

KIEV ARBITRATION DAYS 2012: THINK BIG!

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Kiev



ARBITRABILITY OF CORPORATE DISPUTES IN CIS AND WESTERN EUROPE

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Introduction

- (1) No common approach
- (2) Exceptions and some uncertainty
- (3) Spectrum: England to Ukraine

England

- No general statutory limitation on arbitrability
(Companies Act 2006, Arbitration Act 1996)
- Pro-arbitrability jurisprudence
(e.g. Fulham FC v Sir David Richards, The Football Association Premier League Ltd [2011]):
 - no public policy reason for a general prohibition of arbitration agreements re disputes about the internal management of a company
 - difference between subject matter and remedies:
 - ✓ certain statutory remedies cannot be granted by arbitration BUT
 - ✓ seeking a remedy only to be granted by the court does not necessarily mean non-arbitrability

England

- Summary:
 - Disputes under shareholder agreements are arbitrable as any contractual disputes
 - Claims brought under statute may be arbitrable
 - Potential question: claims from statutory provisions aimed at safeguarding the interests of third parties

Germany

(1) Arbitrability generally permitted by statutory law

- All claims involving an economic interest [broadly interpreted] are arbitrable or
- Parties can reach a settlement

(2) Certain limitations exist

- discussions over the arbitrability of disputes re challenges of corporate resolutions

Germany

(3) Jurisprudence

- Federal Court of Justice decision 1996: no arbitrability re challenge of partners' meeting resolution of a private ltd co
 - Reason: legal consequences would not only affect claimant and respondent, but also other partners
- Federal Court of Justice decision 2009: disputes between shareholders of limited liability company are arbitrable subject to certain conditions

Germany

(4) Arbitrability conditions

- All shareholders to agree to the arbitration
- All shareholders can participate in arbitration
- All shareholders can influence the choice of arbitrators or choice of arbitrators by neutral institution
- All disputes arising from challenges of a certain shareholder resolution decided by one arbitral tribunal

Russia

(1) No direct statutory limitations

(2) Restrictions derived from

- Art. 248 APC (*exclusive jurisdiction of arbitrazh courts over disputes re establishment, liquidation or registration of legal entities, challenges to corporate bodies' decisions*)
 - Counter-argument: Art. 248 APC aimed "at the division of powers of State courts of various countries in addressing cross-border disputes" [Decision of the Constitutional Court No 10-P of 26.05.2011]
- Art. 33 and 225.1 APC (special subject-matter jurisdiction of arbitrazh courts over corporate disputes)

Russia

(3) No uniform jurisprudence of lower courts

(4) Jurisprudence of higher courts not favourable to arbitrability but leaves uncertainty

- Supreme Arbitrazh Court Decision of 30.01.2012 in Maximov v NLMK case (VAS-15384/11)
 - Refusal to review lower courts decisions interpreting Art. 33 and 225.1 APC as excluding arbitrability of corporate disputes
 - Non-arbitrability because of features of shareholders agreement in SPA or SPA non-arbitrable as corporate dispute?
- SAC in other cases (Ruling No 1557/07 of 16.02.2007) deemed arbitrable a 'corporate' dispute from an SPA

Russia

- Constitutional Court refused to admit Maximov's complaint for consideration:
 - Art. 33 and 225.1 directed "*at the specification of the procedure for protection by court of the violated or disputed rights and the lawful interests of citizens and legal persons in the said category of cases and cannot be regarded as infringing the rights of the applicant*".
- Summary: though no direct statutory restriction, non-arbitrability trend is obvious

Ukraine

(1) Historically no statutory limitation

- International Commercial Arbitration Act (Art. 1) on arbitrability:
 - disputes resulting from contractual and other civil law relationships arising in the course of foreign trade and other forms of international economic relations, provided that the place of business of at least one of the parties is situated abroad;
 - disputes between enterprises with foreign investment, international associations and organizations established on the territory of Ukraine; disputes between the participants of such entities; as well as disputes between such entities and other subjects of the law of Ukraine.
- No limitation of arbitrability in other acts till 2009

Ukraine

(2) Changed jurisprudence and superior court guidance [2007-2008]

- Guidance (Recommendations) of the Presidium of the Superior Commercial Court of 28.12.2007 On Jurisprudence in Disputes arising from Corporate Relations
- Resolution of the Plenum of the Supreme Court of 24.10.2008 On Jurisprudence in Corporate Disputes
 - *“Members of business companies ... are not entitled to subject the corporate disputes related to the activity of business companies, including those arising from corporate management, to international commercial arbitration courts”.*
 - Reasoning: scarce, but may be derived from exclusive subject-matter jurisdiction rules (Art. 12 CPC ed. 2006)

Ukraine

(3) 2009 Amendments to the Commercial Procedural Code

- Art. 12 of CPC on subject-matter jurisdiction and non-arbitrability:
 - disputes arising out of corporate relations between a company and its participant [including a former one], as well as between the participants re establishment, activities, management and liquidation of the company (except for labour disputes)
 - [exclusive subject-matter jurisdiction since Dec. 2006]
 - [non-arbitrable since March 2009]
- Article 16 CPC on territorial jurisdiction: exclusive to the courts at the company registered seat

Ukraine

(4) Formal approach and cumulative criteria

- Arising from corporate relations
- Parties – dispute between:
 - company and participants / founders/ shareholders (including former); or
 - two or more participants / founders/ shareholders
- Subject matter – disputes over either of:
 - establishment;
 - management;
 - activities;
 - dissolution of the company

Ukraine

- No analogy of law
(not applicable to entities not being a “business company” (“господарське товариство”), e.g. cooperatives and collective enterprises)
- No broad interpretation
(e.g. parties do not include successors such as heirs or future shareholders)

Ukraine

(5) Exceptions from formal approach exist

- claims for invalidation of transactions arising from infringement of corporate rights
- shareholders claims against registrars

(6) Disputes over title in and transactions with shares not considered corporative

except for those arising from infringement of
[statutory] pre-emption rights

Ukraine

(7) Summary

- Corporate disputes in business companies are generally non-arbitrable
- Exceptions possible due to narrow interpretation of statutory definition of 'corporate dispute'



Thank you for attention!

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