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On Performance of Functions of Support and Control in regard of Arbitral Proceedings, International Commercial Arbitration by Courts of the Russian Federation

In order to ensure the correct and uniform consideration of cases pertaining to performance of functions of support and control in regard of arbitral proceedings, international commercial arbitration by the courts of the Russian Federation, the Plenary Session of the Supreme Court of the Russian Federation, guided by Article 126 of the Constitution of the Russian Federation, Articles 2 and 5 of Federal Constitutional Law No. 3 of 5 February 2014 “On the Supreme Court of the Russian Federation”, hereby rules to provide the following clarifications:

1. General Provisions. Sources of Domestic and International Law

1. The right of parties to a civil law dispute to choose alternative means of dispute resolution, in particular to refer the dispute to arbitration (arbitral proceedings), is based on Article 45 (Part 2) of the Constitution of the Russian Federation, in accordance with which everyone has the right to defend one’s rights and freedoms by all means not prohibited by law.

Support for the development of alternative means of dispute resolution is one of the tasks of the judiciary of the Russian Federation, implemented on the basis of norms of Article 2 of the Civil Procedure Code of the Russian Federation (hereinafter – the

CPC RF), Article 2 of the Commercial Procedure Code of the Russian Federation (hereinafter – the ComPC RF) within the limits stipulated in federal law (Chapters 14.1, 45, Section VI of the CPC RF, Chapters 15, 30, 31 of the ComPC RF, Articles 5 and 6 of Federal Law No. 382 of 29 December 2015 “On Arbitration (Arbitral Proceedings) in the Russian Federation” (hereinafter – the Law on Arbitration), Articles 5 and 6 of Law of the Russian Federation No. 5338-I of 7 July 1993 “On International Commercial Arbitration” (hereinafter – the Law on International Commercial Arbitration).

Article 11 of the Civil Code of the Russian Federation (hereinafter – the CC RF) stipulates that the protection of violated or disputed civil rights is performed by the court, the commercial court or the arbitral tribunal in accordance with their competence.

Arbitration (arbitral proceedings), in particular international commercial arbitration, is a process of resolution of a dispute and adoption of a decision (arbitral award) by the arbitral tribunal (Item 2 of Article 2 of the Law on Arbitration, Article 2 of the Law on International Commercial Arbitration).

Arbitration (arbitral proceedings), in particular international commercial arbitration, is a mean of alternative dispute resolution, important features of which include the autonomy of the will of the parties, confidentiality of proceedings and the possibility for the parties to the dispute to determine the rules of proceedings on their own, impartiality and independence of the arbitrators, inadmissibility of review of the award on its merits by the courts of the Russian Federation (hereinafter – the courts), correspondence of the award to the public policy (*ordre public*) of the Russian Federation.

2. Arbitration (arbitral proceedings) may be used to resolve both domestic disputes (domestic arbitral proceedings or arbitration of domestic disputes) and international disputes (in particular, within the framework of international commercial arbitration) arising during exercise of foreign trade relations and of other types of international economic relations, as stipulated in Items 3, 4 of Article 1 of the Law on International Commercial Arbitration.

3. Unless otherwise stipulated in a federal law, the courts perform functions of support and control both in regard of arbitration (arbitral proceedings) administered by a permanent arbitral institution and in regard of arbitration conducted by an

arbitral tribunal, constituted by the parties to hear a specific dispute (*ad hoc* arbitral tribunal) (Articles 1, 2 of the Law on Arbitration).

4. Legal regulation of relations in the sphere of domestic arbitral proceedings and international commercial arbitration (hereinafter, as regards domestic arbitral proceedings and international commercial arbitration – arbitral proceedings), as well as in the sphere of the courts' performance of functions of support and control in regard of arbitral proceedings in the Russian Federation, is performed in accordance with the Constitution of the Russian Federation, the universal principles and norms of international law and international treaties of the Russian Federation, which are a component part of the legal system of the Russian Federation pursuant to Part 4 of Article 15 of the Constitution of the Russian Federation, in accordance with the CPC RF, the ComPC RF, the Law on Arbitration, the Law on International Commercial Arbitration, other laws and normative legal acts.

5. International treaties of the Russian Federation in the sphere of arbitral proceedings include, in particular, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (hereinafter – the 1958 Convention) and the European Convention on International Commercial Arbitration of 21 April 1961 (hereinafter – the Convention on International Commercial Arbitration).

The 1958 Convention is applied to resolve issues pertaining to recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought (Article I, paragraph 1 of the 1958 Convention).

By virtue of Article 1, paragraph 1 of the Convention on International Commercial Arbitration, its provisions apply where natural and legal persons, who are parties to an arbitration agreement or in whose regard an arbitral award is issued, have their habitual place of residence or their seat in different Contracting States when concluding the agreement.

6. The provisions of the Agreement on the Manner of Resolution of Disputes pertaining to Economic Activities of 20 March 1992, of the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Cases of 22 January 1993, as well as provisions of bilateral legal assistance treaties of the Russian Federation do not regulate the issues of recognition and enforcement of foreign arbitral awards, unless otherwise stipulated in such international treaties of the Russian Federation.

If the scope of a bilateral legal assistance treaty includes the issues of recognition and enforcement of arbitral awards, the provisions of such a treaty shall not cover the procedure of the arbitral proceedings, in particular the manner of notification of parties to arbitration.

7. The Law on International Commercial Arbitration and the Law on Arbitration apply to arbitration (arbitral proceedings) with due regard to the provisions on their scope of application.

If in international commercial arbitration the place of arbitration is within the territory of the Russian Federation, Part 7.1 of Article 7 "Definition, Form and Interpretation of the Arbitration Agreement", Article 39 "Storage of Arbitral Awards, Orders to Terminate Arbitration and Case Files of Arbitrations", Article 43 "Amending Legally Relevant Registers", Chapter 9 "Creation and Functions of Permanent Arbitral Institutions in the Russian Federation", Chapter 10 "Interrelation Between Arbitration and Mediation", Chapter 11 "Liability of the Non-Profit Organization, Under which the Permanent Arbitral Institution Was Created, and of the Arbitrator", Chapter 12 "Final Provisions" of the Law on Arbitration apply to it (Part 2 of Article 1 of the Law on Arbitration and Item 2 of Part 1 of the Law on International Commercial Arbitration).

If the place of arbitration is abroad, Article 8 "Arbitration Agreement and Filing a Substantive Claim to Court", Article 9 "Arbitration Agreement and the Court's Provisional Measures", Article 35 "Recognition and Enforcement of Arbitral Award", Article 36 "Grounds for Refusing Recognition or Enforcement" of the Law on International Commercial Arbitration apply to international commercial arbitration.

8. By virtue of Item 3 of Article 1 of the Law on International Commercial Arbitration, where there is an arbitration agreement, a foreign investor may file a claim to an arbitral tribunal under the rules of international commercial arbitration, in particular against a Russian commercial organisation, concerning a dispute that arose with regard to making of foreign investments on the territory of the Russian Federation.

If the dispute did not arise with regard to making of foreign investments on the territory of the Russian Federation, a Russian commercial organisation, the share (contribution) in the charter (contributed) capital of which belongs to a foreign

investor, may apply to an arbitral tribunal under the rules of domestic arbitral proceedings, provided that there is an arbitration agreement (Part 4 of Article 2 of the Law on Arbitration).

2. Competence of Courts over Arbitral Proceedings. Jurisdiction

9. The powers of the courts include the functions of support and control in regard of arbitral proceedings, realised with due regard to the scope of judicial interference, stipulated in Article 5 of the Law on Arbitration, Article 5 of the Law on International Commercial Arbitration.

The functions of support of arbitral proceedings, performed by the court, include:

procedures, conducted in the manner stipulated in Chapter 47.1 of the CPC RF, § 3 of Chapter 30 of the ComPC RF, aimed at resolving the issues pertaining to:

- appointment of an arbitrator (Article 11 of the Law on Arbitration, Item 4 of Article 11 of the Law on International Commercial Arbitration),
- recusal of an arbitrator (Articles 12, 13 of the Law on Arbitration, Articles 12, 13 of the Law on International Commercial Arbitration),
- termination of an arbitrator's mandate (Article 14 of the Law on Arbitration, Article 14 of the Law on International Commercial Arbitration),

as well as taking of evidence (Article 63.1 of the CPC RF, Article 74.1 of the ComPC RF) and

adoption of provisional measures, in particular the securing of evidence pertaining to arbitral proceedings (Part 3 of Article 139 of the CPC RF, Article 72, Part 3 of Article 90 of the ComPC RF).

Performance of separate functions of support to arbitral proceedings may be imposed upon a different, specially authorised person (Item 11 of Annex I and Item 10 of Annex II to the Law on International Commercial Arbitration). In that instance, the court refuses to accept an application on appointment of an arbitrator, on recusal of an arbitrator or on termination of an arbitrator's mandate (Item 1 of Part 1 of Article 134 of the CPC RF, Item 1 of Part 1 of Article 127.1 of the ComPC RF), and, where the court has initiated a case, proceedings in regard of the corresponding

application are subject to termination pursuant to the second paragraph of Article 220 of the CPC RF and Item 1 of Part 1 of Article 150 of the ComPC RF.

Within the framework of arbitration conducted by an *ad hoc* arbitral tribunal, the court may also provide support in regard of the arbitral proceedings, except for support in taking of evidence (Article 63.1 of the CPC RF, Article 74.1 of the ComPC RF).

10. The functions of control in regard of arbitral proceedings are performed by the court within the following procedures:

- challenge of an arbitral tribunal's preliminary ruling stating that it is competent (Part 3 of Article 16 of the Law on Arbitration, Item 3 of Article 16 of the Law on International Commercial Arbitration, Article 422.1 of the CPC RF, Article 235 of the ComPC RF);
- challenge of the arbitral award (Article 40 of the Law on Arbitration, Article 34 of the Law on International Commercial Arbitration, Chapter 46 of the CPC RF, § 1 of Chapter 30 of the ComPC RF);
- issuance of a writ of execution for the enforcement of an arbitral award adopted on the territory of the Russian Federation, recognition and enforcement of foreign arbitral awards (Article V of the 1958 Convention, Article IX of the Convention on International Commercial Arbitration, Articles 41 and 42 of the Law on Arbitration, Articles 35 and 36 of the Law on International Commercial Arbitration, Chapters 45 and 47 of the CPC RF, § 2 of Chapter 30 and Chapter 31 of the ComPC RF).

When performing the functions of support and control, the court checks, whether it was allowed to refer the dispute to the arbitral tribunal, as well as whether the arbitration agreement is invalid, inoperative or incapable of being performed (Article II, paragraph 3 of the 1958 Convention, Article 8 of the Law on Arbitration, Article 8 of the Law on International Commercial Arbitration, Article 22.1, sixth paragraph of Article 222 of the CPC RF, Article 33, Items 5 and 6 of Part 1 of Article 148 of the ComPC RF).

11. In cases pertaining to performance of functions of support and control in regard of arbitral tribunals, the competence of courts of general jurisdiction and of commercial courts is determined under the rules of Article 22, Item 9 of Part 1 of Article 26 of the CPC RF, Articles 27, 28, 31, 32 of the ComPC RF proceeding from the nature of

claims resolved (subject to resolution) by the arbitral tribunal and from the whole composition of participants of the dispute with regard to their status.

Where the defendant’s side in arbitral proceedings is represented by both natural and legal persons, the recoveror submits the application for issuance of a writ of execution for enforcement of an arbitral award, on recognition and enforcement of a foreign arbitral reward to a court of general jurisdiction, against all the debtors, unless it is possible to separate the claims (Part 4 of Article 22 of the CPC RF, Part 7 of Article 27 of the ComPC RF).

Functions of support and control in regard of arbitral proceedings in corporate disputes with participation of legal persons indicated in Article 225.1 of the ComPC RF, which may be referred to consideration of an arbitral tribunal, are performed by commercial courts of the Russian Federation, independent of whether the participants of legal relationships from which the dispute arose are legal persons, individual entrepreneurs or other organisations and citizens (Item 2 of Part 6 of Article 27 of the ComPC RF). This approach is also applicable to disputes arising from activities of depositaries pertaining to registration of rights to shares and securities and to realisation of other rights and duties stipulated in federal law (Item 4 of Part 6 of Article 27 of the ComPC RF), disputes arising from the activities of public not-for-profit companies, state companies, state corporations (Item 5 of Part 6 of Article 27 of the ComPC RF).

Functions of support and control in regard of arbitral proceedings in corporate disputes regarding legal persons indicated in Item 8 of Part 1 of Article 22 of the CPC RF, which may be referred to consideration of an arbitral tribunal (Parts 1, 3 of Article 22.1 of the CPC RF) are performed by courts of general jurisdiction of the Russian Federation.

12. Functions of support in regard of arbitral proceedings pertaining to appointment, recusal, termination of mandate of an arbitrator (of arbitrators) are performed by the district court, commercial court of the constituent entity of the Russian Federation at the place of arbitration (Part 5 of Article 427.1 of the CPC RF, Part 9.1 of Article 38, Part 5 of Article 240.1 of the ComPC RF).

Support in taking of evidence pursuant to Part 1 of Article 63.1, Chapter 47.1 of the CPC RF, Part 1 of Article 74.1, § 3 of Chapter 30 of the ComPC RF is performed by the district court, commercial court of the constituent entity of the Russian Federation at the location of the requested evidence.

13. An application for adoption of provisional measures pertaining to arbitral proceedings is submitted to the court at the location of the arbitral tribunal, or at the address or place of residence of the debtor, or at the location of the debtor's property (Part 3 of Article 139 of the CPC RF and Part 3 of Article 90 of the ComPC RF), and an application for adoption of preliminary provisional measures – at the address of the applicant, or at the location of monetary funds or other property in regard of which the applicant motions for measures aimed at securing property interests, or at the place of violation of the applicant's rights (Part 3 of Article 99 of the ComPC RF).

14. An application for annulment of an award of an arbitral tribunal or of an international commercial arbitration tribunal with the place of arbitration in the Russian Federation is submitted to the district court, commercial court of the constituent entity of the Russian Federation, on the territory of which the arbitral award was adopted. By agreement of the parties to arbitral proceedings, such an application may be submitted to the district court, commercial court of the constituent entity of the Russian Federation at the place of residence or location (address) of one of the parties to the arbitral proceedings (Part 2 of Article 418 of the CPC RF, Part 8.1 of Article 38, Part 4 of Article 230 of the ComPC RF).

An application for issuance of a writ of execution for enforcement of an award of an arbitral tribunal or international commercial arbitration tribunal adopted on the territory of the Russian Federation is submitted to the district court, commercial court of the constituent entity of the Russian Federation at the place of residence or location (address) of the debtor, or, if its place of residence or address are unknown, at the location of property of the debtor-party to arbitral proceedings. By agreement of the parties to arbitral proceedings, such an application may be filed to the district court, commercial court of the constituent entity of the Russian Federation, on the territory of which the arbitral award was adopted, or at the place of residence or location (address) of the winning party to arbitral proceedings (Part 2 of Article 423 of the CPC RF, Part 9 of Article 38, Part 3 of Article 236 of the ComPC RF).

An application for recognition and enforcement of a foreign arbitral award is submitted to the supreme court of the republic, the court of the territory, region, federal city, autonomous region, autonomous circuit, to the commercial court of the constituent entity of the Russian Federation at the location (address) or place of residence of the debtor or, if its address or place of residence is unknown, at the location of the debtor's property (Item 9 of Part 1 of Article 26, Part 4 of Article 1,

Article 410 of the CPC RF, Part 9 of Article 38, Part 1 of Article 242 of the ComPC RF).

Applications of the interested person regarding objections against recognition of the foreign arbitral award not requiring enforcement are submitted to the supreme court of the republic, the court of the territory, region, federal city, autonomous region, autonomous circuit, to the commercial court of the constituent entity of the Russian Federation at the location (address) or place of residence of the interested person or at the location of its property, and if the interested person does not have its place of residence, address or property in the Russian Federation – to the Court of the City of Moscow, Commercial Court of the City of Moscow (Item 9 of Part 1 of Article 26, Part 2 of Article 413 of the CPC RF, Part 9.2 of Article 38, Part 3 of Article 245.1 of the ComPC RF).

15. In order to determine jurisdiction, the location of the arbitral tribunal, the place of conduction, performance of arbitral proceedings or the place of adoption of the arbitral award is understood as the place of arbitration, which is determined under the rules of Part 1 of Article 20 of the Law on Arbitration, Item 1 of Article 20 of the Law on International Commercial Arbitration and, unless otherwise agreed upon by the parties, indicated in the arbitral award (Item 2 of Part 2 of Article 34 of the Law on Arbitration, Item 3 of Article 31 of the Law on International Commercial Arbitration). The place of arbitration may differ from the location of the arbitral institution, under the rules of which the arbitral proceedings are conducted, as well as from the place of hearings in the case.

3. Consideration of Issues of Competence of Arbitral Tribunals by the Courts. Disputes Subject to Referral to Consideration of an Arbitral Tribunal. Arbitration Agreement

16. The court establishes the fact that the arbitral tribunal is competent (not competent) by checking whether the parties observed the conditions for recourse to arbitral proceedings.

A dispute of civil law nature may be referred to consideration of an arbitral tribunal, unless otherwise stipulated in federal law, and provided that there is an effective arbitration agreement between the parties (Part 3 of Article 3, Part 1 of Article 22.1 of the CPC RF, Part 6 of Article 4, Article 33 of the ComPC RF, Parts 3 and 4 of Article 1 of the Law on Arbitration, Item 3 of Article 1 of the Law on International Commercial Arbitration).

If there is an agreement of the parties regarding the consideration of the dispute by an arbitral tribunal, and either of the parties states an objection against consideration of the case in court no later than on the day of presenting its first statement on the merits of the dispute in a court of first instance, the court leaves the statement of claim without consideration, except when it establishes that the agreement is invalid, inoperative or incapable of being performed (sixth paragraph of Article 222 of the CPC RF, Item 5 of Part 1 of Article 148 of the ComPC RF).

The court also leaves the statement of claim without consideration by virtue of sixth paragraph of Article 222 of the CPC RF, Item 6 of Part 1 of Article 148 of the ComPC RF where the parties conclude an agreement to refer the dispute to the consideration of an arbitral tribunal during a trial, but before the court adopts a judicial act finalising the consideration of the case on its merits, if any of the parties states an objection against consideration of the case in court based on these grounds, except when the court establishes that the agreement is invalid, inoperative or incapable of being performed.

When resolving the issue of leaving the statement of claim without consideration due to existence of an arbitration agreement, the court checks for signs that obviously indicate that the arbitration agreement is invalid, inoperative or incapable of being performed, as well as that the dispute is not subject to consideration in an arbitral tribunal. The conclusions of the court regarding the absence of such signs do not preclude the arbitral tribunal from studying these issues when determining whether it is competent to consider the dispute and are not binding for the court subsequently performing the functions of support and control in regard of the arbitral proceedings (Article 16 of the Law on Arbitration, Article 16 of the Law on International Commercial Arbitration).

In accordance with Part 1 of Article 8 of the Law on Arbitration, Item 1 of Article 8 of the Law on International Commercial Arbitration, if a statement of claim in regard of an issue, regarding which there is an arbitration agreement, is submitted to court, and herewith the dispute is not subject to consideration by an arbitral tribunal, the court considers this dispute on its merits even if one of the parties objects against its consideration in court.

17. Disputes and other cases arising from civil law relations (civil law disputes) may be resolved in arbitral proceedings, unless otherwise explicitly stipulated in federal

law (Part 1 of Article 22.1 of the CPC RF, Part 1 of Article 33 of the ComPC RF, Part 3 of Article 1 of the Law on Arbitration).

Part 2 of Article 22.1 of the CPC RF, Part 2 of Article 33 of the ComPC RF stipulate a list of civil law disputes and other cases that may not be referred to consideration of an arbitral tribunal. In particular, such disputes include cases considered by the court in the manner of special proceedings, including cases on establishment of facts that have legal significance (Item 1 of Part 2 of Article 22.1, Article 262 of the CPC RF, Chapter 27 of the ComPC RF); cases on protection of rights and legal interests of a group of persons (Chapter 28.2 of the ComPC RF, Chapter 22.3, Part 4 of Article 1 of the CPC RF); disputes on convocation of the general meeting of participants of a legal person (Item 7 of Part 1, Item 1 of Part 2 of Article 225.1 of the ComPC RF, Item 8 of Part 1 of Article 22, Parts 1, 3 of Article 22.1, Part 4 of Article 1 of the CPC RF); disputes regarding expulsion of participants of a legal person from that legal person (Item 5 of Part 2 of Article 225.1 of the ComPC RF, Item 8 of Part 1 of Article 22, Parts 1, 3 of Article 22.1, Part 4 of Article 1 of the CPC RF).

It is not allowed to resolve cases arising from administrative and other public legal relationships in the manner of arbitral proceedings, unless otherwise stipulated in a federal law or an international treaty of the Russian Federation. In particular, the following may not be referred to the consideration of an arbitral tribunal: compensation claims for the violation of right to trial within a reasonable time or execution of a judicial act within a reasonable time; cases pertaining to challenge of non-normative legal acts, decisions and actions (failure to act) of state bodies, local self-government bodies, other bodies, organisations vested with certain state or other public powers by virtue of federal law, of officials, for example in the sphere of emission of securities (Part 1, Item 2 of Part 2 of Article 225.1 of the ComPC RF, Item 8 of Part 1 of Article 22, Part 1 of Article 22.1, Part 4 of Article 1 of the CPC RF); cases arising from tax, customs, budgetary legal relationships.

Federal law must explicitly stipulate other disputes not subject to referral to consideration of an arbitral tribunal (Part 2 of Article 22.1 of the CPC RF, Part 2 of Article 33 of the ComPC RF). For example, in accordance with Item 22 of Article 4.1 of Federal Law No. 39 of 22 April 1996 “On Stock Market”, disputes regarding contracts concluded by Forex dealers with natural persons, who are not individual entrepreneurs, cannot be referred to consideration of an arbitral tribunal.

Disputes arising from relations regulated by Federal Law No. 44 of 5 April 2013 “On the Contract System in the Sphere of Procurement of Goods, Works, Services for

State and Municipal Needs" may not be referred to an arbitral tribunal until the day on which a federal law enters into force, stipulating the manner of determination of the permanent arbitral institution authorised to administer disputes arising from relations regulated by the legislation of the Russian Federation on the contract system in the sphere of procurement of goods, works, services for state and municipal needs (Item 8 of Article 13 of Federal Law No. 409 of 29 December 2015 "On Amendments to Certain Legislative Acts of the Russian Federation and Abrogation of Item 3 of Part 1 of Article 6 of Federal Law 'On Self-Regulating Organisations' due to Adoption of Federal Law 'On Arbitration (Arbitral Proceedings) in the Russian Federation'").

Moreover, federal law may stipulate exceptions from the list of disputes that are not subject to consideration by an arbitral tribunal under the rules of Part 2 of Article 22.1 of the CPC RF, Part 2 of Article 33 of the ComPC RF.

For example, in accordance with Article 36.2 of Federal Law No. 329 of 4 December 2007 "On Physical Culture and Sports in the Russian Federation", disputes arising in professional sports and high performance sports, including individual labour disputes, are referred by the parties to such disputes to arbitration (arbitral proceedings) administered by a permanent arbitral institution considering professional sports and high performance sports disputes in accordance with the legislation of the Russian Federation on arbitration (arbitral proceedings) and with due regard to the features stipulated in said Federal Law and other federal laws.

18. An arbitration agreement is an agreement of the parties to refer to arbitration all or some disputes that arose or may arise between them with regard to any particular legal relationship, independent of whether such a legal relationship was of contractual nature (Article II, paragraph 1 of the 1958 Convention, Part 1 of Article 7 of the Law on Arbitration, Item 1 of Article 7 of the Law on International Commercial Arbitration).

19. Based on provisions of Part 1 of Article 7 of the Law on Arbitration, Item 1 of Article 7 of the Law on International Commercial Arbitration, Part 3 of Article 3 of the CPC RF, Part 6 of Article 4 of the ComPC RF, an arbitration agreement may stipulate that the parties refer to consideration of an arbitral tribunal the disputes that have already arisen between them, as well as future disputes, unless otherwise stipulated in federal law.

For example, an arbitration clause included into a consumer credit (loan) contract before grounds for filing of a claim arose is invalid due to prohibition stipulated in Part 4 of Article 13 of Federal Law No. 353 of 21 December 2013 "On Consumer Credit (Loan)".

20. By virtue of Part 1 of Article 16 of the Law on Arbitration, Item 1 of Article 16 of the Law on International Commercial Arbitration, an arbitration clause that is part of a contract is recognised as an agreement that is independent from the other terms and conditions of the contract, i.e. is of autonomous nature. If the contract is invalidated or recognised as non-concluded, this by itself does not result in invalidity of the arbitration agreement.

The grounds for invalidity, to which the norms of applicable law link the invalidity of an arbitration agreement (e.g. defects of will during conclusion of the arbitration agreement) are related directly to such an agreement, are assessed by the court separately from the defects of the main contract and may coincide with the grounds for invalidity of the main contract only in certain cases (e.g. when it is discovered that the contract was falsified and lacked subsequent approval).

21. Unless the parties agree otherwise, an arbitration agreement applies to any transactions aimed at fulfilment, amendment or dissolution of the contract indicated in the arbitration agreement, as well as to any disputes regarding its conclusion, entry into force, amendment, termination, validity, in particular including the parties returning all performance under a contract recognised as invalid or non-concluded. Unless otherwise follows from the wording of the arbitration agreement, it applies to claims arising from non-contractual damage, unjust enrichment and other claims, if they are related to the contract in regard of which the arbitration agreement was concluded (Parts 9, 11 of Article 7 of the Law on Arbitration, Items 10, 12 of Article 7 of the Law on International Commercial Arbitration).

By general rule, an arbitration agreement remains operative after dissolution of the main contract, except when the will of the parties is directly aimed at dissolving not only the main contract, but also the arbitration clause that it contains.

22. An arbitration agreement may be included into the contract in the form of an arbitration clause or may be concluded as a separate agreement (Part 1 of Article 7 of the Law on Arbitration, Item 1 of Article 7 of the Law on International Commercial Arbitration).

The requirement for an arbitration agreement to be concluded in written form is observed, in particular, if it is concluded through exchange of letters, telegraphic and telex messages, fax messages and other documents, including electronic documents transmitted via communication channels allowing to reliably ascertain that the document originates from the other party (Parts 2 and 3 of Article 7 of the Law on Arbitration, Items 2 and 3 of Article 7 of the Law on International Commercial Arbitration).

Taking into account the provisions of Parts 2 and 3 of Article 7 of the Law on Arbitration and Items 2–4 of Article 7 of the Law on International Commercial Arbitration, an arbitration agreement is also regarded as concluded in writing in the form of an electronic message, if the information contained therein is accessible for further use, and if the arbitration agreement is concluded in accordance with requirements of the law, stipulated for a contract concluded by way of exchange of documents through electronic communications.

An arbitration agreement may be concluded through exchange of procedural documents (in particular, of the statement of claim and the statement of defence), in which one of the parties states that an agreement exists, and the other does not object against it (Part 4 of Article 7 of the Law on Arbitration, Item 5 of Article 7 of the Law on International Commercial Arbitration). Unless otherwise follows from the texts of such procedural documents, this agreement applies only to the dispute, during arbitration regarding which it has been concluded. Further disputes with participation of the same parties are not covered by such an arbitration agreement.

When applying Part 6 of Article 7 of the Law on Arbitration, Item 7 of Article 7 of the Law on International Commercial Arbitration, the court should take into account that the arbitration clause may be concluded through reference, in particular to standard rules (e.g. to the rules of organised trading, clearance), a model contract.

The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement concluded in writing, provided that the reference is such as to regard that clause as part of the contract (Part 5 of Article 7 of the Law on Arbitration, Item 6 of Article 7 of the Law on International Commercial Arbitration), i.e. the court establishes that it is the will of the parties to apply the terms and conditions of this document to the relations arising from the contract. In particular, a reference in a contract, stating that all future disputes will be resolved in the manner stipulated in another document, the text of which contains an arbitration

clause (e.g. a particular model contract) makes the corresponding clause a part of the parties' contract.

23. An arbitration agreement may be concluded by accession to a recommended arbitration clause contained in the charter of an organisation, in the rules for dispute resolution of a particular organisation, in other rules of an organisation, exchange market, association, etc., provided that these acts apply to the parties that concluded the arbitration agreement.

When applying Part 7 of Article 7 of the Law on Arbitration, Item 8 of Article 7 of the Law on International Commercial Arbitration, the courts should take into account that by virtue of legal succession, unless otherwise stipulated in the charter of a legal person, an arbitration clause included into the charter binds not only the legal person itself and its participants that voted to include the arbitration clause, but also any new participants of the legal person, who purchased stock or participation shares in its charter capital or became its members after the arbitration clause was included into the charter (Part 10 of Article 7 of the Law on Arbitration, Item 11 of Article 7 of the Law on International Commercial Arbitration).

Such an arbitration clause is also valid with regard to a corporate dispute with participation of counterparts of the legal person (third persons), for example with regard to claims directed at realisation of the right stipulated in the sixth paragraph of Item 1 of Article 65.2 of the CC RF (Item 3 of Part 1 of Article 225.1 of the ComPC RF, Item 8 of Part 1 of Article 22, Part 4 of Article 1 of the CPC RF), if such third persons are also parties to the arbitration agreement.

Herewith, both an independent arbitration agreement concluded between the legal person and a third person and a statement regarding accession to the arbitration clause contained in the charter of the legal person, sent to the address of the legal person, may serve as evidence of the fact that such a third person consented to being bound by the arbitration agreement contained in the charter of the legal person.

24. It is allowed to conclude alternative-based dispute resolution agreements, stipulating the plaintiff's right to choose the applicable dispute resolution procedure at its discretion. An alternative-based dispute resolution agreement may provide the plaintiff with a choice between a tribunal and a court; between two and more arbitral institutions; between a tribunal administered by an arbitral institution and an *ad hoc* tribunal, etc. An alternative-based dispute resolution agreement may also stipulate the

right of one party to submit a claim to one of the tribunals or courts listed in the agreement, and of the other party – to a different tribunal or court.

A dispute resolution agreement providing this right of choice to only one party to the contract (asymmetric agreement) is invalid in the part depriving the other party of the right to choose from the same dispute resolution options. In this instance, each of the parties to the contract has the right to recourse to any of the means of dispute resolution stipulated in the alternative-based agreement.

25. By virtue of Part 10 of Article 7 of the Law on Arbitration and Item 11 of Article 7 of the Law on International Commercial Arbitration, an arbitration agreement concluded by the legal predecessor applies to all its legal successors both in case of universal (inheritance, reorganisation of a legal person) and singular (any forms of substitution of persons in an obligation) legal succession.

26. The grounds for competence of an arbitral tribunal are a valid and operative arbitration agreement, capable of being performed.

Application of provisions of Part 8 of Article 7 of the Law on Arbitration, Item 9 of Article 7 of the Law on International Commercial Arbitration presupposes that any doubts should be interpreted in favour of validity and capability of performance of the arbitration agreement.

A party to an arbitration agreement that disputes its validity and capability of performance is obliged to prove that any interpretation renders it invalid and (or) incapable of being performed.

27. By implication of Article V, paragraph 1 (a) of the 1958 Convention, the issues of whether an arbitration agreement is concluded, valid, capable of being performed, as well as the issues of its interpretation are regulated by the law applicable to the arbitration agreement. The parties may independently choose the law applicable to the arbitration agreement. By virtue of arbitration agreement autonomy principle, the law applicable to the arbitration agreement may differ from the law applicable to the main contract and from the law applicable to the arbitration procedure. Where the parties did not choose the law applicable to the arbitration agreement, it is regulated by the law of the state in which the arbitral award has been adopted or must be adopted in accordance with the arbitration agreement.

28. By virtue of Part 12 of Article 7 of the Law on Arbitration and Item 13 of Article 7 of the Law on International Commercial Arbitration, the rules of arbitration, to which a reference is contained in the arbitration agreement, are regarded as an inalienable part of the arbitration agreement. Where the provisions of the chosen rules of arbitration contradict other terms and conditions of the arbitration agreement, the courts should proceed from the priority of conditions of the arbitration agreement that were specifically agreed upon by the parties, except when the corresponding provisions of the chosen rules of arbitration cannot be amended by agreement of the parties.

29. An invalid arbitration agreement is understood as an agreement concluded under defect of will (deceit, threat, violence), in violation of the form, or contradicting other imperative requirements of applicable law.

30. An arbitration agreement incapable of being performed is understood as an agreement from the contents of which it is impossible to establish the will of the parties regarding the arbitration procedure chosen by them (e.g. it is impossible to establish whether a particular institutional arbitration tribunal or an *ad hoc* tribunal was chosen) or which cannot be performed in accordance with the will of the parties (e.g. an arbitral institution agreed upon has no right to administer arbitration in accordance with the requirements of applicable law).

Where a non-existent arbitral institution is indicated, this in particular may be a sign that the arbitration clause is incapable of being performed.

Taking into account the provisions of Part 8 of Article 7 of the Law on Arbitration, Item 9 of Article 7 of the Law on International Commercial Arbitration, when interpreting an arbitration agreement containing an imprecise name of an arbitral institution or of applicable rules of arbitration, the court should proceed from whether it is possible to determine the arbitral institution or the rules of arbitration, at the use of which the expressed will of the parties was directed. An arbitration agreement may be recognised as incapable of being performed only when it is impossible to establish the actual will of the parties, for example when there are two or more arbitral institutions, the names of which are similar to the name indicated by the parties, provided that this defect of the arbitration agreement cannot be remedied with the use of mechanisms stipulated in Article IV of the Convention on International Commercial Arbitration.

An arbitration agreement corresponding to the arbitration agreement recommended by the arbitral institution agreed upon by the parties is capable of being performed.

Where there are doubts as to whether the arbitration agreement is valid and capable of being performed, the court should assess not only the text of the arbitration agreement, but also other evidence allowing to establish the actual will of the parties (including the negotiations and communications of the parties preceding the conclusion of the arbitration agreement, the subsequent conduct of the parties).

31. Where, in accordance with Part 2 of Article 16 of the Law on Arbitration, Item 2 of Article 16 of the Law on International Commercial Arbitration, a party to arbitration states objections against the competence of the arbitral tribunal no later than presenting its first statement on the merits of the dispute, its further participation in the arbitral proceedings is not in itself the acknowledgment of competence of the arbitral tribunal. Where the defendant submits a counterclaim, this also cannot be construed as recognition of competence of the arbitral tribunal, if the defendant objects against the competence of the tribunal in its statement of defence or its first statement on the merits of the dispute.

32. Where, in the course of arbitration, a condition of the arbitration agreement, the provisions of applicable rules of arbitration, or a dispositive norm of the Law on Arbitration or of the Law on International Commercial Arbitration are not complied with, and the party that knows or must know about such a violation continues to participate in the arbitration without stating objections against such a violation without undue delay (or, if a certain time limit is stipulated for this purpose – within that time), it is regarded as having waived its right to objection (Article 4 of the Law on Arbitration and Article 4 of the Law on International Commercial Arbitration). This party loses the right to state said objections in the future, both at a later stage of arbitral proceedings and during consideration of an application for annulment or enforcement of the arbitral award, because by not stating any objections and continuing its participation in the arbitration this party expresses consent with the arbitration procedure through its actions.

If a party to arbitration believes that the arbitral tribunal is exceeding its competence, this party must state said objections at once, as soon as an issue that is outside the competence is raised in the course of arbitration (Part 2 of Article 16 of the Law on Arbitration, Item 2 of Article 16 of the Law on International Commercial Arbitration). Herewith, the party is regarded as having lost its right to objection regarding competence over a disputed issue, if it presents its position on the merits of

the issue without referring to the absence of competence. In particular, the party is regarded as having lost its right to objection within the framework of proceedings regarding the challenge and enforcement of the arbitral award.

33. If an arbitral tribunal issues any separate preliminary ruling stating that it is competent, any of the parties to arbitration may apply to court with an application for annulment of that ruling in the manner stipulated in Article 422.1 of the CPC RF, Article 235 of the ComPC RF.

Where such an application is submitted to a court, this in itself does not preclude the arbitral tribunal from proceeding with arbitration and adopting an arbitral award (Part 3 of Article 16 of the Law on Arbitration, Item 3 of Article 16 of the Law on International Commercial Arbitration).

A court decree annulling the preliminary ruling of the arbitral tribunal regarding its competence constitutes grounds for termination of unfinished arbitration.

A party that did not apply to court with an application for annulment of the separate preliminary ruling regarding the competence of the tribunal does not lose the right to state the objections against the competence of the tribunal, previously stated during the arbitral proceedings, within the framework of court proceedings regarding the annulment of an arbitral award or the issuance of a writ of execution for its enforcement.

If an arbitral tribunal issues a ruling stating that it is not competent, the arbitration is subject to termination. Such a ruling, as well as the acts of the tribunal pertaining to termination of arbitration based on the aforementioned grounds, are not subject to challenge in court. The court refuses to accept an application for challenge of said acts of the tribunal pursuant to Item 1 of Part 1 of Article 134 of the CPC RF, Item 1 of Part 1 of Article 127.1 of the ComPC RF, and if proceedings have been initiated in the case – terminates proceedings in the case in the manner stipulated in the second paragraph of Article 220 of the CPC RF, Item 1 of Part 1 of Article 150 of the ComPC RF. In this instance, the interested person may apply to court with a claim for protection of its violated rights under the general rules of jurisdiction over the dispute.

If the parties to arbitral proceedings have explicitly agreed to exclude the possibility of challenging the ruling of an arbitral tribunal that states it is competent (Part 3 of Article 16 of the Law on Arbitration) in the manner stipulated in Article 422.1 of the

CPC RF, Article 235 of the ComPC RF, such an application is not subject to consideration by the court (Item 1 of Part 1 of Article 134 of the CPC RF, Item 1 of Part 1 of Article 127.1 of the ComPC RF), and proceedings initiated in the case must be terminated (second paragraph of Article 220 of the CPC RF, Item 1 of Part 1 of Article 150 of the ComPC RF).

4. Performance of Functions of Support in regard of the Arbitral Tribunal by the Courts

34. The court performs the functions of appointment of an arbitrator (arbitrators) where Parts 3 and 4 of Article 11 of the Law on Arbitration, Items 3 and 4 of Article 11 of the Law on International Commercial Arbitration apply, provided that all the procedures stipulated in law or the agreement of the parties have been complied with, but this has not provided the necessary result, and that the arbitral tribunal cannot be formed without participation of the court.

As regards Item 1 of Part 3 of Article 11 of the Law on Arbitration, sub-item 1 of Item 3 of Article 11 of the Law on International Commercial Arbitration, where arbitration is conducted with participation of several arbitrators, the court may appoint any of the arbitrators, including the president of the arbitral tribunal. If the court appoints one of the arbitrators in accordance with the application of a party, the appointment (or election) of the president of the tribunal must be performed in accordance with the procedure stipulated in the agreement of the parties. If in this instance the president of the tribunal cannot be appointed (elected) in accordance with the procedure stipulated in the agreement of the parties, then one of the parties may submit a separate application to the court in regard of the president’s appointment.

When appointing an arbitrator, the court takes into account the requirements of the law and of the agreement of the parties, in particular such considerations that would ensure the appointment of an independent and impartial arbitrator (Part 5 of Article 11 of the Law on Arbitration and Item 6 of Article 11 of the Law on International Commercial Arbitration).

For the purpose of selection of candidates, the court may use the recommended lists of arbitrators, managed by permanent arbitral institutions.

The court does not perform the functions of appointment of an arbitrator, if the parties to an arbitration administered by a permanent arbitral institution have

explicitly agreed to rule out the possibility of court appointment of an arbitrator, as well as if the agreement of the parties (in particular the applicable rules of arbitration) provides for other ways of appointment of an arbitrator (e.g. appointment of an arbitrator by the permanent arbitral institution), and a party fails to provide evidence that such a way cannot guarantee the appointment of an arbitrator in accordance with the agreed appointment procedure (Part 4 of Article 11 of the Law on Arbitration, Item 5 of Article 11 of the Law on International Commercial Arbitration).

35. The court considers a recusal against an arbitrator, filed by a party within the framework of arbitration of a domestic dispute or of international commercial arbitration with place of arbitration in the Russian Federation, if the party's application for recusal has earlier been declined in accordance with the procedure stipulated in the agreement of the parties.

The fact that said application is submitted to court does not by itself preclude the arbitral tribunal, including the recused arbitrator, from proceeding with the arbitration and adopting the arbitral award (Part 3 of Article 13 of the Law on Arbitration, Item 3 of Article 13 of the Law on International Commercial Arbitration).

Based on provisions of Part 3 of Article 13 of the Law on Arbitration, Item 3 of Article 13 of the Law on International Commercial Arbitration, second paragraph of Article 220 of the CPC RF, Item 1 of Part 1 of Article 150 of the ComPC RF, the court terminates proceedings regarding an application for recusal of an arbitrator, if the parties to arbitration administered by a permanent arbitral institution have concluded an explicit agreement ruling out the court resolution of the issue of an arbitrator's recusal.

If an application for an arbitrator's recusal has not been considered by the court before the arbitral award on the merits was adopted by the tribunal, proceedings in this case are subject to termination due to finalisation of arbitral proceedings (Part 4 of Article 427.3 of the CPC RF, Part 4 of Article 240.3 of the ComPC RF). In this instance, a party to arbitration that filed such an application is not deprived of the right to refer to the circumstances that formed grounds for said application when the court considers an application for annulment of the arbitral award or for issuance of a writ of execution for its enforcement in the same dispute.

36. The court adopts provisional measures upon application of a party to arbitral proceedings under the general rules stipulated in the norms of Chapter 13 of the

CPC RF, Chapter 8 of the ComPC RF, with due regard to the procedure of arbitral proceedings based on the arbitration agreement.

In particular, apart from evaluating the substantiation of the application regarding the need to adopt the requested provisional measures and their adequacy to the claims stated before the arbitral tribunal, as well as when assessing whether it is possible to secure the enforcement of the arbitral award (Article 139, Parts 1 and 3 of Article 140 of the CPC RF, Article 91 of the ComPC RF), the court checks whether the arbitration agreement is valid and capable of being performed, and whether it was allowed to refer the dispute that arose between the parties to consideration of the arbitral tribunal (Article 22.1 of the CPC RF, Article 33 of the ComPC RF). If there is a ruling or a different act of the tribunal regarding provisional measures, this does not preclude the filing of an application for provisional measures to a court.

The court considers an application for securing the claim within the term and under the rules stipulated in Article 141 of the CPC RF, Article 93 of the ComPC RF. After considering the application, the court adopts a court decree on application of measures aimed at securing the claim or on refusal to secure the claim (Article 141 of the CPC RF, Part 5 of Article 93 of the ComPC RF).

Provisional measures may be adopted by the court in regard of arbitral proceedings with place of arbitration both on the territory of the Russian Federation and abroad.

Based on provisions of Chapter 13, Section VI of the CPC RF, Chapters 8, 30 of the ComPC RF, Article 17 of the Law on Arbitration, Article 17 of the Law on International Commercial Arbitration, the rulings, other acts of an arbitral tribunal regarding provisional measures are subject to execution by the parties, but cannot be enforced in the manner stipulated for enforcement of arbitral awards; therefore, writs of execution are not issued for enforcement of acts of tribunals regarding provisional measures.

37. Based on provisions of Article 63.1 of the CPC RF, Article 74.1 of the ComPC RF, Article 30 of the Law on Arbitration, Article 27 of the Law on International Commercial Arbitration, the right to apply to court with a request for support in taking of evidence is provided to the arbitral tribunal and to a party to the dispute, which may be provided with a request by the tribunal for direct forwarding to the court.

In accordance with Part 1 of Article 63.1 of the CPC RF, Part 1 of Article 74.1 of the ComPC RF, support in taking of evidence may be requested by an arbitral tribunal with place of arbitration in the Russian Federation, constituted within the framework of arbitral proceedings administered by a permanent arbitral institution, in particular by a foreign arbitral institution that obtained the right to perform the functions of a permanent arbitral institution in accordance with Article 44 of the Law on Arbitration.

In accordance with Part 3 of Article 63.1 of the CPC RF, Part 3 of Article 74.1 of the ComPC RF, a request of an arbitral tribunal may be forwarded for the purpose of obtaining written evidence, material evidence, other documents and materials stipulated in Articles 71, 73 and 77 of the CPC RF, Articles 75, 76 and 89 of the ComPC RF.

38. The court considers and fulfils the request for support in taking of evidence in the manner stipulated in Part 6 of Article 63.1 of the CPC RF, Parts 4 and 5 of Article 74.1 of the ComPC RF.

Prior to fulfilling the request, the court checks whether it was allowed to refer the dispute to consideration of the arbitral tribunal (Part 2 of Article 22.1, Item 3 of Part 4 of Article 63.1 of the CPC RF, Article 33, Item 3 of Part 4 of Article 74.1 of the ComPC RF).

The court supports a tribunal in taking of evidence within the limits of the tribunal's request, in particular when the request is issued to a party to arbitral proceedings.

For the purposes of fulfilling the request for support in taking of evidence, the court may order to present evidence in the manner stipulated in Article 57 of the CPC RF, Parts 4, 6 of Article 66 of the ComPC RF.

Herewith, the court does not evaluate the requested evidence under the rules of Article 67 of the CPC RF, Article 71 of the ComPC RF.

39. The court refuses to fulfil the arbitral tribunal's request for support in taking of evidence, where Part 4 of Article 63.1 of the CPC RF, Part 4 of Article 74.1 of the ComPC RF apply.

By implication of Part 1 of Article 63.1 of the CPC RF, Part 1 of Article 74.1 of the ComPC RF, the court also refuses to fulfil the tribunal's request for support in taking

of evidence, if the request is sent by an *ad hoc* tribunal or by a tribunal with place of arbitration outside of the Russian Federation.

40. In accordance with Parts 5 and 7 of Article 63.1 of the CPC RF, Parts 5 and 7 of Article 74.1 of the ComPC RF, after considering the request for support in taking of evidence, the court adopts a court decree on refusal to fulfil the request or a court decree on fulfilment of the request.

A court decree on refusal to fulfil the request is forwarded to the tribunal that sent the request (Part 5 of Article 63.1 of the CPC RF, Part 5 of Article 74.1 of the ComPC RF).

A court decree on fulfilment of the request, accompanied by all the materials gathered in fulfilment of the request, is forwarded to the tribunal that sent the request within three days or is handed to the party to arbitral proceedings, if the request explicitly states the possibility of receipt of requested evidence by that party (Part 7 of Article 63.1 of the CPC RF, Part 7 of Article 74.1 of the ComPC RF).

41. With due regard to the provisions of Article 72, Part 3 of Article 90 of the ComPC RF and of Part 4 of Article 1, Articles 64–66 of the CPC RF, the possibility for the court to consider the issue of securing evidence upon application of a party to arbitral proceedings is not ruled out.

5. Challenge and Enforcement of Arbitral Awards

42. An award of an arbitral tribunal with place of arbitration on the territory of the Russian Federation may be challenged by filing an application for annulment to a court (Part 1 of Article 418 of the CPC RF, Part 1 of Article 230 of the ComPC RF). It is not allowed to challenge arbitral awards in courts of the Russian Federation, if the place of arbitration was outside of the Russian Federation; in this regard, the court refuses to accept such an application by virtue of Item 1 of Part 1 of Article 134 of the CPC RF, Item 1 of Part 1 of Article 127.1 of the ComPC RF, proceedings initiated based on such applications are subject to termination pursuant to the second paragraph of Article 220 of the CPC RF, Item 1 of Part 1 of Article 150 of the ComPC RF.

The recognition and enforcement of an arbitral award, foreign arbitral award are performed under the rules of Chapters 45, 47 of the CPC RF, § 2 of Chapter 30 of the

ComPC RF, Chapter 31 of the ComPC RF, Chapter 8 of the Law on Arbitration, Section VIII of the Law on International Commercial Arbitration.

43. The parties to an arbitration agreement providing for administration of arbitration by a permanent arbitral institution may by their explicit agreement stipulate therein that the arbitral award is final for the parties (Article 40 of the Law on Arbitration, Item 1 of Article 34 of the Law on International Commercial Arbitration).

The condition regarding the final nature of the arbitral award may only be contained in the explicit agreement of the parties and cannot be regarded as mutually approved if it is contained in the rules of the permanent arbitral institution, even if the parties, when concluding the arbitration agreement, have agreed that such rules are an inalienable part of the arbitration agreement (Item 13 of Article 2, Part 12 of Article 7, Article 40 of the Law on Arbitration, Item 13 of Article 7, Item 1 of Article 34 of the Law on International Commercial Arbitration).

The agreement regarding the final nature of the arbitral award only applies to the parties of arbitral proceedings. Other persons, in regard of whose rights and duties the arbitral award is issued, as well as the prosecutor, where so stipulated in law (Part 1 of Article 418 of the CPC RF, Parts 2, 3, 5 of Article 230 of the ComPC RF), may challenge such an award in court by filing an application for its annulment.

A party to arbitral proceedings is not deprived of the right to use the means of judicial control in regard of the arbitral tribunal within the framework of proceedings for issuance of a writ of execution for enforcement of the arbitral award.

44. By virtue of Part 6 of Article 420, Part 4 of Article 425 of the CPC RF, Part 6 of Article 232, Part 4 of Article 238 of the ComPC RF, when considering applications on annulment, enforcement of an arbitral award, the court may not re-evaluate the facts established by the arbitral tribunal or review the arbitral award on its merits, and confines itself to establishing the fact of whether there are grounds or no grounds for annulling the arbitral award.

45. The grounds for annulling an award of an arbitral tribunal with place of arbitration on the territory of the Russian Federation are stipulated in provisions of Article 421 of the CPC RF, Article 233 of the ComPC RF, Item 2 of Article 34 of the Law on International Commercial Arbitration.

The grounds for refusing to issue a writ of execution for the enforcement of such an arbitral award are stipulated in provisions of Article 426 of the CPC RF, Article 239 of the ComPC RF, Item 1 of Article 36 of the Law on International Commercial Arbitration.

The grounds for refusal to recognise and enforce foreign arbitral awards are stipulated in Item 5 of Part 1 of Article 412, Part 1 of Article 416, Parts 1 and 3 of Article 417 of the CPC RF, Part 3 of Article 244 of the ComPC RF, Article 36 of the Law on International Commercial Arbitration, Article V of the 1958 Convention.

Based on provisions of Article 417, Part 3 of Article 421, Part 3 of Article 426 of the CPC RF, Part 3 of Article 233, Part 3 of Article 239, Article 244 of the ComPC RF, Item 2 of Article 34, Item 1 of Article 36 of the Law on International Commercial Arbitration, Article V, paragraph 1 of the 1958 Convention, the burden to prove the facts serving as grounds for annulment of an arbitral award or refusal to recognise and enforce an arbitral award lies on the party filing the application for annulment of the arbitral award or on the losing party to arbitration.

46. Provisions of Item 5 of Part 1 of Article 412, Part 1 of Article 416, Articles 417, 421, 426 of the CPC RF, Articles 233, 239, Part 3 of Article 244 of the ComPC RF, Item 2 of Article 34, Item 1 of Article 36 of the Law on International Commercial Arbitration, Article V of the 1958 Convention provide grounds for annulment of an arbitral award and refusal to enforce an arbitral award.

The court may annul an award of an arbitral tribunal with place of arbitration on the territory of the Russian Federation or refuse to enforce an arbitral award based on grounds stipulated in Item 1 of Part 1 of Article 417, Items 1–5 of Part 3 of Article 421, Items 1–5 of Part 3 of Article 426 of the CPC RF, Items 1–5 of Part 3 of Article 233, Items 1–5 of Part 3 of Article 239 of the ComPC RF, sub-item 1 of Item 2 of Article 34, sub-item 1 of Item 1 of Article 36 of the Law on International Commercial Arbitration, Article V, paragraph 1 of the 1958 Convention, only if the party filing the application for annulment of such an award or the losing party to arbitration itself refers to these grounds in the application. Herewith, the court does not on its own initiative check the existence of and does not apply the grounds for annulment of an arbitral award or refusal to issue a writ of execution for enforcement of an arbitral award, stipulated in those norms.

The court applies the grounds for annulment of an arbitral award or for refusal to issue a writ of execution for enforcement of an arbitral award stipulated in Item 5 of

Part 1 of Article 412, Item 2 of Part 1 of Article 417, Items 1, 2 of Part 4 of Article 421, Items 1, 2 of Part 4 of Article 426 of the CPC RF, Items 1, 2 of Part 4 of Article 233, Items 1, 2 of Part 4 of Article 239 of the ComPC RF, sub-item 2 of Item 2 of Article 34, sub-item 2 of Item 1 of Article 36 of the Law on International Commercial Arbitration, Article V, paragraph 2 of the 1958 Convention independent of whether the corresponding party states their existence.

If there is evidence in the case, indicating that the dispute could not be subject matter of arbitral proceedings, and (or) that the arbitral award violates the public policy of the Russian Federation, the court may suggest it to the persons participating in the case to discuss these issues (Article 56 of the CPC RF, Article 65 of the ComPC RF).

The imperative nature of the powers of the court, stipulated in Item 2 of Part 1 of Article 417, Items 1, 2 of Part 4 of Article 421, Items 1, 2 of Part 4 of Article 426 of the CPC RF, Items 1, 2 of Part 4 of Article 233, Items 1, 2 of Part 4 of Article 239 of the ComPC RF, sub-item 2 of Item 2 of Article 34, sub-item 2 of Item 1 of Article 36 of the Law on International Commercial Arbitration, Article V, paragraph 2 of the 1958 Convention does not exclude the right of the parties to arbitration, third persons to motion for the arbitral award to be checked based on said grounds, to present the corresponding evidence in support of their arguments.

47. In accordance with the second paragraph of Item 1 of Part 1 of Article 417, Item 1 of Part 3 of Article 421, Item 1 of Part 3 of Article 426 of the CPC RF, Item 1 of Part 3 of Article 233, Item 1 of Part 3 of Article 239 of the ComPC RF, second paragraph of sub-item 1 of Item 2 of Article 34, second paragraph of sub-item 1 of Item 1 of Article 36 of the Law on International Commercial Arbitration, Article V, paragraph 1 (a) of the 1958 Convention and Article VI, paragraph 2 of the Convention on International Commercial Arbitration, the court may annul the award of an arbitral tribunal, international commercial arbitration tribunal adopted on the territory of the Russian Federation, as well as refuse to issue a writ of execution for enforcement of the arbitral award, if the losing party to arbitral proceedings presents evidence that one of the parties of the arbitration agreement, based on which the dispute was resolved by the arbitral tribunal, did not have full legal capacity.

With regard to these grounds, the court checks the legal passive capacity of a legal person.

As regards arbitral proceedings with place of arbitration on the territory of the Russian Federation, the issue of whether a person that signed the arbitration

agreement had the necessary passive legal capacity and legal capacity is determined by the personal law of that person (Article 1197, 1202, 1203 of the CC RF).

48. When verifying the arguments of a party to arbitral proceedings that it was not duly notified about the selection (appointment) of arbitrators or about the time and place of session of the arbitral tribunal, or could not provide its explanations to the tribunal for other good reasons (third paragraph of Item 1 of Part 1 of Article 417, Item 5 of Part 3 of Article 421, Item 3 of Part 3 of Article 426 of the CPC RF, Item 5 of Part 3 of Article 233, Item 3 of Part 3 of Article 239 of the ComPC RF, third paragraph of sub-item 1 of Item 2 of Article 34 of the Law on International Commercial Arbitration, Article V, paragraph 1 (b) of the 1958 Convention), the court should take into account that due to the discretionary nature of arbitral proceedings, the parties may stipulate any manner of receipt of written messages or follow the manner stipulated in the rules of the permanent arbitral institution, which the parties agreed to apply.

A party that provided the other party, the arbitral tribunal or the arbitral institution with an address for forwarding of notifications about the arbitral proceedings bears the risk of non-receipt or failure to timely receive the notifications delivered at that address (Articles 20, 165.1 of the CC RF).

In this regard, unless the parties to arbitration have agreed upon a different manner, the documents and other materials are regarded as received, if they were sent to the last known address of an organisation that is party to arbitration, or to the place of residence of a citizen, in particular of an individual entrepreneur, who is a party to arbitration, by registered mail with return receipt or by other means providing for the registration of the attempt to deliver said documents and materials (Article 3 of the Law on Arbitration, Article 3 of the Law on International Commercial Arbitration).

A notification sent to a party to arbitration, arbitral proceedings at the address provided by that party, but not received for reasons within its control (e.g. due to absence at the place of residence or evasion of receipt of postal correspondence at the post office) is regarded as delivered.

If following the conclusion of an arbitration agreement a party to that agreement changed its place of residence or address, but failed to inform the other party to the agreement (and after arbitration commences – also the arbitral tribunal) about these circumstances, it bears the risks pertaining to non-receipt or failure to timely receive

notifications, and notification sent to it at the address indicated at the time of conclusion of the arbitration agreement is regarded due.

Notification about the time and place of a session of an arbitral tribunal in regard of the case is regarded due, only if it was sent with a view to provide each of the parties with reasonable time to prepare for the consideration of the case and arrive to the session.

49. When studying the arguments of a party to arbitral proceedings regarding the non-compliance of the composition of the arbitral tribunal or of the arbitration procedure with the agreement of the parties or with federal law as grounds for annulment of the arbitral award, for refusal to enforce that award, the court, with due regard to provisions of Article 18 of the Law on Arbitration, Article 18 of the Law on International Commercial Arbitration, checks whether the principle of independence and impartiality of arbitrators was observed.

Non-compliance of the arbitration procedure with the agreement of the parties or with federal law may only constitute grounds for annulment of the arbitral award or for refusal to enforce it, if said violation resulted in significant violation of rights of one of the parties, entailing the infringement of the right to fair consideration of the dispute, and if that party objected against such non-compliance without undue delay in accordance with Article 4 of the Law on International Commercial Arbitration.

50. Arbitral awards adopted within the framework of arbitration conducted by an *ad hoc* tribunal constituted in violation of the prohibition stipulated in Part 20 of Article 44 of the Law on Arbitration are regarded as adopted in violation of procedure stipulated in federal law. Said violations exist, if the tribunal is formally constituted to hear a specific dispute (*ad hoc*), but in reality has features that are characteristic of institutional arbitration (e.g. the arbitrators are united in chambers or lists, the tribunal formulates its own rules of arbitration, one and the same person performs supporting functions in conducting arbitral proceedings with participation of different arbitrators).

51. The court annuls an arbitral award or refuses to issue a writ of execution for its enforcement, if it establishes that such an award or its enforcement is contrary to the public policy of the Russian Federation (Item 5 of Part 1 of Article 412, Item 2 of Part 1 of Article 417, Item 2 of Part 4 of Article 421, Item 2 of Part 4 of Article 426 of the CPC RF, Item 2 of Part 4 of Article 233, Item 2 of Part 4 of Article 239 of the ComPC RF, third paragraph of sub-item 2 of Item 2 of Article 34, third paragraph of

sub-item 2 of Item 1 of Article 36 of the Law on International Commercial Arbitration, Article V, paragraph 2 (b) of the 1958 Convention).

For the purpose of application of said norms, public policy (*ordre public*) is understood as the fundamental legal basics (principles), characterised by utmost imperative nature, universality, particular social and public significance, which form the basis on which the economic, political, legal system of the Russian Federation is constructed.

In order to annul an arbitral award or refuse its enforcement for the reason of public policy violation, the court must establish the concurrent existence of two features: first, the violation of fundamental principles on which the economic, political, legal system of the Russian Federation is constructed, which, secondly, may entail consequences in the form of harm to the sovereignty or security of the state, may infringe the interests of large social groups or violate constitutional rights and freedoms of natural or legal persons.

If the arbitral tribunal applies foreign law norms that do not have analogues in Russian law; if the defendant does not participate in arbitral proceedings; if the debtor fails to state objections against the enforcement of the arbitral award, these are not, as such, signs of violation of the public policy of the Russian Federation.

Violation of the public policy is applied by the court as grounds for annulment of an arbitral award, for refusal to enforce it only in exceptional cases, without replacing the special grounds for refusal of recognition and enforcement, stipulated in international treaties of the Russian Federation and the norms of the CPC RF and ComPC RF. For example, if the manner of notification of the losing party to arbitration about the time and place of consideration of the case results in its inability to provide its explanations to the tribunal, these are independent grounds for annulment or refusal to enforce an award, and therefore it is not necessary to use the public policy clause mechanism due to its extraordinary nature.

52. If within the framework of consideration of an application for annulment of an arbitral award or for issuance of a writ of execution for its enforcement the court establishes that a defect of the award, which constitutes grounds for annulment or refusal to enforce the award, pertains only to certain provisions of that award, which may be severed from the rest of the award, the court annuls or refuses to enforce only the provisions of the award that contain those defects. Herewith, the part of the award that does not contain such defects remains operative and may be enforced by the

court. For example, a part of an award that contains conclusions on issues beyond the scope of the arbitration agreement or violates the public policy of the Russian Federation may be severed (Item 3 of Part 3, Item 2 of Part 4 of Article 421, Item 4 of Part 3, Item 2 of Part 4 of Article 426 of the CPC RF, Item 3 of Part 3, Item 2 of Part 4 of Article 233, Item 4 of Part 3, Item 2 of Part 4 of Article 239 of the ComPC RF).

For example, if it is impossible to enforce the arbitral award in regard of one of joint debtors (e.g. due to procedures of realisation of a citizen's property within the framework of bankruptcy), where the party applying to court insists on issuance of the writ of execution for enforcement of the award in regard of the other joint debtors, and there are no other grounds for refusal to issue a writ of execution, this does not constitute grounds for refusal to issue the writ of execution (Part 4 of Article 1, Item 3 of Part 3 of Article 426 of the CPC RF, Part 5 of Article 3, Item 3 of Part 3 of Article 239 of the ComPC RF).

53. By implication of Article 423 of the CPC RF, Article 236 of the ComPC RF, Articles 38, 41 of the Law on Arbitration, the court resolves the issue of issuing a writ of execution for enforcement of an arbitral award that has not been voluntarily executed by the debtor.

Partial execution of the arbitral award by a party results in refusal to issue a writ of execution for enforcement of the part of the award that has been executed voluntarily (Part 4 of Article 1, Item 4 of Part 3 of Article 426 of the CPC RF, Part 5 of Article 3, Item 4 of Part 3 of Article 239 of the ComPC RF).

54. If a person participating in the case states arguments that may only be verified if the court has the materials of the arbitration file (e.g. that there was no due notification about the appointment of an arbitrator or about the arbitral proceedings, in particular about the time and place of the session of the arbitral tribunal), then, with due regard to Part 2 of Article 420, Part 2 of Article 425 of the CPC RF, Part 2 of Article 232, Part 2 of Article 238 of the ComPC RF, the court should suggest the issue of ordering to present said materials for discussion of the parties. An order to present the materials of the arbitration file is issued under the rules of Part 2 of Article 57 of the CPC RF, Parts 6, 7 of Article 66 of the ComPC RF.

55. During consideration of a case on annulment or enforcement of an arbitral award, any of the parties may motion for proceedings in the case to be stayed for a term not exceeding three months to allow the arbitral tribunal to renew the arbitral proceedings

and remedy the grounds for annulment of the award. If the court concludes that the violations committed by the tribunal cannot be remedied through renewal of arbitral proceedings, it must refuse to satisfy the party's motion to stay the proceedings (Part 5 of Article 420, Part 8 of Article 425 of the CPC RF and Part 5 of Article 232, Part 8 of Article 238 of the ComPC RF, Part 6 of Article 37 of the Law on Arbitration, Item 4 of Article 34 of the Law on International Commercial Arbitration).

If during consideration of a case on enforcement of an arbitral award the court discovers obvious arithmetical errors, slips of pen or misprints made by the arbitral tribunal, then, pursuant to Part 8 of Article 425 of the CPC RF, Part 8 of Article 238 of the ComPC RF, the court may suggest it to the parties to discuss the issue of staying proceedings in the case to allow the tribunal to remedy those violations.

56. If an arbitral tribunal adopts an award in a dispute regarding rights to real property, in particular an award that does not require enforcement, this in itself does not constitute grounds for state cadastre registration and (or) state registration of rights (Part 2 of Article 14 of Federal Law No. 218 of 13 July 2015 "On State Registration of Real Property", Article 43 of the Law on Arbitration).

The procedure stipulated in Chapter 47 of the CPC RF, § 2 of Chapter 30 of the ComPC RF must be observed for the purposes of state cadastre registration and (or) state registration of rights on the basis of such an arbitral award. Therefore, as regards the abovementioned category of disputes, the courts should accept for consideration applications for issuance of a writ of execution for enforcement of an arbitral award, even if the corresponding award, by its nature, does not require enforcement (e.g. arbitral awards recognising the plaintiff's property right or other rights to real property objects located on the territory of the Russian Federation).

57. Issues of procedural legal succession following the adoption of an award by an arbitral tribunal, in particular those arising on the stage of enforcement of a writ of execution issued on the basis of a court decree on issuance of a writ of execution for the enforcement of the award (Item 1 of Part 2 of Article 52 of Federal Law No. 229 of 2 October 2007 "On Enforcement Procedure" (hereinafter – the Law on Enforcement Procedure) are subject to consideration by the court in the manner stipulated in Article 44 of the CPC RF, Article 48 of the ComPC RF.

58. During the consideration of a case on issuance of a writ of execution for enforcement of an arbitral award, the parties may conclude a settlement agreement,

which may be approved by the court, provided that the requirements stipulated in Part 2 of Article 39, Part 2 of Article 153.8 of the CPC RF, Part 3 of Article 139, Part 6 of Article 141 of the ComPC RF are met. As regards this category of cases, the court checks whether the terms and conditions of the settlement agreement are in compliance with the law and observe the rights of third persons.

59. If based on the results of consideration the court adopts a court decree to issue a writ of execution for enforcement of the arbitral award, the court decree must address precisely the issuance of the writ of execution, not the performance of some other actions, such as recovery of awarded monetary funds from the defendant (Item 5 of Part 2 of Article 427 of the CPC RF, Item 5 of Part 2 of Article 240 of the ComPC RF). By implication of Chapter 47 of the CPC RF and § 2 of Chapter 30 of the ComPC RF, sub-item 6 of Item 5 of Part 1 of Article 13 of the Law on Enforcement Procedure, the writ of execution issued by the court on the basis of said court decree must refer to the operative part of the arbitral award subject to enforcement, not to the operative part of the court decree on issuance of the writ of execution.

60. Unless otherwise stipulated in law, court decrees adopted in a case on challenge or enforcement of an arbitral award, as well as other court decrees adopted within the framework of functions of control in regard of arbitral tribunals under the rules of Chapters 45, 47, 47.1 of the CPC RF, Chapters 30 and 31 of the ComPC RF (in particular, court decrees in cases on recognition and enforcement of a foreign arbitral award, court decrees on return of applications for review of judicial acts based on newly discovered facts, on imposing of court fines for contempt of court, on staying proceedings in the case) are not subject to appeal in appellate proceedings, but may be appealed against in a court of cassation (Part 5 of Article 422, Part 5 of Article 427 of the CPC RF, Part 5 of Article 234, Part 5 of Article 240, Part 3 of Article 245 of the ComPC RF).

61. Where there are grounds stipulated in Part 1 of Article 203 of the CPC RF, Part 1 of Article 324 of the ComPC RF, the court that has satisfied the claim for issuance of a writ of execution for enforcement of an arbitral award may, upon application of a party to arbitral proceedings (of the debtor or recoveror), as well as of a bailiff, postpone the enforcement of the award or provide for its enforcement in instalments, change the means and manner of its enforcement, in particular by approving a settlement agreement (Part 1 of Article 50 of the Law on Enforcement Procedure, Part 1 of Article 153.8 of the CPC RF, Part 1 of Article 139 of the ComPC RF). If the corresponding issue has earlier been considered by the arbitral tribunal (e.g. a party

motioned for the arbitral tribunal to set an additional time limit for the voluntary execution of the award), the court takes the conclusions of the tribunal into account when considering the corresponding application.

62. An application for recognition and enforcement of a foreign arbitral award and, likewise, an application for issuance of a writ of execution for enforcement of an arbitral award may be submitted within the time not exceeding three years from the day of adoption of the award or from the day of expiration of the term for its voluntary execution, stipulated in the award (Part 4 of Article 1, Part 3 of Article 409 of the CPC RF, Part 5 of Article 3, Part 2 of Article 246 of the ComPC RF, Article 38, Part 1 of Article 41 of the Law on Arbitration).

63. Rules stipulated in Chapter 47 of the CPC RF, § 2 of Chapter 30 of the ComPC RF also apply when courts consider applications for issuance of writs of execution for the enforcement of rulings of arbitral tribunals, based on which the costs were recovered and distributed, the arbitration fee was recovered.

64. If a court annuls the arbitral award or refuses to issue a writ of execution for the enforcement of the arbitral award, this does not preclude the parties to arbitral proceedings from repeatedly applying to the arbitral tribunal (unless the possibility of such application has been lost) or to a court in accordance with the rules stipulated in the CPC RF and ComPC RF (Part 3 of Article 422, Part 3 of Article 427 of the CPC RF, Part 3 of Article 234, Part 3 of Article 240 of the ComPC RF).

Chief Justice of the Supreme Court of
the Russian Federation V.M. Lebedev

Secretary of the Plenary Session, Judge of
the Supreme Court of the Russian Federation V.V. Momotov