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Arbitrability of Disputes Arising out of a Concession Contract: The Russian Perspective

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Arbitrability is a fundamental concept of arbitration law which gives an answer to a question which dispute can be submitted to arbitration. Traditionally in Russia the non-arbitrability of a dispute was explained through a public policy consideration. In other words, disputes which have or might have a public interest cannot be submitted to arbitration.

The inquiry regarding the arbitrability of a dispute is conducted in two steps. Firstly, the issue is whether the subject matter of a dispute can be submitted to arbitration (arbitrability *ratione materiae*). In that regard, the Federal Law of 21 July 2005 No. 115-FZ (as amended) On Concession Agreements proclaims in Article 17 that disputes between a concessor and a concessionary might be resolved in accordance with Russian law by courts of general jurisdiction, arbitrazh (commercial) courts, or Russian arbitral tribunals. Secondly, the capacity of a party to enter into an arbitration agreement is to be inquired (arbitrability *ratione personae*). The mentioned law does not limit the capacity of the concessor to enter into an arbitration agreement.

The results of the two-step inquiry lead to a conclusion that disputes arising out of a concession contract can be submitted to arbitration in Russia. However, a recent case poses a question of whether this checklist is complete. Namely, the *Nevskaya Concession Company, Ltd. v The Government of St Petersburg* (Russia) (?56-9227/2015) case revealed that this inquiry is only a starting point for a discussion on the arbitrability of disputes arising out of concession contracts in Russia.

Background

In 2010, the government of St Petersburg (Russia) ("concessor") and Nevskaya Concession Company Ltd. ("company" or "concessionary"), a Russian entity, entered into an agreement, according to which the concessionary had been granted a tunnel construction concession. The contract contained an arbitration clause providing for *ad hoc* arbitration under the UNCITRAL Arbitration Rules. The parties have agreed on Moscow as a place of arbitration and the ICC as the appointment authority.

When a dispute regarding the termination of the concession agreement arose, the arbitral tribunal rejected the concessor's objection that the arbitral tribunal had not had jurisdiction over the dispute in its award rendered in 2015. Eventually, the arbitral tribunal awarded the company, *inter alia*, the compensation in the amount of more than RUB 315 million, together with interest.

Two motions were eventually brought before Russian courts. In the first case (?40-66296/15), the concessor sought the annulment of the arbitral award. In the second one (?56-9227/2015), the company sought the enforcement of the arbitral award.

The proceeding regarding the first motion was terminated. The Federal Law of 24 July 2002 No. 102-FZ (as amended) On Arbitral Tribunals in the Russian Federation (on the recent reform of arbitration law, see here) in Article 40 provides that if the parties have agreed that an arbitral award *is not* to be treated as a final award, the parties to arbitral proceedings *may challenge* the award. In the *Nevskaya Concession Company* case, the parties have agreed that the arbitral award would be a final award. Therefore, any action against the award was precluded. Consequently, the court terminated the proceeding. The enforcement proceeding, on the other hand, were conducted and resulted in the court decisions, which are explored below.

Special Parameters of Arbitral Tribunals for Concession Disputes

The concessor argued that Article 17 the Federal Law On Concession Agreements has been violated. In particular, it argued that the arbitral tribunal and the arbitral proceeding in whole did not meet the meaning of "*Russian arbitration tribunals*", as provided in Article 17.

One may assume that if the seat of arbitration is in Russia, then the tribunal can be considered a *Russian arbitration tribunal*. In the *Nevskaya Concession Company* case, the courts, however, took a different approach. The fact that the seat of arbitration was in Moscow (Russia) was not considered to be a decisive factor. According to the court, the link between an arbitral tribunal and the jurisdiction must be stronger.

Interestingly, a simple fact that the ICC was named as the appointment authority was enough for the Russian courts to reach the conclusion that the arbitral tribunal has been constituted outside of Russia. Also, the fact that the UNCITRAL Arbitration Rules were designed under the auspice of the United Nations Commissions for International Trade Law was used to qualify the tribunal as a non-Russian arbitration tribunal.

Finally, the *Arbitrazh* court of St Petersburg (a state court) inferred that the arbitral tribunal, which has been formed with the assistance of a foreign institution and which applied the UNCITRAL Arbitration Rules, does not meet the notion of a *Russian arbitration tribunal*. Having established this, the court declared the arbitration agreement null and void and, therefore, rejected the enforcement of the arbitral award.

The court of cassation upheld the ruling. Moreover, the court of cassation clarified criteria, which must be fulfilled in order for an arbitral tribunal to be considered a *Russian arbitration tribunal*:

1. An arbitral tribunal must apply arbitral rules adopted by a Russian institution;
2. An arbitral proceeding must be conducted under the auspice of Russian arbitral institutions or, in a case of *ad hoc* arbitration, an appointment authority must be a Russian entity, either a legal person or an individual;
3. The seat of arbitration must be in Russia.

Non-compliance with these criteria in the *Nevskaya Concession Company* case (?56-9227/2015) led to a declaration of an arbitral agreement as null and void, which eventually precluded the enforcement of the arbitral award in Russia. On 4 May 2016, the Supreme Court of the Russian Federation rejected *Nevskaya Concession Company*'s request for the reconsideration of the case.

Conclusion

The *Nevskaya Concession Company* case established three criteria, which need to be met under Article 17 of the Federal Law On Concession Agreements in order for an arbitral tribunal to be considered a Russian arbitral tribunal and to establish jurisdiction over a dispute arising out of this type of contracts.

The rationale behind the strict approach in the *Nevskaya Concession Company* case is hardly explained in the court decisions. On one hand, Article 17 permits recourse to arbitration, meaning that disputes arising out of a concession are arbitrable. On the other hand, an arbitral tribunal has to have a strong link with Russia in order to comply with Article 17, which anchors this type of disputes in this jurisdiction and departs from a usual, pro-arbitration approach. Still, due attention needs to be given to these criteria in order to preserve a successful enforcement of an arbitral award in Russia.

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