NEWSLETTER

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Arbitrability of disputes from the viewpoint of Russian legislation and court practice

I. General rules

Art. 1 of RF Law No. 5338-1 on International Commercial Arbitration, dated 7 July 1993, provides that in general, all civil law disputes in the field of international economic affairs can be sent to arbitration. However, federal law may restrict the arbitrability of certain disputes. The same rule regarding internal civil law disputes is stipulated by Art. 1 (2) of Federal Law No. 102-FZ on Arbitration Tribunals, dated 24 July 2002. Moreover, Art. 4 (6) of the RF Arbitration Procedure Code (hereinafter, APC RF) also provides that upon agreement between the parties, any civil law dispute falling within the jurisdiction of the state arbitrazh court may be referred to arbitration before the judicial act resolving the case on its merits is enacted by the state arbitrazh court, unless otherwise established by federal law.

The only law in the RF that expressly restricts arbitrability is the Law on Insolvency (bankruptcy), according to Art. 33 (3) of which insolvency cases may not be settled by arbitration. However, Russian courts sometimes rule out arbitrability for some other types of disputes notwithstanding the absence of a law that expressly stipulates that they cannot be sent to arbitration.

II. Arbitrability of corporate disputes

According to Art. 33 (1) item 2 and Art. 255.1 of the APC RF, corporate disputes are subject to the jurisdiction of state arbitrazh courts. Art. 255.1 of the APC RF defines corporate disputes as disputes connected with the incorporation or management of a legal entity or participation in a legal entity, in particular, disputes regarding rights to shares, the appointment and liability of management, claims made by shareholders for compensation of damages caused to a legal entity, challenging the decisions of management bodies of a legal entity, etc. (of course, this only applies to Russian legal entities). Corporate disputes also include certain types of public law disputes, for example challenging the decisions of state bodies relating to the incorporation or liquidation of a legal entity as well as registration of securities, etc. It is obvious, however, that such disputes are non-arbitrable, therefore, below, we will analyse only the arbitrability of private corporate disputes.

The provisions of the Art. 33 (1) item 2 and Art.255.1 of the APC RF can be interpreted in two ways:

1. they are aimed at removing corporate disputes from the jurisdiction of the state courts of general jurisdiction by subjecting them to the jurisdiction of the state arbitrazh courts, i.e. the provisions in question deal only with the separation of jurisdiction between different types of state courts and should not be considered as restricting the arbitrability of corporate disputes;

2. as the provisions in question stipulate that corporate disputes are subject to the jurisdiction of the state arbitrazh courts, they therefore exclude such disputes from the jurisdiction of arbitration tribunals.

Russian court practice tends to hold the second view and consider that corporate disputes cannot be referred to the arbitration.

The NLMK (Novolipetsk Metallurgical Plant) case

In 2011, the International Commercial Arbitration Court at the RF Chamber of Commerce (hereinafter, the ICAC) rendered an award under which NLMK was obliged to pay to the seller the price for shares in JSC Maxi-Group stipulated in the share sale agreement. NLMK, however, applied to the State Arbitrazh Court of Moscow in order to revoke the award and was successful.

In their Ruling of 28 June 2011 on case No. A40-35844/11-69-311, the State Arbitrazh Court of Moscow pointed out that in their award, the ICAC had ruled not only regarding payment of the price for the shares, but also regarding the transfer of the rights to the shares, and that in the opinion of the State Court disputes concerning rights to corporate shares, according to Art. 33 and Art. 225.1 of the APC RF, may be resolved only by the state arbitrazh court and not by international commercial arbitration.

The same opinion was held by the Federal Arbitrazh Court of Moscow District (Resolution of 10 October 2011) and the RF Supreme Arbitrazh Court (Ruling of 30 January 2012). Both rejected applications for a revision of the Ruling of the court of first instance. **The Federal Arbitrazh Court of Moscow District expressly stated that Art. 33 of the APC RF, according to which corporate disputes are subject to the jurisdiction of the state arbitrazh courts, was aimed not only at separation of jurisdiction between the state arbitrazh courts and the state courts of general jurisdiction, but should be interpreted as prohibiting the submission of corporate disputes to arbitration.** Corporate disputes regarding rights to shares were also characterized as a public matter and, therefore, not arbitrable.

In connection with this case, the RF Constitutional Court adopted a Ruling, No. 1804-O-O, on 21 December 2011. In that Ruling, the RF Constitutional Court stipulated that federal laws providing that certain disputes, in particular corporate ones, are subject to the exclusive jurisdiction of state courts do not contradict the RF Constitution, as the federal legislator may itself establish the rules of judicial protection for violated rights.

Negative opinions regarding the arbitrability of corporate disputes have also been expressed by other state courts in connection with other types of corporate disputes (see, for example, Resolution of the Federal Arbitrazh Court of the Central District of 2 July 2012 on case No. A54-62/2012, and Resolutions of the Federal Arbitrazh Court of Povolzhskiy District of 19 September 2012 on cases No. A12-8322/2012 and No. A12-8323/2013).

However, Russian state courts sometimes take the opposite view and consider that corporate disputes can be referred to arbitration (for example, Resolution of the Federal Arbitrazh Court of the Northern-West District of 19 December 2011 on case No. A42-4871/2011), but such a position is the exception rather than the rule.

III. Arbitrability of real estate disputes

For some time, the Russian state arbitrazh courts also rejected arbitration for disputes regarding title to real estate located in Russia. In their opinion, such disputes had a so-called 'public element', as titles to real estate are subject to state registration in a special state register (see, for example, item 27 of Information Letter No. 96 of the RF Supreme Arbitrazh Court Presidium, dated 22 December 2005, 'Review of court practice

on recognition and enforcement of foreign court decisions, challenging arbitration awards, and issuance of receiving orders for enforcement of arbitration awards'). The State Arbitrazh Courts referred also to Art. 38 (1) of the APC RF, according to which actions regarding title to real estate shall be brought to the state arbitrazh court at the location of said real estate, and Art. 248 (1) item 2 of the APC RF, which provides that Russian state arbitration courts have exclusive jurisdiction to settle disputes that involve a foreign person regarding title to real estate objects located in the RF.

However, the situation changed fundamentally when RF Constitutional Court Resolution No. 10-P of 26 May 2011 was adopted. The RF Constitutional Court stipulated that neither the requirement to register title to real estate nor the aforementioned provisions of the APC RF can be considered as grounds for excluding real estate disputes from arbitration. The provisions of Russian legislation that allow state registration of title to real estate on the basis of an arbitration award were considered as not contradicting the RF Constitution.

Therefore, according to the current position of the RF Constitutional Court which is binding on all state bodies, including all the courts, real estate disputes shall be considered arbitrable in Russia.

Subscriber Questions

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Evgenia EVDOKIMOVA

Associate

evgenia_evdokimova@epam.ru

+7 (812) 322 9681