stipulated that all disputes and disagreements should be resolved by arbitration in compliance with the Provisions

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3 Resolution of the Presidium of the RF Supreme Arbitrazh Court of 25 February 2009 in case No. 13848/08.

4 Ruling of the Vladimir Region Arbitrazh Court of 11 June 2009 in case No. A11-905/2008-K1-5/75.

of GAFTA No. 125, and that the decisions would be final and binding on both parties.

On 17 April 2008, the arbitral tribunal of GAFTA handed down a decision in favor of VALARS for recovery of losses from Agro-Holding LLC in the amount of USD666,000 and USD40,600 in interest and arbitration expenses. VALARS filed an application with the Rostov Region Arbitrazh Court for recognition and enforcement of the foreign arbitral award.

Agro-Holding LLC objected to the granting of the application and stated that the foreign arbitral award should not be enforced in the Russian Federation due to the absence of an arbitration agreement.

On 23 September 2009, the court of first instance issued a decision to recognize and enforce the arbitral award,[5] concluding that the contract between the parties dated 26 April 2007 contained a valid arbitration agreement.

In the cassation appeal, Agro-Holding requested that the ruling be overturned, arguing that the contract of 26 April 2007 had not been concluded, the original of the agreement had not been signed, the place where the contract was concluded and the applicable law had not been determined, the transaction passport (the document required under the Russian currency control rules) had not been executed, and the court did not investigate the circumstances of the parties' exchange of faxed copies of the contract. Thus, Agro-Holding argued, an arbitration agreement had not been reached by the parties.

On 28 November 2008, the Federal Arbitrazh Court of the Northern Caucasus District rejected these arguments and upheld the decision of the court of first instance.

On 26 February 2009, the Supreme Arbitrazh Court of the Russian Federation refused to refer the case to the Presidium.[6]

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[5] Ruling of the Rostov Region Arbitrazh Court of 23 September 2008 and Resolution of the Federal Arbitrazh Court of the Northern Caucasus District of 28 November 2008 in case No. A53-11666/2008-C2-42.

[6] Ruling of the Supreme Arbitrazh Court of the Russian Federation of 26 February 2009 in case No. 16894/08.

B.3 Determination of Applicable Law

Hebenstreit-Rapido GmbH (Germany) v. Saratovskaya Konditerskaya Fabrika OJSC

This case established that when evaluating the validity of an arbitration agreement, a court must apply the law agreed upon by the parties, and in the absence thereof, the law of the place of arbitration. In the event of a failure to specify exactly the name of an arbitration institute, a court must establish the intentions of the parties as well as the possibility of performance under the arbitration agreement.

On 23 May 2002, the German company Hebenstreit-Rapido GmbH entered into a contract with Saratovskaya Konditerskaya Fabrika OJSC, under which all disputes and arising from or in connection with the contract, and which cannot be resolved by negotiations between the parties, shall be "with the exception of jurisdiction to a general court, resolved in arbitration by the Chamber of Industry and Commerce in Vienna, Austria in compliance with its Rules."

On 4 September 2007, the International Court of Arbitration at the Austrian Economic Chamber handed down an award to recover from Saratovskaya Konditerskaya Fabrika OJSC 65,430 euros, plus interest. On 18 August 2008 the Saratov Region Arbitrazh Court refused to recognize and enforce this award.[7] The court of first instance came held that the arbitration clause specified that disputes arising out of the contract be referred to an international commercial arbitration institution different from the one indicated in the award. The Federal Arbitrazh Court of the Volga District upheld this decision, but the highest court overturned the decision of the lower courts,[8] stating:

> ...in essence, the court of first instance refused to recognize and enforce a foreign arbitral award on the formal ground that the name of the foreign arbitral institution given in the arbitration clause did not coincide with the name of the international

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7 Ruling of the Saratov Region Arbitrazh Court of 18 August 2008 in case No. A57-8082/2008-116.

8 Resolution of the Presidium of the RF Supreme Arbitrazh Court of 22 September 2009 in case No. 5604/09.

court of arbitration that had issued the decision, and the latter's application of Rules when considering the dispute.

That said, the court of first instance did not take into account that, when appraising the company's objections regarding the competence of the International Court of Arbitration at the Austrian Economic Chamber as not based on the arbitration clause of the parties to the contract, it should have been guided by the rules of law to be applied to this clause taking account of the provisions of subclause 'a' of clause 1 of Article V of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) and clause 2 of Article VI of the European Convention on International Commercial Arbitration (Geneva, 1961), to which both Germany and Russia are parties, and which should be applied in this case.

As follows from the content of the arbitration clause, the parties excluded from the competence of any state courts consideration of disputes arising between the parties from the contract or in connection with it. Likewise the parties indisputably and unambiguously agreed that the place of any future arbitration would be Vienna, Austria. When appraising the statement in the arbitration clause that the dispute should be reviewed in an arbitration procedure by the Chamber of Industry and Commerce in Vienna, Austria, the court of first instance should have taken into consideration the fact that the Austrian Economic Chamber, located in Vienna, is an organization similar to the chambers of commerce and industry existing in other countries, while the International Court of Arbitration at the Austrian Economic Chamber is the sole institutional (permanently active) international commercial arbitration court created at that location.

B.4 Scope of Arbitration Clause

The arbitration clause "all disputed matters arising out or in connection with the mentioned lease agreement" does not encompass disputes on extending the lease based on a right specified therein.

In 1997, the company Kalinka-Stockmann entered into a lease agreement for premises in the Smolensky Passage business complex in the center of Moscow for a period of 10 years. The lease specified that the tenant had the right to extend the term of the lease for a further 10-year period on the terms applicable during the last five years of the lease's operation.

In 2007, the landlord refused to extend the lease on the specified terms. Kalinka-Stockmann appealed to the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation ("ICAC") in accordance with the arbitration clause in the agreement.

On 29 April 2008, the ICAC handed down an award in favor of claimant Kalinka-Stockmann. The award supported claimant's right to extend the lease for the next 10-year period on the requested terms. The arbitral tribunal also ordered respondent Smolensky Passazh LLC to extend the lease agreement, and sign and register an addendum to the 1997 agreement.

On 14 August 2008, the Moscow City Arbitrazh Court set aside the ICAC award. One of the reasons for the reversal was that the dispute could not be the subject of arbitration.

On 13 October 2008, the Federal Arbitrazh Court of the Moscow Circuit confirmed the position of the Moscow City Arbitrazh Court on this issue.[9]

The cassation court stated that in recognizing Kalinka-Stockmann's right to extend the lease agreement and ordering the respondent to extend the term of the lease and to sign and register an addendum to the lease, the ICAC actually extended contractual relations for 10 more years on certain conditions. The lease itself, as well as the 2000 addendum thereto, was registered; consequently, an agreement to change the lease (being subject to state registration) shall also be subject to state registration.

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[9] Resolution of the Federal Arbitrazh Court of the Moscow Circuit of 13 October 2008 in case No. KG-A40/9294-08-1,2.

Furthermore, the legal relations connected with state registration of rights have a public legal character, and matters relating to real property rights are assigned to the exclusive jurisdiction of the state courts.

In connection with this, the Federal Arbitrazh Court of the Moscow Circuit held that the conclusion of the court of first instance on setting aside the arbitral award made in relation to the subject of the dispute, which is not arbitrable, is correct and justified.

Both the Moscow City Arbitrazh Court and the Federal Arbitrazh Court of the Moscow Circuit also came to a conclusion on the non-arbitrability of the subject of the dispute, setting aside a similar award of the ICAC issued on 29 April 2008 upon a claim by Kalinka-Stockmann against AKB Mosstroyekonombank CJSC to extend the lease concluded in 2005 for a new term while preserving the conditions of the lease.[10]

The RF Supreme Arbitrazh Court found no grounds to overturn the decisions of the lower-ranking courts,[11] stating the following:

> Having examined the justification for the arguments put forth in the application, in the reply to it, and the presentations of the representatives of the parties to the case present at the session, the Presidium believes that the disputed judicial acts should be upheld on the following grounds...
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> Under Article 34.2.1 of Russian Federation Law No. 5338-1 of 7 July 1993 On International Commercial Arbitration an arbitral award may be set aside by a competent court if the party that has petitioned for the setting aside provides evidence that the award was handed down in a dispute which is not provided by the arbitration agreement or not falling under the provisions thereof.

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[10] Resolution of the FAC of the Moscow Circuit No. KG-A40/9254-08 of 13 October 2008.

[11] Resolutions of the Presidium of the RF Supreme Arbitrazh Court of 19 May 2009 in cases Nos. 17476/08 and 17481/08.

> Proceeding from clause 25.9 of the lease...all disputed matters arising based on or in connection with the mentioned lease...shall be subject to final resolution at the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation in Moscow, in accordance with its Rules.
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> The named lease was signed by the previous landlord (closed joint-stock company Tema) and by Kalinka-Stockmann, and fixed the right of the latter to extend the lease for a new ten-year term under the same terms in operation during the last five years, subject to notifying the landlord thereof not later than six months before the expiry of the lease.
>
> The lease contains no provisions defining the procedure for the landlord and tenant to formalize their relations under the lease for a new ten-year term when the tenant exercises its right to prolong the lease.
>
> Consequently, since this lease does not specify otherwise, the tenant's right to extend the lease could have been realized by it only in the general procedure — via concluding a lease for a new term under the rules of Article 621 of the Russian Federation Civil Code.
>
> However, under the sense of the mentioned arbitration clause, in totality with the other provisions of the lease its operation does not extend to the conclusion of the lease for a new term, since the parties did not envisage that, limiting the operation of the arbitration clause to disputes arising based on and in connection with the lease agreement concluded by them for a term up to 30 April 2008.
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> Thus, the ICAC unjustifiably rejected the objection regarding its lack of competence to consider the dispute on extending the lease filed by Smolensky Passazh, and pronounced a decision on that dispute.

It should be noted that in the international arbitration community, there has been a rather lengthy discussion over whether an arbitration clause referring to "disputes under this contract" also covers

other disputes, for instance, those related to its validity, termination, extension, unjustified enrichment or torts, if the cause of action is in fact related to the contract.

Moreover, it was believed that a "broad" arbitration clause — *e.g.*, "all disputes under this contract or related to it" —encompasses all possible categories of disputes that are related to the contract.

However, it appears that the wording of such a "broad" arbitration clause is insufficiently "broad" for the Supreme Arbitrazh Court, and when cases are considered in Russian courts the phrase "disputes related to the contract" should, in the Supreme Arbitrazh Court's opinion, be interpreted in exactly the same way as "disputes arising under the contract." It follows, therefore, that to be considered "broad" in the Russian Federation, an arbitration agreement must be directed not only to the resolution of disputes over a contract (or in connection with it), but also enumerate all possible categories of such disputes.

B.5 Scope of Review by Arbitrazh Courts

When considering an application to set aside the arbitral award, an arbitrazh court is limited to establishing the presence or absence of grounds for a reversal, and is not entitled to review the arbitral award on its merit.

According to a general rule, when considering a challenge of an arbitral award, an arbitrazh court must restrict the proceedings to establishing the presence or absence of grounds for setting aside, as specifically set forth in Article 233 of the RF Arbitrazh Procedure Code.

Moreover, the arbitrazh court is not entitled to go beyond the scope of such an examination, investigate the circumstances established by the arbitral tribunal, perform a re-evaluation of them or revise a substance of the arbitral award.[12] The Presidium of the RF Supreme Arbitrazh Court paid particular attention to this in Informational

[12] Art. 5 of RF Law No. 5338-1 of 7 July 1998 "On International Commercial Arbitration."

Letter No. 96 of 22 December 2005, where it is stated that when considering an application to set aside an arbitral award, an arbitrazh court is not entitled to review an award on its merit.[13]

The practice of arbitrazh courts likewise has followed this rule for many years,[14] as confirmed by the majority of the cases considered in 2009.

Klinger Fluid Control GmbH (Austria) v. ENEKOS CJSC (RF)

The Austrian company Klinger Fluid Control GmbH (hereinafter "Klinger") entered into a licensing agreement with the Russian company ENEKOS CJSC, under which it furnished the right to use Klinger's know-how and technical information to develop, manufacture, test and install central heating systems. The parties' rights and duties under the agreement were regulated by the substantive law of the Republic of Austria; disputes were to be considered by arbitration under the ICC Rules.

The licensing agreement specified that for use of Klinger's know-how, ENEKOS CJSC would make a down payment in the amount of 500,000 euros in sixteen installments, as well as pay royalties.

When ENEKOS CJSC paid only a portion of the down payment and royalties, Klinger initiated arbitration proceedings.

On 22 August 2008, the sole arbitrator issued an award in favor of the Austrian company, recovering from ENEKOS CJSC 991,238 euros for the down payment, royalties, lost profit and interest under the licensing agreement, as well as company's legal expenses, company costs and arbitration costs. Also, the award specified that on all the amounts awarded above, interest would be charged after the pro-

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[13] Clause 12 of Informational Letter No. 96 of the Presidium of the Supreme Arbitrazh Court of the Russian Federation of 22 December 2005 "Overview of the arbitrazh courts' practice concerning the recognition and enforcement of the decisions of foreign courts, challenges to arbitral awards, and issuance of writs of execution for enforcement of the arbitral awards."

[14] *See* the ruling of the RF Supreme Arbitrazh Court of 6 December 2007 in case No. 13452/07, resolutions of the Arbitrazh Court of Moscow Region of 11 January 2007 in case No. KG-A40/12621-06, of 17 October 2006 in case No. KG-A40/9839-06-P, of 21 July 2004 in case No. KG-A40/5789-04.

nouncement of the award at a rate of 7% per year from the date of the award and until these amounts were fully paid off.

As follows from the contents of the arbitral award, the arbitrator, justifying the reasonable nature of recovering 500,000 euro in losses, referred to Article 273(1) of the Civil Code of the Republic of Austria, pointing to the fact that in a case where it was proven that losses were caused, but an exact assessment of the losses was impossible, Austrian law requires a reasonable and just assessment of the losses incurred with account taken of the circumstances of the case.

Klinger appealed to the Arbitrazh Court of the City of St. Petersburg and the Leningrad Region, which granted its application for recognition and enforcement of the arbitral award.

ENEKOS CJSC, referring to Article V(i)(d) of the New York Convention, tried to overturn the Arbitrazh Court's ruling with respect to damages and interest. In particular, ENEKOS CJSC pointed to the unlawful application by the arbitrator of the Civil Code of the Republic of Austria. In the opinion of the applicant, the arbitrator should have been guided by the rules of the procedural law of France rather than Austria.

The cassation court found no grounds for overturning the ruling of the court of first instance.[15] In the court's opinion, the rules of substantive law regulate matters of liability for failure to fulfill a civil-legal obligation, compensation of damage, recovery of lost profit, irrespective of the normative legal act in which they are set forth. Thus, the arbitrator of the ICC International Court of Arbitration, when making the decision in regard to determining the amount of lost profit, was legitimately guided by the material law of the Republic of Austria.

Furthermore, the arguments of the petitioner amounted to a re-assessment of the specific circumstances of the case established by the ICC International Court of Arbitration, and affect the substance of the award, and therefore were not accepted by the cassation court.

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[15] Resolution of the Federal Arbitrazh Court of the North-Western District of 15 January 2009 in case No. A56-45941/2008.

B.6 Method of Service of Notice of an Arbitration Proceeding

The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 15 November 1965 does not apply to the notifications on an arbitration proceeding. The method of serving the parties is established by the applicable arbitration rules. A party is considered to have been notified of an arbitration proceeding if it has sent to an arbitral tribunal documents related to the arbitration proceeding.

Despite the fact that the Hague Service Convention directly defines the area of its application,[16] the mistaken opinion that in the case of an arbitration a party must be notified in accordance with the provisions of this Convention is quite common.

Meat-Packing Plant Vladivostoksky ("RF") v. Trade and Economic Limited Liability Company Ching Yan ("PRC")

Meat-Packing Plant Vladivostoksky (hereinafter the "Plant") and Trade and Economic Limited Liability Company Ching Yan concluded a contract in accordance with which disputes were to be considered by the Mûdānjiāng Arbitration Committee.

In April 2007, the Mûdānjiāng Arbitration Committee sent an instruction to the RF Ministry of Justice informing the debtor of the date of an arbitration hearing scheduled for 26 July 2007. The Frunzensky District Court of Vladivostok could not follow the instruction, about which the RF Ministry of Justice on 6 February 2008 notified the Ministry of Justice of the People's Republic of China.

Nonetheless, on 26 June 2007 the Mûdānjiāng Arbitration Committee, in the absence of a respondent, issued an award to recover 5,343,539.72 yuan from the Plant.

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[16] Article 1 "This Convention applies in civil or commercial cases in all events in which a judicial or extra-judicial document must be sent for transmission or service abroad". That said, extra-judicial documents are understood as documents originating by the official agencies and court officers of a Contracting State (article 17 of the Convention).

Ching Yan filed an application with the Primorsky Region Arbitrazh Court to recognize and enforce the arbitral award; however, on 28 August 2008 this application was rejected.[17] The court based its decision on the fact that the award was passed in the absence of the Plant, which was not notified of the time and place of the arbitration proceeding.

The cassation court upheld the ruling of the court of first instance, stating that the provisions of the Hague Service Convention do not regulate matters relating to notifying the parties to an arbitration proceeding, and furthermore, as of the opening of the session, the Arbitration Committee had no proof that the party had received notification about the hearing.[18]

VALARS S.A. (Switzerland) v. Agro-Holding LLC (RF)

In the above-mentioned case, Agro-Holding LLC also referred to the fact that it was not notified of the arbitration in compliance with the Hague Service Convention. The debtor declared that the case materials lacked proof of notification as to the time and place of the proceeding at GAFTA. Russia, Switzerland and the United Kingdom are parties to the Hague Service Convention, and according to clause VI of the declaration of the Russian Federation, under the Convention the service of documents in ways other than those specified in Article 10 of the Convention is not allowed. The Holding was not notified as to the time and place of the GAFTA proceeding in the manner specified by the Convention.

Furthermore, the debtor denied that documents sent by fax had been received, as the court had not investigated to whom the fax number belonged to which the messages were sent, at what address the fax machine was set up, whether any faxes from GAFTA were received at that number, and if received, how they were passed on to the holding. Proof of receipt of written correspondence from GAFTA was not presented by the claimant. The fax machine to which the mes-

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17 Ruling of the Primorsky Region Arbitrazh Court of 20 August 2008 in case No. A51-2548/2008.

18 Resolution of the Federal Arbitrazh Court of the Far Eastern District of 18 March 2009 in case No. F03-5393/2008.

sages were sent belonged to another organization and was not set up at the debtor's location. The debtor declared that only two messages had been received from GAFTA, which were passed on to the holding's director; no other messages arrived.

However, the cassation court and the highest court rejected the arguments of Agroholding LLC that it had not been duly notified of the arbitration proceeding, stating as follows:

> In accordance with clause 21:1 of the arbitration rules of GAFTA No. 125 (hereinafter the Rules), all notices and notifications transmitted under these Rules must be sent by post, telex, telegram or other means of transmission of written information. That said, according to clause 4:8 of the Rules, an arbitral tribunal has the right to independently determine the necessity of holding oral hearings.
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> As follows form the contents of the case materials and the disputed judicial acts, oral hearing at the GAFTA arbitral tribunal did not take place, notifications on the appointment of arbitrators, confirmation of the receipt of the debtor's reply and the claimant's clarifications, on the end of the hearings and the transition to the pronouncement of the award in the case, on the pronouncement of the award and the manner for submitting an appeal, were sent to the company by fax and e-mail. After the award was pronounced, the firm notified the company by fax of the intention to submit an appeal and carried out correspondence by e-mail with the arbitral tribunal on the procedure for submitting an appeal.
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> These circumstances are evidence that the firm was notified in the course of the proceeding at the GAFTA arbitral tribunal and had the opportunity to present its explanations.
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> The firm's argument that the GAFTA arbitral tribunal should have sent all notifications in according to the provisions of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 15 November 1965 also cannot be taken into account by the court. Article 3 of the Convention regulates the proce-

dure for sending or transmitting documents originating from judicial and extra-judicial state authorities of contracting parties, whereas in the dispute under consideration the notifications and notices were sent by the GAFTA arbitral tribunal — a court of arbitration founded by the Grain and Feed Trade Association, which is not a state authority. The Arbitration Court at GAFTA thereat is one of the means of alternative resolution of disputes and does not belong to the court system of Great Britain.

Limited Partnership P. Krücken GmbH and Co. KG (Germany) v. Avtodor-Agro (Russia)

On 11 July 2005, Limited Partnership P. Krücken GmbH and Co. KG, of Cologne, Germany (hereinafter Partnership P. Krücken) entered into contract No. 110 with Avtodor-Agro, of Kaliningrad, Russia (hereinafter Avtodor-Agro), in accordance with which Avtodor-Agro LLC undertook to sell under conditions of FOB port of Kaliningrad (INCOTERMS 2000) rapeseed in the volume of 3000 metric tons plus or minus 10% in the buyer's option at the contractual price.

According to the contract, if a compromise is not reached, the dispute shall be referred to the LCIA in accordance with the FOSFA rules of arbitration and appeal ("FOSFA Rules").

On 9 December 2005, Partnership P. Krücken initiated arbitration proceedings and appointed an arbitrator.

On 20 December 2005, Avtodor-Agro LLC sent Partnership P. Krücken a letter expressing disagreement with the claim on its merits and pointing to the lack of authority of the Federation's arbitrators to consider the dispute.

On 27 January 2006, Partnership P. Krücken sent a request to the Federation in accordance with clause (1d) of the FOSFA Rules to appoint an arbitrator on behalf of Avtodor-Agro LLC.

In a letter dated 30 January 2006, sent by fax and by international registered mail, the Federation proposed that Avtodor-Agro LLC

appoint an arbitrator by 13 February 2006 or entrust appointment thereof to the Federation on behalf of Avtodor-Agro LLC.

On 9 February 2006, Avtodor-Agro LLC stated that it did not recognize the competence of the Federation, and also referred to the presence of *forcemajeure* circumstances as grounds for release from liability.

On 16 February 2006, the Federation notified Avtodor-Agro LLC of the official appointment of an arbitrator on its behalf. This letter was also sent to Avtodor-Agro LLC by fax and international registered mail.

On 6 November 2006, the arbitral tribunal made a decision in favor of Partnership P. Krücken and Partnership P. Krücken filed an application with the Kaliningrad Region Arbitrazh Court for recognition and enforcement of this award. Avtodor-Agro LLC referred to the fact that it had not been notified of the appointment of the arbitrator and of the arbitration proceeding.

On 4 July 2008, the Kaliningrad Region Arbitrazh Court refused to grant the application to enforce the award.[19]

The court stated that, as proof that Avtodor-Agro LLC had been notified of the appointment of the arbitrator, reports on the transmission of fax messages and notifications from the post office had been accepted, distributed, and ultimately received, under power of attorney by a person by the name of "Pavlovichev."

Documents presented by the respondent indicated that there was no employee named Pavlovichev in the company, no power of attorney to perform any actions (including receiving postal correspondence) had been issued by Avtodor-Agro LLC to Pavlovichev, and it was not clear to which of two addresses given in postal dispatches the letters were delivered. It appeared that Pavlovichev was an employee of Avtodor CJSC, and then Avtodor-Terminal LLC, but not of Avtodor-Agro LLC.

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[19] Ruling of the Kaliningrad Region Arbitrazh Court of 4 July 2008 in case No. A21-8346/2007.

As far as the deliver of letters via fax is concerned, the court noted that these faxes were sent to a phone which was the property of another organization, and transferred for the use of Avtodor CJSC.

The Federal Arbitrazh Court of the North-Western Circuit, upholding the decision of the court of first instance, stated:[20] "The doubts expressed in the course of a presentation at the cassation court session by representatives of the Partnership [P. Krücken] as to the unfair behavior of the Firm [Avtodor-Agro], denying the receipt of the notification on the appointment of an arbitrator and disputing the competence of the international commercial court of arbitration in London to consider this dispute, cannot be recognized as sufficient ground to grant the cassation appeal."

Unfortunately, it is not clear from the text why both court instances failed to count the letters sent by Avtodor-Agro LLC on 20 December 2005 and 9 February 2006, in which it objected to the competence of the arbitral tribunal and expressed its view on the substance of the dispute, as sufficient proof that Avtodor-Agro LLC had been notified of the arbitration proceeding.

B.7 Effect of Existence of a Contract on Enforceability of Arbitration Clause

A court's conclusion that contracts did not enter into force does not influence the question of whether an arbitration agreement in respect of the contracts was concluded. The enforcement of an arbitral award granting recovery of losses in connection with the non performance of contracts violates public order of the Russian Federation, as a Russian court in the course of considering an application to recognize and enforce a foreign arbitral award has found that these contracts have not entered into force. The debtor presented an argument that the enforcement of a foreign arbitral award might lead to the bankruptcy of debtor, a state-controlled company. The alleged damage that subsequently will be caused to the state may not be considered as a violation of the public order in the Russian Federation.

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[20] Resolution of the Federal Arbitrazh Court of the North-Western District of 2 December 2008 in case No. A21-8346/2007.

StenaRoRo AB (Sweden) v. Baltiysky Zavod OJSC (RF)

On 7 July 2005, Baltiysky Zavod OJSC and StenaRoRo AB signed contracts Nos. 443 and 444, under which Baltiysky Zavod OJSC undertook to design, build, launch, equip and finish building two ROPAX-class vessels (ships), lease and sell them to StenaRoRo AB.

According to these contracts, any disputes or disagreements arising from or in connection with them, as well as any breach, termination of operation, or their invalidity, would be decided in a court of arbitration in accordance with the rules of the Stockholm Chamber of Commerce Court of Arbitration.

Also on 7 July 2005, the parties signed an option agreement, which specified that in connection with the conclusion of contracts Nos. 443 and 444, Baltiysky Zavod OJSC would provide to StenaRoRo AB an option with the right to acquire two additional vessels with the same characteristics and on the same terms as in contracts Nos. 443 and 444, if the option agreement did not specify otherwise. The option would not take effect until contracts Nos. 443 and 444 were signed by the parties and entered into force.

The option agreement is regulated by Swedish law, and the arbitration clause contained in contracts Nos. 443 and 444 is a part of the option agreement.

Referring to the seller's improper fulfillment of the conditions of contracts Nos. 443 and 444 and the option agreement, StenaRoRo AB filed a claim with the Arbitration Institute of the Stockholm Chamber of Commerce against Baltiysky Zavod OJSC for recovery of its losses.

On 24 September 2008, the arbitral tribunal, acting according to the SCC Rules, issued an award in favor of StenaRoRo AB for losses caused by non-fulfillment of contracts Nos. 443 and 444 and the option agreement, compensation of arbitration expenses and costs incurred by the company in connection with the arbitration, as well as interest accrued on these amounts.

On 20 February 2009, the Arbitrazh Court of the City of St. Petersburg and the Leningrad Region refused to grant the appli-

cation to recognize and enforce a foreign arbitral award, since to do so would contravene the public policy of the RF, and also because it was "issued in a dispute not envisaged by the arbitration clause of non-concluded contracts, of which it forms a part."

The court stated that the arbitration clause was contained in contracts that had not entered into force, as the decision of the Company board of directors to approve the transactions was not set down in the form of formal minutes, which in turn were not sent to the factory. This was a breach of a fundamental principle of Russian law that recognizes the equality of the participants in civil-legal relations.

On 24 April the Federal Arbitrazh Court of the North-Western Circuit upheld the decision of the court of first instance, holding:[21]

> [Baltiysky Zavod OJSC] and [StenaRoRo AB], proceeding from the principle of freedom of contract, when concluding contracts Nos. 443 and 444, in their XX articles specified that one of the conditions for the contracts' entry into force was that they be approved by the board of directors of the seller and buyer. That said, the parties specifically mentioned that, if this condition is not fulfilled before 8 August 2005, contracts Nos. 443 and 444 will be considered cancelled, invalid and lapsed, and each of the parties as a result shall undertake not to bring complaints against the other.
>
> Since it follows from the award of the Arbitration Institute of 24 September 2008 in case No. V054-56/2007 that minuted on the approval of contracts Nos. 443 and 444 by the board of directors of the Company [Baltiysky Zavod OJSC] was absent and was not sent to the Firm [StenaRoRo AB], then the court of first instance came to the correct conclusion that contracts Nos. 443 and 444 had not entered into force, nor had the option agreement.

The FAC of the North-Western Circuit also disagreed with the conclusion of the court of first instance that the failure to conclude

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[21] Resolution of the FAS SZO of 24 April 2009 in case No. A56-60007/2008.

an underlining agreement affects the existence of the arbitration agreement.

In this case, the court of first instance also stated that the enforcement of the arbitral award in relation to the factory which was a strategic enterprise, with a special right of management on the part of the government, might become a cause of the factory's bankruptcy and cause damage to the sovereignty and security of the state, and therefore contravenes public order in the Russian Federation.[22]

The Federal Arbitrazh Court of the North-Western Circuit stated the following:[23]

> Civil legislation (in the RFCC) is founded on the recognition of the equality of participants in the relations regulated by it, the inviolability of property, freedom of contract, inadmissibility of dictatorial interference in private affairs, the necessity of unhindered exercise of civil rights, assurance of restoration of violated rights and their judicial protection (clause 1). Citizens (individuals) and legal entities acquire and exercise their civil rights at their own will and in their own interest. They are free in the establishment of their rights and duties on the basis of agreement and in determining any conditions of agreement that do not contravene legislation (clause 2).
>
> Likewise among the fundamental principles of Russian civil law are the main rules for assessing liability for non-fulfillment of obligations, envisaging in particular that liability for causing harm (tort liability) ensues only in the presence of guilt of the one who causes it (Article 104 of the RFCC), as well as the fact that a person failing to fulfill, or improperly fulfilling an obligation when engaged in business activity bears liability if he does not prove that due fulfillment was impossible as a result of force majeure (Article 401 of the RFCC)...

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22 Ruling of the Arbitrazh Court of the City of St. Petersburg and the Leningrad Region of 20 February 2009 in case No. A56-60007/2008.

23 Resolution of the FAS SZO of 24 April 2009 in case No. A56-60007/2008.

> In connection with the fact that the Company and the Firm lack contractual obligations regarding the construction and supply of ROPAX-class vessels, liability cannot be assigned to the latter in the form of compensation for losses due to their non-fulfillment.
>
> Proof that the Company was caused non- contractual damage, established by award of the Arbitration Institute of 24 September 2008 in case No. V054-56/20907, at the fault of the Firm, was not provided by the applicant.[24]
>
> Under such circumstances, the recognition and enforcement of the award of the Arbitration Institute of 24 September 2008 in case No. V054-56/20907 contravenes public order in the Russian Federation.
>
> With consideration of the foregoing, the court of first instance acted lawfully in refusing to grant the Company's application.
>
> The erroneous conclusions of the court, contained in the disputed ruling that the enforcement of the award of the Arbitration Institute of 24 September 2008 would lead to the Firm's bankruptcy and as a result cause damage to the state, possessing a special right to participate in managing it, which testifies to a violation of public order in the Russian Federation...did not lead to the making of an incorrect decision in this case.

Disagreeing with this decision, StenaRoRo AB submitted a supervisory appeal.

The panel of judges of the Supreme Arbitrazh Court referred this case to the consideration of the Presidium this appeal, stating:[25]

- In this case the matter of whether the Swedish company's board of directors observed the procedure for approval of

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[24] Apparently the message here was that the Company did not plead in arbitration that it suffered non-contractual damage caused the Factory.

[25] Ruling of the Supreme Arbitrazh Court of 11 September 2009 in case No. 9899/09.

contracts was decided by an arbitral tribunal based in Stockholm, Sweden, according to the material and procedural law of that state, to which the parties to the contracts subordinated their legal relations. Therefore, the arbitrazh courts lacked legal grounds to revise the factual circumstances established by the arbitral tribunal and evaluate these circumstances applying the norms of Russian legislation.

- Both the penalty and the losses are envisaged by civil legislation and are part of the legal system of the Russian Federation; therefore ipso facto the application of these measures of liability cannot contravene public order in the Russian Federation.

Nonetheless, on 3 November 2009 the Presidium of the RF Supreme Arbitrazh Court decided to suspend consideration of the supervisory appeal until the end of the consideration of the appeal of Baltiysky Zavod OJSC in the Swedish state courts.[26]

C. PARALLEL PROCEDURES BEFORE STATE COURTS AND ARBITRATING TRIBUNALS

The law of the Russian Federation is based on the theory that an agreement to submit a dispute to arbitration would not have any value if either of the parties to the agreement could commence legal action before a state court in respect of the matters covered by the agreement.

Thus following provisions of the New York Convention, the Russian Law "On International Commercial Arbitration" obliges a state court to *direct* parties to arbitration[27].

The Arbitrazh Procedure Code of the Russian Federation states:[28]

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[26] Unpublished. Information from the SAC RF official site at http://www.arbitr.ru/vas/presidium/nadzor/25447.html.

[27] Article 8.1 of the Russian Federation Law "On International Commercial Arbitration".

[28] Articles 148.5 and 148.6 of the Arbitrazh Procedure Code of the Russian Federation.

> An arbitrazh court shall leave a statement of claim unheard upon establishing after the latter's acceptance for trial that: ...
>
> 5) there is an agreement between the parties to submit the dispute to an arbitral tribunal...
>
> 6) the parties agreed to submit the dispute to an arbitral tribunal in the course of the trial, but before the delivery of the judicial act capping the hearing of the case upon its merits...

However, quite often the question arises as to who, a state court or the arbitral tribunal, must decide on validity of the arbitration agreement in case one of the parties disputes it.

From one side, the powers of an arbitral tribunal are based on an arbitration agreement. The absence of such an agreement leaves the arbitrators without any authority to consider a dispute, since their jurisdiction is only based on the parties' agreement to submit their differences to arbitration.

The question, therefore, arises: is the arbitral tribunal under the circumstances entitled not only to take up a dispute between parties upon its merits, but also to decide on a challenge to its own jurisdiction? In theory, assuming that the party questioning the competence of the tribunal is right and that the arbitration agreement, is invalid, the arbitrators do not have any authority, including that to pronounce a decision on their own jurisdiction. This is why the state court at the place of arbitration shall be the sole authority empowered to decide on the competence of the tribunal. If the court finds that the tribunal does have the jurisdiction to deal with the dispute, the arbitration is valid and the tribunal may proceed with reviewing the dispute on its merits. If the court comes to the conclusion that the tribunal does not have the required jurisdiction (due either to defects in the arbitration agreement itself or to failure to observe the procedure in place for the tribunal's formation), then there is no point in carrying on the arbitration proceedings, as the resulting award will in any event be set aside by a competent judicial authority. From the point of view of procedural efficiency, there is also no sense in allowing the tribunal to have a say on its own competence, as the matter will still be ultimately decided by the court.

In practice, however, things have taken a different tack.[29] One of the reasons explaining that turn of events is that a different approach has been required as leverage against stonewallers exploiting every opportunity to drag out the arbitration proceedings. If only state courts were entitled to rule on the competence of arbitral tribunals, it would be sufficient for an obstructing party to merely object to the jurisdiction of the tribunal for the arbitration to be stayed pending a state court's relevant ruling. The final decision on the matter (if the case is taken to the appellate stage) would take at least half a year in Russia and between two and three years in some European countries. The arbitral panel would have to suspend the proceedings for all this time.

In order to prevent such situations, the lawmakers, the judiciary,[30] and the arbitration authorities[31] have devised a principle which has come to be known as *kompetenz-kompetenz.*[32] According to the *kompetenz-kompetenz* principle, the tribunal itself *is entitled* to consider the question of its own competence without waiting for a relevant decision from a state court. This principle can also be found in the

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29 *See Antonias Dimolitsa*, Separability and kompetenz-kompetenz. Wolters Kluwer, ICCA Congress series no. 9 (Paris/1999), pp. 230–231.

30 The first act going along the lines of the "competence-competence" principle in France was passed by a cassation court in 1949 in the case of *Cualliez-Tibergien v. Caulliez-Hannart*, Cass.com., Feb 22, 1949, JCP, Ed.G., Pt.II, No. 4899 (1949). *See also* Sarah Francois-Poncet, *Application of the Competence-Competence Principle in France*, The London Shipping Law Centre conference, February 2008.

31 Fouchard, Gaillard, Goldman on International Commercial Arbitration / Philipp e Fouchard, Emmanuel Gaillard, John Savage, Berthold Goldman. — Kluwer Law International, 1999, pp. 381–382.

32 The term originated from the German *kompetenz-kompetenz* theory, whereby arbitrators may finally decide on their own jurisdiction if the parties have empowered them to do so. The role of the courts is then limited to examining the question of whether the parties have actually granted the arbitrators such powers. *See Antonias Dimolitsa*, Separability and Kompetenz-Kompetenz. Wolters Kluwer, ICCA Congress series no. 9 (Paris/1999), pp. 227-228. However, the German Federal Court on January 13, 2005 effectively nullified that principle by ruling that regardless of how an arbitration agreement may be formulated, a state court still has the authority to make a final decision on whether the arbitral panel is competent to take up a particular dispute (Case III ZR 265/03, NJW 2005, 1125; SchiedsVZ 2005, 95; DIS database (www.dis-arb.de)).

European Convention on International Commercial Arbitration,[33] the UNCITRAL Model Law,[34] the Russian law "On International Commercial Arbitration,"[35] the legislation of other countries,[36] and also in the Recommendations of the International Law Association.[37] The majority of arbitration rules likewise include a provision to the effect that the tribunal itself is entitled to decide on its own competence.[38]

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33 "Subject to any subsequent judicial control provided for under the lex fori, the arbitrator whose jurisdiction is called in question shall be entitled to proceed with the arbitration, to rule on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement or of the contract of which the agreement forms part." (Clause 3 of Article V of the European Convention on International Commercial Arbitration).

34 "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement" (Article 16.1 of the UNCITRAL Model Law).

35 Article 16.1 of the Russian Federation Law "On International Commercial Arbitration" contains a clause which is identical to the above provision in the UNCITRAL Model Law.

36 Article 1466 of the new French Code of Civil Procedure says: "Where a party addressing an arbitrator questions his jurisdiction or the latter's scope, the arbitrator shall decide on his own jurisdiction and its scope." Article 186 of Switzerland's Code on International Private Law: "The arbitral tribunal shall rule on its own jurisdiction."

37 "An arbitral tribunal that considers itself to be prima facie competent pursuant to the relevant arbitration agreement should, consistent with the principle of competence-competence, proceed with the arbitration ("Current Arbitration") and determine its own jurisdiction, regardless of any other proceedings pending before a national court or another arbitral tribunal in which the parties and one or more of the issues are the same or substantially the same as the ones before the arbitral tribunal in the Current Arbitration ("Parallel Proceedings"). Having determined that it has jurisdiction, the arbitral tribunal should proceed with the arbitration, subject to any successful setting aside application" (Recommendation by the International Law Association's 1st conference in Toronto, 2006).

38 Article 21.1 of the UNCITRAL Arbitration Rules says: "The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement." According to Article 23.1 of the LCIA Arbitration Rules, "the Arbitral Tribunal shall have the power to rule on its own jurisdiction, including any objection to the initial or continuing existence, validity or effectiveness of the Arbitration Agreement". Section 2.4 of the Rules of the International Commercial Arbitration Court (ICAC) at the Chamber of Commerce and Industry of the Russian

If the arbitral tribunal finds itself competent to deal with the dispute, therefore, there will be no question regarding its powers to decide so. However, if the arbitral tribunal comes to the opposite conclusion, for example, because the arbitration agreement is invalid, one will be apt to ask how is it that the arbitrators were entitled to make any decision at all after admitting themselves they had no competence. The answer is that the authority to take a negative decision on jurisdiction stems not from the parties' arbitration agreement, but rather from the applicable rules of law[39] such as the European Convention on International Commercial Arbitration[40] and national legislation.[41] This means that before it issues a negative decision on its jurisdiction, the arbitral tribunal is entitled to exercise all powers envisaged by the arbitration agreement and applicable arbitration rules such as those to establish procedural routines and to issue procedural orders. In turn, each of the parties, including the one disputing the competence of the tribunal, is to follow the latter's instructions, pay the arbitration fee, and otherwise act in accordance with the directions received from the tribunal before the arbitrators' decision on their jurisdiction (even if it proves negative).

It should be noted that the UNCITRAL Model Law[42] (as well as Russian legislation[43]) provides a possibility to contest only a positive conclusion drawn by an arbitral tribunal on its competence.

Federation: "The issue of ICAC competence in a particular case shall be decided by the arbitral tribunal examining the case."

39 Fouchard, Gaillard, Goldman on *International Commercial Arbitration* / Philippe Fouchard, Emmanuel Gaillard, John Savage, Berthold Goldman. — *Kluwer Law International*, 1999, pp. 399–340.

40 Clause 3 of Article V of the European Convention on International Commercial Arbitration.

41 Article 16.1 of the UNCITRAL Model Law.

42 "If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter" — Article 16.3 of the UNCITRAL Model Law.

43 "Either party to arbitration may file an application with an arbitrazh court to request that the latter should reverse the arbitral tribunal's preliminary decision on its jurisdiction if an international agreement signed by the Russian Federation or federal

To sum up, the fundamental meaning of the *Kompetenz-Kompetenz* principle is that the tribunal *is itself entitled* to make a decision on its jurisdiction.[44]

However, the substance of the principle is something more than merely the possibility for an arbitral tribunal to decide on its own competence. Another aspect of the tenet is the requirement that a state court before which the matter of the tribunal's jurisdiction is brought should stay proceedings, thus giving the opportunity to the tribunal first to take a decision on this issue.[45]

In such a situation of parallel proceedings or *lis pendens,* the question is which of the forums is to stay proceedings, pending a relevant decision by the other forum, in order to avoid conflicting decisions.

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law so provides." — Article 235.1 of the Arbitrazh Procedure Code. *See also* Article 16.3 of the Russian Federation Law "On International Commercial Arbitration" and Resolution No. 2384/08 by the Presidium of the Supreme Arbitrazh Court of the Russian Federation, dated May 27, 2008.

[44] However, some countries follow a different approach. In the United States, the precedent has been set by the US Supreme Court's decision in *First Options of Chicago v. Kaplan*. An investment company sustained losses during the October 1987 stock market crash and initiated arbitration against MK Investments and its shareholders, Carol and Manuel Kaplan. Although the respective contract had been signed with that company itself, and not with its shareholders, the arbitral tribunal applied the "piercing the corporate veil" theory and rendered an award not only against MK Investments, but also against its shareholders. The Federal District Court upheld the award, but the Court of Appeals quashed it after observing that the shareholders were not bound by the arbitration agreement. A unanimous Supreme Court decision finally affirmed the Court of Appeals ruling, stating that the arbitration agreement in the case did not clearly establish the competence of arbitrators to decide all issues of their jurisdiction, leaving those issues to be resolved by the courts. William W. Park, *The Arbitrability Dicta in First Options v. Kaplan: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic*?, Arbitration International, Vol. 12 No. 2 (1996), pp. 139–141.

[45] It should be noted that there are several varying views in legal literature on what exactly the *Kompetenz-Kompetenz* principle means. William Park, for example, believes that the principle has operated with at least three meanings: (a) arbitrators need not stop the arbitration when one party objects to their jurisdiction; (b) courts will delay the consideration of arbitral jurisdiction until an award is made; and (c) arbitrators may decide on their own jurisdiction free from judicial review. — *William W. Park*, Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators, Am. Rev. Int'l Arb., 1997, 8, p. 20.

That is really not an issue to the extent concerning arbitral tribunals, as the prevailing view in both the relevant doctrine[46] and the law is that the presence of a dispute in a state court over the jurisdiction of an arbitral tribunal does not require the latter to stay proceedings. The tribunal *may* stay proceedings if it finds good reasons for such suspension, for example, if there is a high likelihood that the arbitration agreement will be found to be null and void. However, the tribunal is *not obliged* to order a stay of the proceedings, because there is no rule obliging it to do so. Furthermore, the UNCITRAL Model Law expressly authorizes the arbitrators to continue the proceedings even if, for example, a state court receives a request to invalidate the arbitration agreement:[47]

> Where an action referred to in paragraph (1) of this article[48] has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

The International Law Association gives the following recommendation to the arbitrators:

> 3. Where the Parallel Proceedings[49] are pending before a court of the jurisdiction of the place of the arbitration, in deciding whether to proceed with the Current Arbitration, the arbitral tribunal should be mindful of the law of that jurisdiction, particularly having regard to the possibility of setting aside of the award in the event of conflict between the award and the decision of the court.

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46 Fouchard, Gaillard, Goldman on International Commercial Arbitration / Philipp e Fouchard, Emmanuel Gaillard, John Savage, Berthold Goldman. — Kluwer Law International, 1999, pp. 398–399.

47 Article 8.2 of the UNCITRAL Model Law.

48 The commencement of an action in a matter which is the subject of an arbitration agreement, including the validity of the arbitration agreement itself, before a state court.

49 Proceedings pending before a national court or another arbitral tribunal in which the parties and one or more of the issues are the same or substantially the same.

> 4. Where the Parallel Proceedings are pending before a court of a jurisdiction other than the jurisdiction of the place of the arbitration, consistent with the principles of competence-competence, the tribunal should proceed with the Current Arbitration and determine its own jurisdiction, unless the party initiating the arbitration has effectively waived its rights under the arbitration agreement or save in other exceptional circumstances.[50]

The situation becomes somewhat more complicated where state courts are concerned. At first glance, a state court for a number of reasons has no grounds for staying or discontinuing proceedings on the issue of the arbitrators' jurisdiction pending the outcome of their own deliberations on the matter. This is because, firstly, the state court has the final say on the competence of the tribunal and, secondly, the New York Convention only obliges the state court to refer the parties to arbitration unless it finds the arbitration agreement to be null and void, inoperative, or incapable of being performed. Therefore, if a court determines that the arbitration agreement is invalid, it is under no obligation to discontinue the proceedings and "refer the parties to arbitration."

This notwithstanding, the European Convention on International Commercial Arbitration mandates that the state court dealing with the argument of one of the parties that the tribunal in parallel proceedings does not have jurisdiction should first give the opportunity for the arbitrators themselves to decide whether they have the requisite jurisdiction:[51]

> Where either party to an arbitration agreement has initiated arbitration proceedings before any resort is had to a court, courts of Contracting States subsequently asked to deal with the same subject-matter between the same parties or with the question whether the arbitration agreement was non-existent or null and void or had

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50 International Law Association Recommendations on Lis Pendens and Arbitration, Toronto, 2006.

51 Clause 3 of Article VI of the European Convention on International Commercial Arbitration.

lapsed, shall stay their ruling on the arbitrator's jurisdiction until the arbitral award is made, unless they have good and substantial reasons to the contrary.

Although Russian law does not provide express regulation on the matter, the Arbitrazh Procedure Code lends itself to an interpretation whereby the Russian state courts are likewise expected to abide by the *kompetenz-kompetenz* principle and to first allow arbitral tribunals to independently decide on their own competence.

Under Article 148.1 of the Arbitrazh Procedure Code, for example, a court is to leave a statement of claim unheard where an arbitral tribunal is already hearing a dispute between the same parties over the same subject matter and on the same grounds.[52] Consequently, where a party challenges an arbitration agreement as being null and void and an identical dispute has already been submitted to international arbitration, the state court must leave the claim unheard.[53]

The presence of a valid arbitration agreement in a contract does not always guarantee that a dispute of the parties resulting from the contract will not end up in a state court.

This happens primarily where a dispute involves several parties, only some of which are bound by an arbitration agreement. One example is a situation in which several parties are jointly and severally liable under certain obligations, while only one of them is also a party to an arbitration agreement. The arbitration clause making part of a suretyship contract, for example, may be missing from the principal agreement. Yet both the surety giver and the debtor under applica-

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52 There is no reason to conclude that foreign arbitral tribunals do not fall under the operation of that provision.

53 This interpretation is favored by the following. Article 140 of the Arbitrazh Procedure Code lists three cases (when mentioning arbitration) where a statement of claim filed with a state court must be left unheard, namely: (1) an arbitral tribunal is already hearing an identical dispute; (2) the parties have agreed beforehand to submit the dispute to arbitration; and (3) the parties have entered into an arbitration agreement in the course of ongoing arbitration. It is only in the second and third cases that the court is not to leave the claims unheard upon finding that the arbitration agreement is null and void, inoperative, or incapable of being performed. What follows is that the court's obligation to dismiss the action in the first case is unconditional.

ble Russian legislation bear joint and several liability for the performance of the agreement.[54] This is why, should the creditor decide to take the debtor to a state court, it is also required to have the surety-giver involved in the proceedings as a co-respondent. Even if the latter pleads for the action to be left unheard in its own respect with reference to the arbitration agreement, the court will have no right to grant a petition to such effect.

On the one hand, the fact that the suretyship contract includes the arbitration clause makes the state court bound to refuse to take up the dispute between the creditor and the surety-giver. On the other hand, where the debtor under the principal agreement is not bound by the arbitration agreement, the court is expected to consider the claims filed against that respondent. However, since ruling on the debtor's liability automatically amounts to deciding also on the liability of the surety-giver (which has agreed to be held jointly and severally liable with the debtor), the court should thus make the surety-giver a party to the proceedings.[55] From the standpoint of the New York Convention, such a situation should be seen as making the arbitration agreement "incapable of being performed," which enables the court to resolve the dispute upon its merits, despite the existence of the arbitration agreement.

A different situation arises where the agreement's validity is questioned by persons other than parties to it.

The Russian Civil Code, for example, says that any "interested person" may bring an action to invoke the invalidity consequences of a void transaction.[56]

That "interested person" does not at all have to be a party to the respective contract and, hence, to the arbitration agreement. With the term "interested person" still remaining legislatively undefined,

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54 Article 313.1 of the Civil Code of the Russian Federation.

55 Decision-making on "the rights and obligations of persons not involved in the proceedings" forms unconditional "grounds for the reversal of the trial court's judgment" (Article 270.4(4) of the Arbitrazh Procedure Code).

56 Article 166.2 of the Civil Code of the Russian Federation.

and in the absence of any consistent judicial practice on the matter, a court may well find a bank having provided a guarantee to secure the contract's performance to be an interested person (unless, of course, the guarantee is covered by the arbitration clause in the principal contract).

In addition, the Federal Law "On Joint Stock Companies" authorizes a minority shareholder to initiate legal proceedings to invalidate a major transaction[57] or a related party transaction[58] that breached applicable legislative requirements.

Considering that a minority shareholder is not a party to the arbitration clause included in the company's principal agreement, it is not bound by its conditions. In the same manner, the state court is not obliged to refuse to hear the action in view of the relevant arbitration agreement. Such lawsuits, therefore, are generally heard[59] by the arbitrazh court in the joint stock company's location.

The Arbitrazh Procedure Code likewise makes it possible for a public prosecutor to go to court to invalidate transactions executed by the state authorities of the Russian Federation or its constituent territories, local governing councils, state- or municipally-owned unitary enterprises, state institutions, or legal entities with the equity participation of the Russian Federation or its constituent territories or municipalities.[60]

The Arbitrazh Procedure Code notes, however, that when applying to an arbitrazh court, a public prosecutor has the procedural rights and procedural obligations of the claimant.[61] It can be concluded, therefore, that even if enjoying a special status, during the resulting arbitrazh proceedings the public prosecutor fills the role of claim-

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57 Article 79/6 of Russian Federation Law No. 208-FZ "On Joint Stock Companies", dated December 26, 1995.

58 Article 84.1 of the Federal Law "On Joint Stock Companies".

59 Article 35 of the Arbitrazh Procedure Code.

60 Article 52.1 of the Arbitrazh Procedure Code.

61 Article 52.3 of the Arbitrazh Procedure Code.

ant and is thus bound by all of the latter's procedural duties, among them the obligation to refer the case to arbitration.[62]

Whereas a public prosecutor only institutes proceedings in order to invalidate a transaction or to invoke the consequences of its invalidity, a state authority, local governing council, or other agency in the cases provided for in the federal law[63] may file statements of claim or applications with an arbitrazh court to uphold public interests.[64] The subject matter of such actions may be much broader than the nullification of a transaction. However, the Arbitrazh Procedure Code also notes that in such instances, the state authority applying to an arbitrazh court has the procedural rights and procedural obligations of the claimant. It can thus be concluded, by analogy to the public prosecutor's participation in arbitrazh proceedings discussed above, that the state authority is likewise bound by the conditions of the arbitration agreement.

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62 An opinion to such effect has been expressed, among others, by the Federal Arbitrazh Court of the North-Western District (see its resolution in Case No. A21-2499/03-S1 dated September 23, 2004). *See also* V. V. Yarkov, *Issues Related to a Public Prosecutor's Participation in Arbitration* [in Russian] / *V. V. Yarkov* // Arbitrazhnaya Praktika [Arbitration Practice], 2005, Issue No. 10, pp. 48–53.

63 Articles 10.5 and 17.9(3) of Federal Law No. 94-FZ "On the Placement of Orders for the Supply of Goods, the Performance of Works, and the Provision of Services in Order to Meet State and Municipal Needs", dated July 21, 2005.

64 Article 53.1 of the Arbitrazh Procedure Code.