RUSSIAN FEDERATION

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A. LEGISLATION, TRENDS AND TENDENCIES

Amendments to the Russian law governing international commercial arbitration[3] (also the "ICA Law") passed their first reading in the State Duma (the lower chamber of Russian legislature) on 25 January 2012. These amendments aim at incorporating the changes made to the UNCITRAL Model Law in 2006 and mainly concern issues of the arbitration agreement and interim measures.

B. CASES

B.1 *Novolipetsk Steel OJSC v. Maksimov Nikolay Victorovich*[4]

Novolipetsk Steel OJSC ("NLMK") and Mr. Maksimov were parties to a Share Purchase Agreement dated 22 November 2007 (the "SPA") under which Mr. Maksimov was to transfer ownership of 50% plus one share of OJSC "Maxi-Group" to NLMK against payment of the purchase price. The SPA

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3 Russian Federation Law of 7 July 1993 N 5338-1 "On International Commercial Arbitration."

4 Case A40-35844/11-69-311.

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provided for arbitration under the Rules of the International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry (the "ICAC"). Mr. Maksimov was successful in this arbitration claiming the recovery of the purchase price plus interest. NLMK challenged the award, alleging, *inter alia*, violation of the public order of the Russian Federation and non-arbitrability of the dispute resolved by the ICAC.

Violation of public order

The courts set aside the award,[5] finding that it violated public order in that it violated the fundamental principles of Russian law, namely the procedural principles of independence and impartiality of the court and the principle of legality.

The principles of independence and impartiality of the court were breached as two of the arbitrators failed to disclose in the course of arbitration the fact that they were employed by the same university as Mr. Maksimov's experts, despite an explicit obligation to do so imposed by the ICA Law,[6] the ICAC Rules and the Rules of Impartiality and Independence of Arbitrators.[7] The courts dismissed the arguments of Mr. Maksimov that NLMK had prior knowledge of the facts to be disclosed, and failed to file a challenge within the time limits provided by the ICAC Rules and that there were no grounds for granting the challenge.

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5 Ruling of Moscow City Arbitrazh Court of 28 June 2011; Resolution of the Federal Arbitrazh Court of the Moscow Circuit of 10 October 2011.

6 Article 12 of the ICA Law.

7 These rules were approved by Order #39 of the President of the RF Chamber of Commerce and Industry of 27 August 2010 and recommended for use by, *inter alia*, the Presidium of the ICAC. The rules, *inter alia*, impose an obligation to disclose the fact of an arbitrator, a party's representative, expert or consultant of a party to the arbitral proceedings, being employed by one and the same organization.

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The cassation court stated that:

> It is the fact of the arbitrators' failure to perform the legal duty of disclosing circumstances that could give rise to justifiable doubts, that is the breach of the judicial principle of impartiality and independence. Such violation of the law by arbitrators is irreversible and derogates from the legality of an arbitral award.[8]

The courts also reasoned that by agreeing to ICAC arbitration the parties had agreed on the procedure under the ICAC Rules, including the standards for constituting the tribunal and the grounds for challenging arbitrators. The breach of the duty of disclosure thus resulted in the arbitral procedure being inconsistent with the agreement of the parties, which is a separate reason for setting aside the award under the ICA Law.[9]

A violation was also found in the failure of the arbitral tribunal to apply the mandatory Russian Federation civil law rules on determination of a purchase price. The court reasoned that the arbitral tribunal breached this principle when instead of determining the price based on the contract terms, and failing that, on the price of similar goods in comparable circumstances, it calculated the price as the sum of two numbers put forward by the parties divided by two. The cassation court upheld the conclusions of the lower court and dismissed the appeal based on allegations that the trial court entered into the merits of the dispute. The cassation court expressly distinguished between failure to apply specific substantive law rules and compliance of tribunals with the fundamental principles of the law that constitute public order. As these principles were breached by the

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8 Resolution of the Federal Arbitrazh Court of the Moscow Circuit dated 10 October 2011.

9 Article 34(2) of the ICA Law.

arbitral tribunal in determining the price of the transaction, the court found it to be in violation of public order.

Non-arbitrability of corporate disputes

The courts also held that the dispute in question (transfer of ownership of shares) was a non-arbitrable corporate dispute. The courts relied on provisions[10] of the Code of Arbitrazh Procedure of the Russian Federation (also the "CAP") establishing the special jurisdiction of state arbitrazh (commercial) courts over corporate disputes. The special jurisdiction, in the courts' view, was justified due to the special registration procedures for the ownership, transfer and issuance of shares, as well as the involvement of the issues of establishment, participation and management of a Russian legal entity.

The court drew a distinction in the case between the private law nature of the part of the transaction concerning the sale of shares, and the public law nature of the remaining part that concerned issues of the ownership to the shares, observance of specific pre-sale conditions that involved corporate management issues and issuance of additional shares. Having established that these two parts of the transaction could not be separated, the court concluded that the dispute in question could not be resolved by arbitration:

> Taking into account the mixed nature of the agreement of 22.11.2007 and the complex nature of transaction B provided for in the agreement, it is impossible to separate the private issue of payment of the share price only without determining whether preliminary conditions of the transaction have been complied with, conducting an additional share issuance, complying with the payment terms and considering the issue of ownership to such shares. Therefore, it is improper to speak of the separability of a private law arbitrable dispute

[10] Article 33 of the CAP; Article 225(1) of the CAP.

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> regarding the payment for the shares from the public law non-arbitrable disputes regarding the transfer of ownership of the shares as a result of performing the set of conditions of transaction B regarding corporate management.

The panel of judges of the RF Supreme Arbitrazh Court refused to transfer the case for supervisory review, thus implicitly agreeing with the conclusions of the lower courts.[11]

These decisions caused a lot of concern in the Russian legal community, because in essence the courts found a dispute arising out of a contract for the sale of shares to be non-arbitrable as they qualified it as a corporate dispute. The legal basis for such conclusions is pretty vague, because the courts relied on the provisions of the CAP, which specifically state that corporate disputes fall within the exclusive jurisdiction of state arbitrazh courts.

However, these provisions of the CAP were aimed at differentiating between disputes falling under the jurisdiction of state arbitrazh (commercial) courts and those that were to be referred to the state courts of general jurisdiction. A similar interpretational issue related to the arbitrability of real estate disputes was finally resolved last year by the Russian Federation Constitutional Court in favor of arbitrability.

Nonetheless, for some reason the Constitutional Court of the Russian Federation decided not to intervene in the Maximov case and not to express its view on the arbitrability of corporate disputes.[12] Mr. Maksimov argued, *inter alia*, that the provisions

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11 Ruling of the Supreme Arbitrazh Court of the Russian Federation VAS-15384/11 of 30 January 2012.

12 *See* RF Constitutional Court Ruling N 1804-O-O of 21 December 2011 (also the "First Ruling") and RF Constitutional Court Ruling N 1488-O of 17 July 2012 (also the "Second Ruling").

of the CAP establishing the special jurisdiction of arbitrazh courts over corporate disputes, as applied in this particular case, infringe upon his constitutional rights by excluding corporate disputes related to the transfer of ownership of shares from the possibility of referring such disputes to arbitration.

The Constitutional Court of the Russian Federation refused to accept this case for consideration stating that the CAP provisions cited above are aimed at establishing a procedure whereby violated rights can be judicially protected and thus cannot infringe the applicant's constitutional rights in the particular case.

Therefore, the Constitutional Court did not take a clear position with regard to the arbitrability of corporate disputes. Given the reluctance of the Supreme Arbitrazh Court to clearly state its position with regard to the arbitrability of corporate disputes, the issue remains open.

B.2 *Russian Telephone Company v. Sony Ericsson Mobile Communications Rus LLC (RF)*[13]

This case deals with the interpretation by Russian courts of asymmetric dispute resolution clauses. Russian Telephone Company ("RTC") and Sony Ericsson Mobile Communications Rus LLC ("Sony Ericsson") were parties to a general agreement containing a clause that referred any dispute in connection with the agreement to arbitration in London under the ICC Rules. However, Sony Ericsson (and only it) was entitled to submit disputes for recovery of funds owed to it by RTC to a competent court.

[13] Case A40-49223/2011.

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RTC filed a claim for specific performance with the Moscow City Arbitrazh Court despite the arbitration agreement, arguing that the arbitration agreement could not be performed as the parties had failed to agree on the rules to govern the arbitration proceedings. The trial court dismissed the case due to the existence of a valid arbitration agreement and the second and third level courts supported this view.[14] However, the Supreme Arbitrazh Court reversed the decisions of the lower courts as it found the arbitration agreement invalid as breaching the principle of procedural equality of the parties.[15]

This fundamental procedural principle means that both sides must have equal procedural rights, including equal opportunities to state their case and equal access to any procedural remedies. This serves as a guarantee of fair trial and effective judicial protection. The court concluded that a dispute resolution clause cannot provide an option of referring disputes to a competent court for one party only. Such agreement, if made, would be invalid as violating the balance of the parties' rights. At the same time, interestingly, the court added that the party affected by such a clause would be entitled to refer to the competent court as well, thus eliminating the inequality of procedural rights.

The Supreme Arbitrazh Court reversed the lower courts' acts and sent the case for re-trial to the first level court, thus leading to speculation as to the effect it intended to give to the dispute resolution provisions of the general agreement. Based on the reasoning of the Supreme Arbitrazh Court, one can distinguish the following options: (1) invalidation of the clause as a whole as

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14 *See* Ruling of Moscow City Arbitrazh Court of 08 July 2011; Resolution of the Ninth Arbitrazh Court of Appeal of 14 September 2011; Resolution of the Federal Arbirazh Court of Moscow Circuit of 05 December 2011.

15 Resolution of the Supreme Arbitrazh Court of the Russian Federation VAS-1831/12 of 19 June 2012.

violating the principle of equality of the parties; (2) invalidating the unilateral option to refer to a competent court; (3) eliminating the inequality by extending the unilaterally granted right to the other party.

The first possibility seems a logical implication of the Supreme Arbitrazh Court's actions of reversing the lower court acts and sending the case for retrial to the first level court of competent jurisdiction. Moreover, it is clearly in line with the explicit statements the court made in its resolution regarding the invalidity of unilateral clauses that violate fundamental principles of the law. The second possibility is unlikely, as in this case the court should have terminated proceedings giving full effect to the valid part of the dispute resolution clause (i.e., the arbitration agreement, as this part does not result in unequal procedural rights).

The third possibility was expressly stated in the Resolution of the Supreme Arbitrazh Court. Literally applying the statements made by the Supreme Arbitrazh Court, one would have to conclude that the party that does not have a right to apply to a court should also have such a right. In order to give effect to this statement, the court should have modified and expanded the agreement of the parties, which is possible only in very limited cases under Russian law.

Therefore, taking into account both the conclusions of the Supreme Arbitrazh Court and its actions in the case, it is difficult to predict the position of the court with regard to unilateral dispute resolution clauses. At the same time, the first option has more chance of being implemented by lower courts. However, this option is also the most dangerous, because it provides the basis for setting aside arbitral awards issued in the Russian Federation and refusing recognition and enforcement of arbitral awards issued in Russia and abroad when an asymmetrical dispute resolution clause is involved.

Considering also that the Resolution of the Russian Federation Supreme Arbitrazh Court specifically stated that previous court decisions in other cases could be reconsidered based on new circumstances, the implications of this position could adversely affect the development of arbitration in Russia.

B.3 *Kubik LLC v. Regus Business Center Metropolis LLC*[16]

Kubik LLC ("Kubik") and Regus Business Center Metropolis LLC ("Regus") agreed in a preliminary lease agreement on submitting all disputes the parties fail to settle amicably to be finally resolved in accordance with the Rules of the ICAC,[17] with such rules incorporated into the clause by reference; the tribunal to consist of three arbitrators, each party appointing one arbitrator and the two arbitrators appointing the chairman of the tribunal.[18] Regus filed for arbitration at the ICAC, which granted

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16 Cases A40-21119/11-68-183 and A40-29251/11-68-256 (consolidated).

17 International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry.

18 *Note:* this wording of the clause was analyzed during the first round of the court review. The wording of the entire clause (as specified in Ruling of Moscow City Arbitrazh Court during the second round of the court review is as follows:

> All disputes arising out this agreement or in connection with it, are to be resolved by the parties via negotiations. If the parties fail to settle the dispute amicably within ten (10) days after one party notifies the other party in writing of the existence of a dispute, any such dispute, disagreement or claim arising out of this agreement or in connection with it, including any issue concerning the existence, validity or termination thereof are submitted to a commercial court and are finally resolved by it in accordance with the Rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, and such Rules are considered to be incorporated into this clause. The tribunal shall consist of three arbitrators. Each party appoints one arbitrator and the two arbitrators so appointed appoint the third arbitrator, who will act as chairman. The place of the arbitration proceedings is Moscow, the language of the arbitration proceedings is English.

its claims against Kubik and dismissed Kubik's counterclaims. Regus filed an application with Moscow City Arbitrazh Court for a writ of execution, while Kubik filed for setting aside the ICAC award based, *inter alia*, on the absence of an agreement to arbitrate the dispute at the ICAC.

The first level court set aside the ICAC award finding that no agreement to arbitrate at the ICAC had been reached by the parties. The court considered the reference to the ICAC Rules in the clause to be insufficient to conclude on the existence of such an agreement. Rather, in the court's view, by incorporating the ICAC Rules into the clause, the parties had agreed only on the procedure for constituting the arbitration court. Thus, the court concluded the parties had reached an agreement to resolve the dispute in accordance with the ICAC Rules, as opposed to resolving it at the ICAC.[19]

The Cassation court sent the case for retrial on formal grounds, finding that the first level court failed to specify on which of the grounds stipulated in the ICA Law[20] it had set aside the award. Upon the second round of review the first level court set aside the award on the grounds that the composition of the court was not in accordance with the agreement of the parties.[21] This time, as instructed by the cassation court, the trial court analyzed in closer detail the correctness of the translation into Russian of the dispute resolution provisions (the English wording of the parties' agreement prevailing over Russian). It found that in English the clause provided for submitting the dispute to "a commercial court" to be resolved thereby in accordance with the ICAC Rules. The use of the indefinite article led the court to conclude

19 Ruling of Moscow City Arbitrazh Court of 31 May 2011.

20 Article 34(2)(1).

21 Ruling of Moscow City Arbitrazh Court of 11 January 2012.

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that the parties meant not any particular commercial court (which would have called for a definite article) but a type of court (commercial court versus court of general jurisdiction, military court etc.).

Interestingly, this prompted the court to conclude that the arbitration agreement was invalid for failing to name the particular court that was to resolve the dispute. The cassation court in upholding the ruling, corrected the trial court in this regard, referring to Article 4 of the European Convention on International Commercial Arbitration that enables the parties to submit their dispute to *ad hoc* arbitration and establish in this case the rules of the procedure to be followed by arbitrators.[22] The court added that the ICAC Rules do not expressly prohibit their use in *ad hoc* arbitration proceedings.

The Supreme Arbitrazh Court agreed with the lower courts' findings that the parties did not specify the ICAC as the place for considering the dispute, and the reference to the ICAC Rules was not sufficient for the ICAC to have jurisdiction. It refused to submit the case for supervisory review to its Presidium.[23]

C. THE GRANT AND ENFORCEMENT OF INTERIM MEASURES IN INTERNATIONAL ARBITRATION

C.1 Tribunal-Ordered Interim Measures

The ICA Law does not specify the types of interim measures that can be ordered by the arbitral tribunal. According to Article 17 of the ICA Law (following the wording of the 1985 UNCITRAL Model Law) the tribunal has discretion to order the measures

22 Resolution of the Federal Court of Moscow Circuit of 13 March 2012.

23 Ruling of the Supreme Arbitrazh Court of the Russian Federation #VAS-8147/12 of 09 July 2012.

with regard to the subject-matter of the dispute that it considers to be necessary. Thus, there are no express limitations on the power of the arbitral tribunal to order interim measures.

The ICA Law is also silent with regard to the tests to be met by a party requesting party interim measures, leaving it to the discretion of the tribunal. However, the amendments to the ICA Law awaiting approval of the Russian legislature do contain such provisions. Thus, according to the bill, the party requesting an interim measure [other than an order to preserve evidence] must satisfy the arbitral tribunal that failure to grant the measures will result in harm to the requesting party that cannot be adequately repaired by an award of damages, and that such harm substantially outweighs the harm likely to be inflicted on the party against whom the measure is directed. Therefore, the bill incorporates two of the three conditions for granting interim measures stipulated in the UNCITRAL Model Law (as amended in 2006).

There are no provisions in the law dealing with an emergency arbitrator.

C.2 Court-Ordered Interim Measures

According to Article 9 of the ICA Law, the parties to arbitration proceedings may request interim measures from the court before the commencement of arbitration proceedings, as well as during the course of arbitration. There is no requirement to approach the arbitral tribunal on the issue first. However, if the tribunal has ordered interim measures and the party complied with them, the court may consider such measures to be sufficient and refuse to order further interim measures.[24]

[24] *See* ¶24 of Information Letter of the Presidium of Supreme Arbitrazh Court #78 of 07 July 2004 "Digest of Arbitrazh Court Case Law on the Application of Preliminary Interim Measures."

The procedure and conditions for granting interim measures and the types of interim measures available are set out in the CAP.

An application for interim measures in support of arbitration proceedings, if filed by a party to those arbitration proceedings, must be accompanied by a copy of the statement of claim with evidence that it was duly filed and certified by the head of the permanent arbitration institution (in the case of arbitration under the rules of such arbitration institution) or a notarized copy of such statement of claim or a duly certified copy of the corresponding arbitration agreement (in the case of *ad hoc* arbitration). An application for preliminary interim measures may be filed even before the commencement of arbitration proceedings.[25] However, it will only be considered by the court if accompanied by the confirmation of counter-security for the equivalent amount, provided by the applicant. Once the court awards preliminary interim measures, the applicant has 15 days to file a statement of claim.

The court must consider an application for interim measures on the day following the date of filing the application. The court takes a decision on interim measures by issuing a court ruling to be sent to the parties on the day following its issuance. The decision is taken *ex parte* by the same judge who is to hear the case.

Interim measures may include, among others:

(1) attachment of funds or other assets of the respondent and held by the respondent or another party;

(2) a prohibition on the respondent or another party committing certain acts relating to the subject matter of the action;

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[25] Article 99 of the CAP.

(3) an order that the respondent must commit certain acts to prevent the spoilage or other deterioration of an asset in dispute;

(4) an order for the transfer of assets in dispute to the claimant or other party for storage;

(5) a stay of execution under a writ of execution or other document challenged by the claimant that enables uncontested recovery; and

(6) the suspension of the sale of assets in an action to have an attachment of assets lifted.

The list of interim measures is not exhaustive, and the court may take other measures, as well as several of them. A court may, on its own initiative, order additional interim measures be taken when granting an application for interim measures.

It should be noted that in practice, when a judge hears an application for preliminary relief, in addition to the formal grounds on which such application may be granted, he/she also takes into account the extent to which the claims in the statement of claim are well-founded (by reference to the evidence attached to the case file at the date of hearing the application).

According to an imperative CAP provision where security measures are applied for, they may not be denied if the applicant provides counter-security.[26] At the same time, this provision should not be interpreted strictly to mean that in such cases security measures will be granted automatically, even when no grounds for granting the measures have been established.

Security measures may be granted even if no counter-security is provided by the applicant. However, the court may instruct the

[26] Article 93(4) of the CAP.

claimant to provide counter-security for any damage that may be caused to the respondent by security measures (usually by a bank deposit or a bank guarantee). The amount of such counter-security may be fixed within the total amount of the claimant's claims as stated in its statement of claim including accrued interest thereon. The amount of counter-security may not be less than one-half of the total amount of the claim.

Counter-security may also be provided by a respondent in lieu of measures to secure an action, if the action is for the recovery of money, by transferring funds in the amount of the claim to the account of the court.

The court may replace one interim measure with another one upon an application by the respondent. Although there are no restrictions in the CAP as to the types of interim measures that can be ordered by state courts, as a matter of practice, the courts in the Russian Federation do not grant anti-suit injunctions, as there is no tradition in Russian procedure of intervening in proceedings of other courts.

When a party files a claim with a court in breach of the arbitration agreement, the court must leave the claim without consideration, unless it finds that the arbitration agreement is invalid, or has become inoperative and incapable of being performed and the other party has filed the relevant objection before its first submission on the merits.[27]

As Article 9 of the ICA Law, dealing with the power of the court to order interim measures, also applies to international arbitration proceedings seated abroad, the court can also order interim measures in aid of foreign arbitrations. Such measures were granted in a recent case in support of an ICC arbitration in

[27] Article 148(1)(5) of the CAP.

London.[28] Nevertheless, case law on the granting of such measures is scarce.

C.3 Enforcement of Interim Measures

Interim measures ordered by a state court are enforceable through the court bailiff with sanctions stipulated in case of non-compliance. However, in practice, non-compliance is not often sanctioned by the law enforcement agencies. Nevertheless, the attachment of monetary funds, immovable property or shares can be effective, as this is normally done by notifying banks, the registry of property or shares of such restrictions. Finally, Russian law does not contain provisions allowing interim measures taken by tribunals to be enforceable through the system of state courts as final awards.

[28] Resolution of the Presidium of the Supreme Arbitrazh Court of the Russian Federation #17095/09 of 20 April 2010.

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