RUSSIAN FEDERATION

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A. LEGISLATION, TRENDS AND TENDENCIES

There have been no changes in the Russian legislation on arbitration.

However, on 27 August 2010, the Chairman of the Chamber of Commerce and Industry of the Russian Federation adopted the "Rules on Impartiality and Independence of Arbitrators."[3] The Rules are recommended for application by the Presidium of the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation ("ICAC RF"), the most popular Russian arbitration institution. The Rules may also be used by Russian state courts as guidelines in proceedings with regard to challenging or enforcement of arbitral awards rendered within the territory of the Russian Federation. The Rules are based on the IBA Rules but contain a number of differences.

For example, the Rules specify that an arbitrator who personally or jointly with his/her spouse or immediate family holds more than five percent of the shares in an entity has to decline

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3 In Russian only: http://tpprf-arb.ru/ru/component/docman/doc_download/41.

participation in arbitration related to that entity.[4] In response to the Russian courts' controversial practice of setting aside arbitral awards for alleged partiality of an arbitrator,[5] the Rules provide that an arbitrator need not disclose the fact that he/she: "participated in public events (conferences, seminars, presentations, etc.) that were financially or organizationally supported by the party or its counsel, provided that the arbitrator did not receive payment or other material benefit from this party or its counsel."

B. CASES

B.1 *Lugana Handelsgesellschaft mbH v. Ryazansky Zavod Metalloceramicheskikh Priborov*

In this case, the court held that an arbitration agreement may be concluded through an exchange of letters, and that a failure to challenge the arbitral tribunal confirms the validity of the arbitration agreement.

The claimant and respondent were parties to an exclusive distributorship agreement, which included a provision that disputes be settled by arbitration under the SCC Rules.

When a dispute arose, the claimant sent a letter of claim to the respondent in which it proposed to amend the arbitration provision in all the agreements between them, including the exclusive distributorship agreement, so as to refer any disputes to arbitration in accordance with the Rules of the German Institution of Arbitration ("DIS") in Berlin. The respondent endorsed the proposed amendment to the arbitration clause and

4 Article 5.2.

5 The 2008 *Baker & McKenzie International Arbitration Yearbook*, p. 233.

appointed an arbitrator. It subsequently took part in the DIS arbitration proceedings.

The arbitrators rendered three awards in favor of the claimant, for principal, interest and costs of the arbitration. When the claimant applied to enforce the DIS awards, the Ryazan Oblast [region] Arbitrazh Court first granted the claimant's requests except for the award of interest. Following an appeal to the higher court, it retried the case and arrived at the conclusion that there was no agreement between the parties to amend the arbitration clause and declined to enforce the awards. The Federal Arbitrazh Court of the Central Circuit upheld such a position.

The Supreme Arbitrazh Court of the Russian Federation (the "Supreme Arbitrazh Court") overturned these judgments.[6] It found that the lower courts had improperly disregarded the fact that the parties: (i) had reached agreement in writing to alter the arbitration agreement; and (ii) had reaffirmed with their actions the intention to refer the dispute to arbitration under the DIS Rules.

B.2 *Ansell S.A. v. MedbusinessService-2000 LLC*

In *Ansell S.A.,* the court upheld an arbitration agreement contained in a framework agreement. Ansell S.A. and MedBusiness-Service-2000 LLC (the "Company") signed a framework agreement (the "Framework Agreement"). It provided that it would take legal effect when the parties signed relevant specifications and invoices. The Framework Agreement contained an SCC arbitration clause. Ansell subsequently obtained an SCC award and sought to enforce it against the Company in

6 Resolution of the Presidium of the RF Supreme Arbitrazh Court N 13211/09 of 2 February 2010.

Russia. The Company objected to its recognition and enforcement on the grounds that there was no arbitration agreement.

The Russian arbitrazh court at all levels concluded that this argument was untenable for the following reasons:

- since the parties signed the specifications and invoices, the Framework Agreement and the arbitration clause contained therein must have been concluded;
- in the arbitration proceedings, the Company did not challenge the jurisdiction of the SCC; and
- the Company filed a defense and brought counterclaims in the arbitration proceedings.[7]

B.3 *UralEnergoGas CJSC (Russia) v. ABB Electroengineering LLC (the Netherlands)*

This case held that a reference to the UNCITRAL Rules without the term "arbitration" clearly specified, as well as use of a translation of the French-language version of the ICC Constitution about designating the appointing body, made it impossible to execute the arbitration clause.

The claimant filed a lawsuit with the Moscow City Arbitrazh Court seeking the recovery of amounts owed to it by the defendant under a contract of supply. The first-instance court rejected the claim on the grounds that the supply contract contained an arbitration clause. This provided that any disputes should be referred to the Moscow City Arbitration Court in accordance with the UNCITRAL Rules; it added that the arbitrators were to be appointed by the President of the International Chamber of Commerce, Paris.

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7 Ruling of the RF Supreme Arbitrazh Court N VAS-8786/10 of 3 August 2010.

However, the higher courts found the arbitration clause to be incapable of being performed because the parties had failed to agree upon the rules under which the case was to be arbitrated and did not specify an appointing authority.

- First, the courts held the reference to the UNCITRAL Rules to be insufficient, since it "does not make it possible to draw the conclusion that the parties had in mind the UNCITRAL Arbitration Rules," and "in addition, the Rules of the International Chamber of Commerce exist as appointing authority in arbitration proceedings under the UNCITRAL Rules and other ad hoc arbitration proceedings, which laid down a different order of appointing arbitrators and specifying other officials empowered to appoint arbitrators."[8]
- Second, the courts found that, in accordance with the ICC Constitution, the ICC did not have a President, *i.e.,* the Constitution "provides for the following posts: Chairman, Vice-Chairman, Honorary Chairman, Regional Chairman, and Secretary General." The concepts of "president" and "chairman" are not identical in Russian and the courts rejected the defendant's arguments to the effect that those were versions of the translation of the word "président" and the word "chairman" respectively from French and English (the two official languages of the ICC).

The Supreme Arbitrazh Court supported the conclusions of the courts that the "parties did not agree in due fashion upon the rules under which the case was to be arbitrated and did not specify the person authorized to appoint arbitrators."[9]

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[8] Resolution of the Ninth Arbitrazh Court of Appeals of 22 June 2009 in Case No. 09АП-10599/2009 and Resolution of the Federal Arbitrazh Court of the Moscow Circuit of 21 September 2009 in same case.

[9] Ruling of the Supreme Arbitrazh Court in Case N VAS-17333/09 of 17 February 2010.

B.4 *Yukos Capital s.a.r.l v. Tomskneft VNK OJSC*

This case held that arbitration notices must be delivered to the party to the arbitration.

On an application by Yukos Capital s.a.r.l. ("YUKOS") to enforce an ICC award against Tomskneft VNK OJSC ("Tomskneft"), the court held that serving a notice of arbitration on the management company (which was in charge of Tomskneft's management due to transfer of the managerial functions) did not amount to proper notification of the arbitration to the party itself.[10]

In its cassation appeal, YUKOS argued that, for enforcement to be refused under Article V(1)(b) of the New York Convention, the key is not the absence of proper notification of the time and place of hearings, but a more general lack of proper notice of the arbitration proceedings themselves. YUKOS explained that Tomskneft's management company had been authorized to represent Tomskneft, took part in the proceedings, made submissions on behalf of Tomskneft and received all the notifications.

Nonetheless, the cassation court upheld the first-level court's position for the following reasons:

- it was apparent from the ICC award that Tomskneft was not present during the hearing;
- receipt of correspondence by the management company after 20 June 2006 was insufficient to prove its receipt by Tomskneft, as at that time, the agreement for the transfer of powers to the management company had been terminated; and

[10] Tomsk Oblast Arbitrazh Court ruling of 7 July 2010 (Case No. A67-1438/2010).

- there was no evidence that the draft and final timetables, the notices of the date and place of the hearings, certain procedural orders and the notice of case closing and comments of December 2006 had been sent to Tomskneft.

In view of the above, the cassation court agreed that Tomskneft had not been directly notified of the arbitration proceedings and therefore could not present its case. The court therefore refused to recognize and enforce the ICC award.[11]

B.5 *AIG Europe S.A. and ACE Insurance Company CJSC v. Voskhod LLC*

In this case, the court found that a governing law clause applies only to substantive law, while the procedure for hearing a dispute in international commercial arbitration is determined by the arbitration rules (if any) and the arbitral tribunal itself.

On 6 July 2009, the ICAC RF made an award in favor of AIG Europe S.A. and ACE Insurance Company CJSC for the recovery of damages from Voskhod LLC ("Voskhod") by way of sub-rogation (Case N 134/2007). The arbitration agreement provided for arbitration by the ICAC in accordance with its rules. The parties chose Russian law as the governing law and the Russian language as the language of the arbitration proceedings.

Voskhod applied to the Moscow City Arbitrazh Court seeking to challenge the arbitral award. It argued that ICAC had failed to apply norms of Russian procedural law in breach of the parties' choice of Russian law as the governing law.

The Supreme Arbitrazh Court noted that the "agreement on the governing law deals solely with applicable substantive law norms,

[11] Resolution by Federal Arbitrazh Court of the West Siberian Circuit of 27 October 2010 (Case No. A67-1438/2010).

whereas the procedure for hearing a dispute in international commercial arbitration court is determined by its Rules (if any) and the arbitral tribunal itself."[12]

Article 19 of RF Law N 5338-I *On International Commercial Arbitration*, dated 7 July 1993 (the "International Arbitration Law"), provides that, in the absence of any agreement between the parties on the procedure to be applied, the tribunal may conduct the arbitration in such manner as it considers appropriate. The powers of the arbitral tribunal include the power to determine the admissibility, relevance, materiality and weight of any evidence. The ICAC Rules state (§ 13, Clause 2) that the rules should be applied to the procedure for conducting the proceedings. In deciding matters not regulated by either the rules or the parties' agreement, the ICAC will, subject to the provisions of the International Arbitration Law, conduct the arbitration in such manner as it considers appropriate, according equal treatment to the parties and giving each party the necessary opportunity to present its case.

Voskhod further argued that the arbitral proceedings had violated the fundamental Russian law principle of equality between the parties. In spite of the fact that the parties had agreed to use the Russian language as the language of the arbitration proceedings, the evidence submitted by both claimants was filed in a foreign language without being accompanied by a translation into Russian.

The Supreme Arbitrazh Court rejected that argument and noted that, in accordance with Article 22.1 of the International Arbitration Law, the parties' agreement on the language, unless otherwise agreed, applied to any written submission by a party, any hearing and any arbitral award or communication of the

[12] Ruling of the RF Supreme Arbitrazh Court N VAS-7815/10 of 26 July 2010.

arbitration tribunal. However, there was no requirement that this should apply equally to the evidence submitted by the parties. Article 22.2 provides for the right, but not the duty, of the arbitral tribunal to order that any documentary evidence be accompanied by a translation into the language of the proceedings.

Voskhod then filed an appeal before the Constitutional Court of the Russian Federation. It argued that the provisions of Articles 19 and 22 of the International Arbitration Law permitted a selective application of Russian law by arbitration tribunals to the extent that the parties determined that the proceedings would be governed by Russian law and chose the Russian language as the language of the arbitration proceedings.[13] Voskhod submitted that these statutory provisions violated its rights as enshrined in

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[13] Article 19. Determination of the Rules of Procedure

1. Subject to the provisions of the present Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
2. Failing such agreement, the arbitral tribunal may, subject to the provisions of the present Law, conduct the arbitration in such manner as it considers appropriate. The powers conferred upon the arbitral tribunal include the power to determine the admissibility, relevance, materiality and weight of any evidence.

Article 22. Language

1. The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.
2. The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Articles 50 (Part 1),[14] 68 (Part 1)[15] and 123 (Part 3)[16] of the Constitution of the Russian Federation.

The Constitutional Court noted that these rules of law did not regulate the method for the submission of written evidence, including the language in which the parties should present such evidence, since that matter was decided by the ICAC Rules (§ 9 and § 34). Article 22.2 of the International Arbitration Law only provided for the right of the arbitration tribunal to order that any and all documentary evidence be accompanied by a translation into the agreed or chosen language(s). Therefore, the Constitutional Court found that there were no grounds to conclude that the legislative provisions violated Voskhod's constitutional rights.

B.6 *Sokos Hotels St. Petersburg v. AB Living Design*

In *Sokos Hotels*, the court held that a separate award ordering a party to reimburse a portion of an advance paid for it by the other party is not final and is not subject to enforcement.

On 10 January 2007, Sokos Hotels St. Petersburg ("Sokos") entered into contract with AB Living Design on the fit-out of 278 hotel rooms. On 19 November 2007, AB Living Design was wound up. Stating that it was a legal successor to AB Living Design and that it had performed the latter's obligations under the contract, Living Consulting Group AB ("LC Group") brought an action before the SCC for the recovery of monies owed under the contract and for the imposition of penalty sanctions.

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14 No one may be convicted twice for one and the same crime.

15 The Russian language shall be a state language on the whole territory of the Russian Federation.

16 Judicial proceedings shall be held on the basis of controversy and equality of the parties.

In accordance with Article 45.4 of the SCC Rules, the SCC determined the amount of an advance (EUR 66,000) to be paid by the parties in equal shares. Sokos refused to pay, so LC Group prepaid the required amount in full and asked the arbitrators to render an award for the recovery of Sokos' share. On 4 June 2009, the tribunal rendered a separate award (Arbitration Case N 142/2008) to compel Sokos to repay Euro 33,000 of the advance on arbitration costs, together with interest at 8% above the reference rate fixed by the Bank from Sweden from time to time for the period from 19 March 2009 until the payment date.

LC Group applied to the Arbitrazh Court for St. Petersburg and the Leningrad Oblast, seeking the recognition and enforcement of the arbitral award. The Federal Arbitrazh Court of the North-Western Circuit upheld the first-instance court's ruling whereby the recognition and enforcement of foreign arbitral awards should not be limited to awards on the merits of a dispute.[17]

However, the Supreme Arbitrazh Court noted that the award had been rendered in the form of a separate award. The award expressly stated that the payment of one's share of the advance did not predetermine the final cost distribution between the parties, as this matter was to be decided by the final award in the case.

Pursuant to Article 31 of the International Arbitration Law, an arbitral award either grants or dismisses the claims and determines the amount of the arbitration fee and costs associated with the case (and the manner of their allocation to the parties). The Supreme Arbitrazh Court noted that such arbitral awards—

[17] Resolution of the Federal Arbitrazh Court of the North-Western Circuit in Case No. F07-13478/2009 of 9 February 2010.

unlike other acts passed by arbitral tribunals—brought to an end the review of a case on its merits either in whole or in part. Article V(1)(e) of the New York Convention and Article 36.1 of the International Arbitration Law provide that recognition and enforcement of an award may be refused if the award has not yet become binding on the parties.

The Supreme Arbitrazh Court found that the separate arbitral award on the payment of the advance on costs constituted an interim foreign arbitration decision. Its intention was to guarantee to the arbitral tribunal the payment of the anticipated arbitration costs before the commencement of the hearing on the merits of the dispute.

It also found that, according to Article 43 of the SCC Arbitration Rules, the final distribution of the arbitration costs between and among the parties to arbitration was to be effected by the SCC Board in accordance with the schedule of costs. This needs to take into account the relevant sums in the award on the merits, the outcome of the hearing and other circumstances of legal relevance. There was no evidence in the case files to demonstrate that this was such an award.

Accordingly, the Supreme Arbitrazh Court arrived at the conclusion that only final awards on the merits of a dispute were subject to enforcement. Interim awards on procedural matters (recovery of procedural costs, imposition of provisional remedies, etc.) are not enforceable in the Russian Federation.[18]

[18] Resolution by the Presidium of the Supreme Arbitrazh Court VAS-6547/2010 of 5 October 2010.

B.7 *Lugana Handelsgesellschaft mbH (Germany) v. Ryazansky Zavod Metalloceramicheskhikh Priborov (Russia)*

In this case, the court held that recovery of compensation for late payment of an awarded amount does not contravene public order.

The arbitrazh courts deciding the case considered whether granting a request for the recovery of interest accrued on the awarded amount, arbitration costs and attorney's fees complied with the public policy of the Russian Federation. The Supreme Arbitrazh Court overturned earlier decisions[19] in which the courts had found that such interest breached rules of civil law and contravened public policy.[20]

Article 1.1 RF Civil Code provides that the equality of the parties is one of the fundamental principles of civil legislation. Another is the provision for restoration of violated rights, and one of the methods for such restoration is the ability to recover sums awarded for an untimely payment. Such a penalty forms part of the legal system of the Russian Federation. The recovery of such a penalty, together with interest accruing on this amount, does not therefore contravene the public policy of the Russian Federation.

In the case at hand, the arbitral tribunal had reviewed the question of the validity of the exclusive distributorship agreement under both Russian law and German law. It had ascertained the rights and duties of the parties and had taken into account all the consequences associated with the breach of those obligations, including the duty to pay a penalty in the event of a breach of the terms and conditions of the agreement and the contract. In the circumstances, the size of the sums to be paid was not excessively burdensome and did not conflict with public policy.

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19 Resolution of the Federal Arbitrazh Court of the Central Circuit in Case No. A54-3028/2008-c10 of 9 April 2009.

20 Resolution of the Presidium of the RF Supreme Arbitrazh Court N 13211/09 of 2 February 2010.

B.8 *Venture Global Engineering LLC (USA) v. Avtotor Holding Group OJSC (Russia)*

In *Venture Global Engineering*, the court held that public policy objections will only apply where the application of foreign law might bring about a result impermissible from the viewpoint of Russian legal conscience.

Venture Global Engineering LLC (USA) ("Venture") applied to the Kaliningrad Oblast Arbitrazh Court for recognition and enforcement of an ICC award it had obtained against Avtotor Holding Group OJSC ("Avtotor"). The award required Avtotor to pay an amount outstanding under an agency agreement, together with a penalty at the rate of 8% p.a. on that amount, the costs of the arbitration and attorney's fees. In addition, the same award ordered Avtotor to file, at its cost and expense, a report on automobiles acquired under the agency agreement from General Motors.

Avtotor objected to the recognition and enforcement of the award. In its view, the arbitrators' conclusions as regards the agency fee amount and the validity of that agreement contradicted the factual circumstances of the case and the evidence put forward by the parties. It also argued that imposing a penalty of 8% p.a. violated the principle of proportionality of civil law liability for the consequences of a legal breach.

The courts refused to accept those arguments. In particular, the cassation court noted that public policy of the Russian Federation

> . . . is understood to mean the fundamentals of the social order of the Russian state. A proviso concerning public policy is only possible in those individual cases where the application of foreign law could bring about a result impermissible from the viewpoint of Russian legal conscience.

> In the present case, there are no grounds whatsoever to believe that the enforcement in the Russian Federation of the arbitral award on the payment of the debt and penalty by the Russian company in favor of the foreign company on the basis of the former's obligation to pay an agency fee (assumed under the aforesaid agency agreement) can bring about a result impermissible from the viewpoint of Russian legal conscience. Failure to enforce the arbitral award in this case means denial of the possibility for the application of foreign law in the Russian Federation, which contravenes the principles of Russian law.[21]

The Supreme Arbitrazh Court upheld that decision.[22]

B.9 Enforcement of an Award on Debt Recovery under a Loan Agreement

As mentioned above, under an ICC award, Tomskneft was ordered to pay YUKOS 7,254,218,987 rubles, US 275,225.84 dollars, 52,964.84 British pounds sterling, as well as interest at a rate of 9% annually on 4,350,000,000 rubles, starting on 12 February 2007. On 7 July 2010, the Tomsk Region Arbitrazh Court refused to enforce the ICC award. The cassation court agreed with this decision. In its reasoning, it made the following findings on public policy grounds:

- The YUKOS claim arose out of a loan agreement.
- In related proceedings, YUKOS emphasized that additional agreements to the loan agreements, including the ones with Tomskneft, had been concluded to alter the jurisdiction of disputes upon instructions of the management of OJSC NK

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21 Resolution of the Federal Arbitrazh Court of the North-Western Circuit of 28 December 2009 in Case No. A21-802/2009.

22 Ruling of the RF Supreme Arbitrazh Court VAS-4351/10 of 24 May 2010.

Yukos for the purposes of maintaining the assets of NK Yukos for "legal shareholders," and for the "prevention of expropriation of assets by the Russian state."

- In addition, the Arbitrazh Court found that, during the period when loan agreements and addenda to them were being concluded, and around the time when YUKOS filed its claim with the ICC Court, NK Yukos OJSC was in complete control, and could determine the actions of YUKOS, Tomskneft and its management company – Yukos EP CJSC.
- The court also referred to the findings of the Moscow City Arbitrazh Court in other cases,[23] and to the verdicts in criminal Case No. 18/432766-07. It found that YUKOS actually loaned to Tomskneft the funds previously unlawfully requisitioned from Tomskneft as part of transfer pricing. Therefore, the loan agreements, which were the basis for the ICC award, concealed the return to Tomskneft of its funds illegally obtained through using transfer prices in favor of other holding companies, YUKOS included.

The cassation court came to the conclusion that there was a factual transfer of money within an interrelated group of parties that "casts doubt upon the real nature of the loan agreements." This conclusion is the key reason for the court's deciding that recognizing and enforcing the ICC award would be a significant breach of the foundations of the constitutional regime and current legal order in Russia, and in this way would contravene public order in the Russian Federation.[24]

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[23] Decision of Moscow City Arbitrazh Court of 28 May 2004 in Case No. A40-17669/04-109-241 and of 28 April 2005 in Case No. A40-4338/05-107-9/A40-7780/05-98-90 (in cases involving the RF tax authorities).

[24] Resolution of the Federal Arbitrazh Court of the West Siberian Circuit of 27 October 2010 in Case No. A67-1438/2010.

C. INSOLVENCY ISSUES IN ARBITRATION

C.1 Bankruptcy under Russian law

Russia has had a series of bankruptcy regulations and laws in place since 1992. The Russian bankruptcy law is comprehensive and provides several options, including reorganization and rehabilitation of an insolvent company as an alternative to liquidation.

The recent amendments to the law have been aimed at strengthening the role and regulation of bankruptcy administrators. The liability of company management and shareholders has been extended. There are also more grounds available to creditors on which to challenge fraudulent conveyances.

Once the petition for bankruptcy has been filed, the debtor enters the first, mandatory phase of the procedure, which is called Supervision. Other phases, which will vary depending on the circumstances of the insolvency, include financial rehabilitation, external management, competition proceedings and amicable settlement.

C.2 Initiating a Bankruptcy Proceeding

The Russian bankruptcy procedure can be initiated either by one or more creditors' petition or by the debtor itself. Creditors can file a petition only[25] after obtaining a court judgment or arbitral award that mandates that a debtor owes them a sum in excess of 100,000 Russian rubles (approximately USD 3,300[26]). The requirement for a court judgment was designed to protect debtors from frivolous filings, but it causes delay for creditors who may wish to act quickly.

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25 Article 4.3 of RF Law "On Insolvency (Bankruptcy)."

26 As at 1 January 2011.

The arbitration legislation states that an arbitral award should be enforced immediately,[27] indicating that the award is enforceable upon being issued. However, the state courts' practice has shown a tendency to accept the arbitral award as a ground for initiating a bankruptcy procedure only if a corresponding writ of execution has been issued, demonstrating that the arbitral award has been "recognized" by a state court.[28]

C.3 International Arbitration and Bankruptcy

Below, we will consider the following issues that arise in international arbitration in connection with bankruptcy:

- Arbitrability of bankruptcy disputes;
- Effect of respondent's bankruptcy on arbitration proceedings;
- Effect of claimant's bankruptcy on arbitration proceedings.

C.4 Arbitrability of Bankruptcy Disputes

The main goal to be pursued by the bankruptcy legislation of practically all countries is the fair distribution of property of a debtor among all creditors. That said, this distribution proceeds on the basis that it is established that the funds obtained as a result of sale of the bankruptcy estate will be insufficient to satisfy the claims of all creditors, and therefore these funds must be distributed in a certain sequence and a certain proportion.

Russian bankruptcy legislation places significant importance on the need to take into account and balance the interests of a potentially large group of creditors.

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27 Article 44.2 of RF Law *On Courts of Arbitration in the Russian Federation*.

28 Ruling of RF Supreme Arbitrazh Court, 26 May 2010 in Case No. BAC-5992/10.

As such, disputes relating to bankruptcy are not arbitrable. There is a general rule in the Russian Federation that only a dispute of a civil-law nature may be referred to arbitration[29] and the RF Law *On Insolvency (Bankruptcy)* (the " Bankruptcy Law") states that a bankruptcy case may not be referred to arbitration.[30]

For the same reasons, disputes arising between a bankruptcy manager, creditors, the debtor, or the debtor's shareholders are to be considered exclusively in the same state court which considers a bankruptcy case, and cannot be subject to arbitration.

The law also excludes from the scope of arbitration disputes arising from transactions completed by a bankruptcy manager in the course of exercising powers in the bankruptcy proceedings, particularly when selling property included in the bankruptcy estate.[31]

C.5 Influence of Respondent's Bankruptcy on Arbitration

The court trying the bankruptcy case has the opportunity to take into account the interests of all creditors in accordance with the category and amount of their claims and based on the size of the bankruptcy estate as a whole.

As stated by the RF Constitutional Court in one of its decisions:[32]

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29 Article 11.1, RF CC.

30 Article 33.3 of RF Law *On Insolvency (Bankruptcy)*.

31 Resolution of Federal Arbitrazh Court of West Siberian Circuit, 16 October 2009 No. A04-6332/2009; Resolution of Federal Arbitrazh Court of North Caucasus Circuit of 15 October 2009 No. A53-10285/2009.

32 Ruling of RF Constitutional Court of 8 June 2004 No. 254-O "On refusal to accept for consideration the appeal of the Plenipotentiary for Human Rights in the Russian Federation on violation of the constitutional rights of citizen M.G. Ershova by the provisions of Article 114.5 of the Federal Law *On Insolvency (Bankruptcy*)."

> The opportunity for creditors to bring their claims against a debtor outside of a bankruptcy case, moreover in conditions of the total absence of resources on the part of the debtor to satisfy these claims, would contradict the very essence of the bankruptcy proceedings, during which (exclusively) the task of proportional distribution among creditors of the entire bankruptcy estate must be decided….

In connection with this, the question arises regarding what should happen to monetary claims against the debtor commenced prior to the initiation of the bankruptcy procedure, either before the state courts or in arbitration.

Under the Bankruptcy Law, as soon as an arbitrazh (commercial) court rules on the imposition of a supervision regime over a debtor, any money claims by creditors may be presented against the debtor only as part of the bankruptcy procedure. Similarly, it is not possible to terminate payment obligations of a debtor via set-off of a counter-claim, as this would violate the priority of claims established by the Bankruptcy Law.[33] Therefore, an arbitration agreement will not be valid for any monetary claim or counter claim a creditor may have that is not already pending against the debtor at the date on which the supervision regime is imposed.

Creditors' claims that have previously been upheld by a valid court decision cannot be disputed in a bankruptcy. The same principle applies to the claims confirmed by international arbitration awards recognized in the Russian Federation, which shall be subject to unconditional registration in the register of creditors.

At the supervision stage, creditors' claims are presented mainly for the purposes of participating in the first creditors' meeting.

[33] Article 63.1 of RF Law *On Insolvency (Bankruptcy)*.

Therefore, a creditor that wishes to continue judicial or arbitration proceedings that are already pending in the other forum does not have to present its claims to the arbitrazh court as part of the supervision procedure and may do so at a later stage. The supervision stage may conclude with the approval of an amicable settlement agreement between those participating,[34] following which the bankruptcy procedures will cease, and therefore the proceedings in international arbitration may be continued.

However, if a party decides to submit its claims in the bankruptcy proceedings in a state court already at the stage of supervision, such actions might be viewed as waiver of the arbitration agreement, and therefore, in the event of termination of bankruptcy procedures, the other party may object to the arbitration proceedings being restarted.

Only monetary claims against a debtor must be submitted within the framework of a bankruptcy. Accordingly, non-monetary claims, for example for the return of property, could be filed according to an agreed procedure outside the scope of the bankruptcy process.[35]

The provisions requiring money claims to be filed within the bankruptcy proceedings once supervision is introduced are valid from the date of the court's decision to impose supervision, and not from the submission of the application for such an order.

Should the supervision stage not finish with an amicable settlement agreement, the court makes a decision to introduce a

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34 *Id.* at Article 75.1.

35 Clause 2 of Legal Alert of the Presidium of the RF Supreme Arbitrazh Court of 14 June 2001 No. 64, "Certain aspects of application in court practice of the Federal Law *On Insolvency (Bankruptcy*)."

procedure of financial rehabilitation,[36] external management,[37] or liquidation proceedings.

Should the arbitrazh court rule to introduce financial rehabilitation or external management, creditors' monetary claims may only be submitted against a debtor to the same state arbitrazh court as is already dealing with the bankruptcy case. Again, set-off or provision of release money are not allowed, as they would violate the established sequence for realizing the claims of the various creditors.

If a liquidation proceeding is launched, the register of creditors closes within two months after the publication of the decision declaring the debtor bankrupt and on the opening of the liquidation proceedings.[38] The claims of creditors registered after the closure of the register of creditors' claims are satisfied using the debtor's property remaining after satisfying the claims of the creditors included in the register of creditors' claims.[39]

The claims of creditors not satisfied due to the insufficiency of the debtor's property are deemed to be discharged. Also, the claims of creditors not recognized by the bankruptcy manager, claims which the creditor did not file with the arbitrazh court, and claims declared invalid by an arbitrazh court, are considered discharged.[40]

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36 *Id.* at Article 81.1.

37 *Id.* at Article 94.1.

38 *Id.* at Article 142.1.

39 *Id.* at Article 142.5.

40 *Id.* at Article 142.9.

C.6 Arbitration Proceeding regarding Claims in which the Bankrupt Party Acts as the Claimant

After a state arbitrazh court introduces supervision[41] or a financial rehabilitation procedure,[42] the representation of a debtor's interests in all types of obligations continues to be done by its executive bodies, including representations related to any pending arbitrations.

The powers of the executive bodies are passed to the external or bankruptcy manager,[43] if external management is introduced[44] or liquidation proceedings are begun.[45]

The bankruptcy manager is entitled to file claims in favor of the company under his/her supervision against third parties, such as debtors of the company,[46] which includes actions for repossession of the company's property from third parties, and to commit other actions aimed at recovering the company's property.[47]

Thus, the indication in the Bankruptcy Law of the right of a bankruptcy manager to "commit other actions" includes the right to file claims in international arbitration. Submitting an action against debtors of a bankrupt party in the same state court that is running the bankruptcy proceedings may seem the simplest way to recover the debt, but the option of enforcing an arbitral award under the Convention in more than 140 countries might prove a

41 *Id.* at Article 64.1.

42 *Id.* at Article 82.1.

43 *Id.* at Article 129.1.

44 *Id.* at Article 94.1.

45 *Id.* at Article 126.2.

46 *Id.* at Article 129.2.

47 *Id.* at Article 129.3.

deciding factor for a bankruptcy manager to refer claims to international arbitration in accordance with an arbitration agreement.

Thus, an arbitration agreement is not terminated for those claims where the bankrupt party is the claimant. However, as noted above, it terminates in regard to counter claims against the debtor, since a set-off against a debtor for which the bankruptcy procedure was initiated or a counter claim must be declared solely to a state arbitrazh court at the debtor's location.

Initiation of a bankruptcy procedure regarding one of the parties to arbitration does not (*ipso facto*) entail termination of powers of attorney to legal representation in connection with international arbitration proceedings. A bankruptcy manager, however, is entitled to revoke a previously issued power of attorney and issue a new one for a new counsel.