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Hot topics in M&A Arbitration

*Dispute Resolution
in M&A Transactions*

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Arbitrability of Russian Corporate Disputes

Before the 2016 Reform of Arbitration Laws

- No restrictions in arbitration laws or procedural codes
- 2009 amendments to procedural codes stipulated that corporate disputes were within 'special jurisdiction' of state arbitrazh (commercial) courts
- The amendments were intended to differentiate between the competence of the courts of general jurisdiction and arbitrazh (state commercial) courts

Arbitrability of Russian Corporate Disputes

Before the 2016 Reform of Arbitration Laws

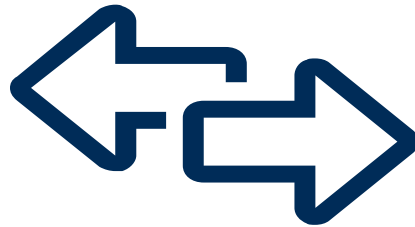
Maximov v NLMK case (2011)

- Dispute for the recovery of the purchase price resolved by the ICAC of Russia
- ICAC award set aside based on non-arbitrability of the dispute:
 - a **private law arbitrable** dispute regarding the payment for the shares cannot be separated from **public law non-arbitrable** disputes regarding the transfer of ownership to the shares as a result of performing pre-sale conditions that involved corporate management issues and issuance of additional shares

Arbitrability of Russian Corporate Disputes

Before the 2016 Reform of Arbitration Laws (1/3)

- Court practice on arbitrability of corporate disputes was not uniform



- Arguments ***against arbitrability***:
 - ‘***special jurisdiction***’ of state courts for corporate disputes precluded the referral of such disputes to arbitration
 - ***public law aspects*** involved in a corporate transaction (registering the transfer of title to the shares)
 - ***affecting*** the rights of the ***target*** company

Main Provisions of the 2016 Reform re: Arbitrability of Russian Corporate Disputes

Conditionally arbitrable disputes

- ***Conditionally arbitrable*** corporate disputes

Type 1 – external corporate disputes (SPA) are arbitrable provided that:

- 1) Arbitration agreements have been entered into after 1 February 2017
- 2) To be administered by ‘licensed’ arbitral institutions

Main Provisions of the 2016 Reform re: Arbitrability of Russian Corporate Disputes

Conditionally arbitrable disputes

- Three further conditions for the **Type 2** disputes (shareholders agreements)
 - 3) Arbitration agreement to be signed by all participants, RLE and any third party involved
 - 4) Special rules for administering corporate arbitrations
 - 5) Seat in Russia

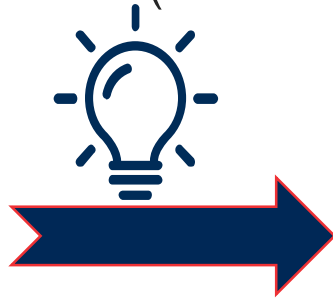
Arbitrability of Corporate Disputes

German Experience

- Issues with arbitrability of disputes related to the annulment of shareholder resolutions (Decision of the Federal Supreme Court dd. 6 April 2009)



inter partes effect
of arbitration



erga omnes effect in arbitration
(mechanism equivalent to Sec. 248
German Stock Corporation Act)

1. Consent to arbitration by all shareholders;
2. Notification of all stakeholders of the institution of the arbitration, the course of the proceedings with a fair opportunity granted to actively participate in the proceedings;
3. Equal opportunity for all stakeholder to participate in the constitution of the tribunal;
4. All disputes to be joined in one single arbitration to exclude conflicting decisions

Arbitrability of Corporate Disputes

Institutions that have adopted Rules on Corporate Disputes

- DIS (2009)
 - 2009-2018 – 5 cases
- International Arbitration Court at the Russian CCI (2017)
 - 2017-2018 – 0 cases
- Russian Arbitration Center (2017)
 - 2017-2018 – 0 cases

Conditionally Arbitrable Disputes

Amendments introduced in March 2019

- Simplifying the requirements for disputes under shareholders agreements, namely conditions 3) and 4) abolished

- **Thus**, they are arbitrable provided that
 - 1) Arbitration agreements have been entered into after 1 February 2017
 - 2) To be administered by 'licensed' arbitral institutions
 - 3) Seat in Russia

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