Case No: CL-2014-337 CL-2014-658

Neutral Citation Number: [2017] EWHC 1911 (Comm)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/07/2017

Before :

SIR MICHAEL BURTON
(sitting as a Judge of the High Court)

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Between :

NIKOLAY VIKTOROVICH MAXIMOV	**Claimant**
- and -	
OPEN JOINT STOCK COMPANY "NOVOLIPETSKY METALLURGICHESKY KOMBINAT"	**Defendant**

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Paula Hodges QC and Dominic Kennelly (instructed by **Herbert Smith Freehills LLP**) for the **Claimant**
Michael Brindle QC, Ciaran Keller and Thomas Munby (instructed by **Debevoise & Plimpton LLP**) for the **Defendant**

Hearing dates: 19-22 and 26-27 June, and 3-4 July 2017

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Judgment

Sir Michael Burton:

1. This has been an application to enforce an award of the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation ('ICAC') made by three distinguished Russian arbitrators, IS Zykin as Chairman, VS Belykh and KI Devyatkin (by a majority, but the dissent was in a minor, and in the event immaterial, respect only as to approximately 1% of the quantum) in the sum of RUB 8,928,001,875.70 plus interest. The Award was set aside by an order by Judge N.V. Shumilina of the Moscow Arbitrazh (i.e. Commercial) Court on 21 June 2011, which was upheld on appeal by the Federal Arbitrazh Court of Moscow District ('FAC') on 10 October 2011, and permission to appeal was refused on paper by the Supreme Arbitrazh Court of the Russian Federation ('SAC') on 30 January 2012. The Claimant seeks its enforcement, notwithstanding, by this Court, pursuant to the New York Convention, and at common law.

2. The Claimant, represented by Paula Hodges QC and Dominic Kennelly, submits that this Court should not recognise the Russian court judgments setting aside the Award. The Defendant, represented by Michael Brindle QC, Ciaran Keller and Thomas Munby, has raised the doctrine of *ex nihilo nihil fit*, whereby if the award has been set aside then there is nothing to enforce. Although Mr Brindle has set out his stall in respect of the latter doctrine, which has some academic, but no material, if any, UK judicial, support, the submissions and the evidence have revolved around the central question of recognition of the Moscow court judgments, with which this Judgment will be primarily concerned. There has not been a great deal of dispute between the parties as to the proper test for me to apply, on any basis a high hurdle for the Claimant to surmount, before refusing to recognise the judgment (upheld on appeal) which set aside the award. There was no evidence in the case of actual bias, but I am asked to infer bias from the perverse nature of the Russian court's conclusions (and in certain respects the manner in which they were arrived at). Effectively the test is whether the Russian courts' decisions were so extreme and incorrect as not to be open to a Russian court acting in good faith.

3. The Award arose out of a Share Purchase Agreement dated 22 November 2007 ('the SPA') whereby the Defendant agreed to acquire 50% plus one share of the Claimant's holding in OJSC Maxi-Group ('Maxi-Group') on the basis of a purchase price calculated in accordance with clauses 3 (the parties had elected for Transaction B of two possible routes) and 4 of the SPA. Maxi-Group was a Russian company founded by the Claimant, which carried on a substantial metallurgical business in Russia. There was dispute as to the calculation of the purchase price, which was resolved by the Arbitrators: the Defendant had put in a counterclaim alleging fraud and breach of contract very late in the course of the arbitration, indeed after the conclusion of three oral hearings, but the Arbitrators, giving full reasons for their decision ruled that out:-

> "*No less important is the fact that during this long period the Company, being the controlling shareholder of the Issuer, had sufficient opportunity to discover all the circumstances affecting the Purchase Price for the Shares and to provide such circumstances in due course during these arbitration proceedings.*

If any violations of the Company's rights as a buyer took place due to any actions or omissions on the part of the Individual as seller, the buyer is still entitled to file the corresponding claims according to the law and the agreement and seek legal recourse to protect its civil rights (article 12 of the RF CC). This however, does not exempt the buyer from an obligation to pay the purchase price if such an obligation was not duly performed. Thus, the seller is entitled to demand timely performance of said obligation.

The Company had the opportunity to make a counter-claim to defend its rights during this arbitration proceedings, however it did not use it. Moreover, the Company still has the procedural ability to file a claim on these grounds within separate proceedings.

Under the given circumstances the arbitrators find no grounds to satisfy the motion to suspend the proceedings.

Given the above …..…the arbitrators rule as follows:

1. *To not allow the Company to amend its counter-claim and its statements in relation to the initial claim, given the delay;*

2. *To dismiss the Company's motion to suspend arbitration hearings in the present case;*

3. *Taking into account the stage of the proceedings and conclusions of the arbitrators regarding submissions made by the Parties upon conclusion of the oral hearings, to dismiss any additional submissions of the Parties on the issues reviewed in this ruling.*"

4. The Award was issued, after the three oral hearings in June, September and October 2010 (all prior to the belated counterclaim in February 2011), on 31 March 2011. Meanwhile:

   (1) The Defendant had issued a claim in the Moscow Arbitrazh Court on 16 March 2011 that the SPA was null and void on the basis that it was procured by fraud: this was challenged by the Claimant on the basis of the arbitration clause in the SPA, which was upheld at first instance by the Arbitrazh Court ('the jurisdiction challenge').

   (2) The Defendant applied to ICAC that the Arbitrators should be recused on grounds of their delay, which was first rebutted by the Arbitrators and then refused by the ICAC Presidium on 30 March 2011, the day before rendition of the Award.

5. The Defendants appealed such decision on 6 April to the President of the Chamber of Commerce and Industry of the Russian Federation ('CCI') (refused on 8 June 2011,

because the Award had been rendered and they regarded themselves as functus) and on 7 April applied to the Arbitrazh Court to set aside the Award, based, by way of addition to the fraud case, on the ground that two of the Arbitrators had failed to disclose links to the expert witnesses whose written reports were submitted in the arbitration by the Claimant (the 'Non-Disclosure Ground').

6. The hearing of the set aside application in the Arbitrazh Court before Judge Shumilina (after a preliminary hearing and the lodging by the parties of substantial written submissions) was heard on 21 June 2011. Judge Shumilina had had other hearings on that day starting at 10.45. The hearing of the Defendant's application, and there were 12 cross motions, began at 5pm and lasted 5 hours. Judge Shumilina delivered, as she was obliged at Russian law to do, an immediate decision orally; she set aside the Award, and her written reasons for doing so were delivered on 28 June.

7. Judge Shumilina gave in her written reasons three grounds for setting aside the Award, only one of which, the Non-Disclosure Ground, had been raised or relied upon by the Defendant. The other two grounds, which had not been raised by her during the hearing and had consequently not been the subject of any argument, were the 'Public Policy Ground' and the 'Non-Arbitrability Ground'. She rejected the second ground which had been relied upon by the Defendant, based upon alleged fraud by the Claimant.

8. Judge Shumilina's judgment was upheld by the FAC (and the cross-appeal by the Defendant dismissed) on 26 September 2011, written reasons being delivered on 10 October. The Claimant appealed to the SAC, which refused permission on paper by a judgment dated 30 January 2012.

9. Meanwhile the Defendant's appeal against the earlier upholding by the Arbitrazh Court of the Claimant's jurisdiction challenge, based upon the arbitrability of the Defendant's fraud case, was allowed on 4 July 2011, following Judge Shumilina's recent judgment, and there were unsuccessful appeals by the Claimant and eventually on 7 April 2014 a decision by the Arbitrazh Court setting aside the SPA, itself unsuccessfully appealed by the Claimant. If the Claimant cannot therefore enforce the Award in his favour, he has no route to seek to recover the unpaid purchase price by any other means, the Russian courts having set aside the SPA itself. The Defendant did seek to raise allegations of fraud against the Claimant in this application, but they were withdrawn.

10. There have been other legal actions between the parties, among others reciprocal criminal complaints, including a criminal complaint by the Defendant sought to be revived against the Claimant only very recently, two applications by the Claimant to the Constitutional Courts of the Russian Federation (the effect to which is very much in dispute between the parties, and I am unable to resolve that dispute so as to derive any assistance from them for the purpose of this hearing), and applications to the European Court of Human Rights by the Claimant, but none of these in the event are now material to my decision. In addition, the Claimant applied successfully to the Tribunal de Grand Instance of Paris to enforce the award, which decision was unsuccessfully appealed by the Defendant to the Paris Court of Appeal; and the Claimant also applied to the Amsterdam District Court for enforcement in the Netherlands, which refused enforcement: the Claimant's appeal to the Amsterdam Court of Appeal was refused in a detailed judgment delivered on 27 September 2016,

and the Claimant has filed an application for appeal to the Dutch Supreme Court. Both sides have raised arguments on issue estoppel arising out of the French and Dutch proceedings, to which I will return later in the Judgment.

11. The Defendant relies upon the judgment of Judge Shumilina, as upheld on appeal. In the event that the Claimant were successful in his argument that the judgments should not be recognised, there is a pleaded case by the Defendant seeking to rely on the same grounds by way of defence to the application to enforce; but it was common ground that such submissions do not need separate consideration, because they are wholly unlikely to arise, in the event that I have resolved the issues based upon the three Grounds in favour of the Claimant.

12. The Claimant's challenge to the Russian court judgment is, as set out in paragraph 2 above, based upon a case of bias. Although Ms Hodges relied upon **Porter v Magill** [2002] 2 AC 357, and the doctrine of apparent bias, Mr Brindle submits, and I accept, that that is not relevant in this case, where it is not suggested that the Russian judges were in such a position that their partiality should be presumed because of some personal interest or involvement. The case is one in which the Claimant must establish actual bias, but that bias can be established by inference, hence inferred bias. There is no evidence here of corruption or actual bias, though the Claimant relies on a number of matters as context in which his case of inferred bias can be supported:-

    (1) The Claimant's expert, Professor Boris Karabelnikov, gave a persuasive account of what he calls 'political cases', in which favouritism on the part of the Russian courts is at the least a real risk. He refers to the long-running Rosneft dispute in Russia, which led to decisions in Holland and indeed the UK (summarised in **Yukos Sarl v OJSC Rosneft Oil Co** [2012] EWCA Civ 855), in the course of which Judges Shumilina. Neshateva and Sarbash, all judges in this case, were also involved. Mr Brindle and his expert, Dr Ilia Rachkov, do not accept that political cases extend beyond cases in which the Russian government has a direct or indirect interest, which is not the case here. The Claimant refers to (i) the very influential position in the Russian establishment held by Mr Lisin, who is the majority owner, and controller, of the Defendant (ii) the fact that in somewhat unexplained circumstances a letter which the Defendant had received direct from the offices of those known to be very close to both Mr Putin, then Prime Minister, and Mr Medvedev, then President, giving support to the Defendant's case that the decision of the CCI that they were functus in respect of the recusal application was wrong, was placed in front of Judge Shumilina during the hearing and thus may have influenced her, by showing that important personages were on the Defendant's side and (iii) the eventual outcome, bitterly resented by the Claimant, that as a result of the various Russian court cases he has now lost his interest in the company which he founded (no shares having been returned to him by the setting aside of the SPA) without any recovery of money. Mr Brindle, however, points out that at least some of the decisions in Russia, particularly the early ones, went in favour of the Claimant, and in any event I am completely unable to assess the competing positions put forward in the witness statements for the Claimant and Defendant, to which I will make some further reference below.

(2) The Claimant points with some force to the criticism of the Russian system of courts and justice made in published articles by practising and recently retired judges of the Russian courts, by the UN special rapporteur dated 30 April 2014, with whose conclusions Professor Bevzenko, the Defendant's own expert as to Russian court procedure, expressed agreement in evidence, and indeed to the published public statements by Professor Bevzenko himself as to the Russian judiciary's lack of independence.

(3) It is clear, and almost common ground, that there has been exemplified in the Russian courts, at least until amendments taking effect last year, a bias against international arbitration and against cases being decided by arbitrators rather than in the Russian courts. As long ago as 2006, Professor Karabelnikov wrote an article in Arbitration entitled '*The Supreme Arbitrazh Court of the Russian Federation does not trust international arbitration'*, and he and Dominic Pellew, a partner in the Russian branch of Lovells, wrote a similar article in the ICC International Court of Arbitration bulletin in 2008.

(4) There was to my mind a disturbing passage in the evidence of the Defendant's expert Dr Rachkov, this against the background of unchallenged evidence from Professor Karabelnikov that this was probably the largest case in terms of amounts at stake then to have come before the Arbitrazh Court. Dr Rachkov said as follows, in answer to a question in cross examination and then continuing in an exchange with me:-

> "*A. I can imagine that the courts were very cautious, especially in this particular case, because the amount at stake was very substantial,and I think the state is also interested that the value which one party pays to the other party is in line with the market value at least, because the state wants to collect its taxes from the profit generated by Mr Maximov as the seller, and would like to make sure that NLMK does not decrease…..*
>
> *JUDGE: Is this a motivation for the Court of Appeal to uphold the judgment of Judge Shumilina?*
>
> *A. My Lord, that's only my guess. I don't know what the judges of the final appeal court had in mind.*
>
> *JUDGE: But it wouldn't be an acceptable reason, would it, for upholding the judgment that they were worried about the public effect of the judgment?*
>
> *A. But I think the public effect of the judgment for, I would say, Russia as a whole is considerable, because if the parties substantially overstate the price of the shares, then the payer of the money can deduct these expenses from the profit tax base, and pay less taxes to the state, and this is what the state leaks from. This is not said in the judgment. Perhaps if I would be such a pro-state judge sitting in that panel, I would say that plainly there is an issue with the tax nature of these payments as well, and this is why there is some state interest in not*

keeping this award alive, but to decide this question from the very beginning before state courts, which happened, as far as I understand, afterwards.

Q. So you're saying that the court could be motivated to conclude that the dispute was not arbitrable, so that it could look into that issue?

A. I wouldn't use the word "motivated" because it has various connotations. I would say the court, or the members of the court being Russian citizens, and getting salaries currently, may have thought this way."

13. Nevertheless all this is only the context, and a context in which I can reach no conclusions one way or the other on the evidence before me, in which the Claimant relies on the three Grounds, and the manner in which they were arrived at (and the fact that, as the Claimant asserts, the SAC closed its eyes to what it must have known to be unsupportable), which I shall now summarise by reference to the three Grounds. It is important to emphasize that there were in addition a great many alleged procedural unfairnesses upon which the Claimant relied at length in the Dutch proceedings, and also to a significant extent in these proceedings, which have not survived consideration and testing in the course of this hearing or have in any event not in the end been relied upon by Ms Hodges.

14. The grounds were as follows:-

(1) <u>The Non-Disclosure Ground.</u> Although the case was put on a more diffuse basis before Judge Shumilina in submissions, it was in the event argued by the Defendant (and addressed by the judge) on the basis that:

(i) the Arbitrator Professor Zykin did not disclose that as Head of the Section of Legal Issues in International Economic Relations of the Russian Academy of Sciences, he was said to be in a subordinate position at that Institution to one of the experts instructed by the Claimant, Professor Shulzhenko, who was (and described himself in his Report) as Deputy Director; and

(ii) the Arbitrator Professor Belykh, who was Head of Department of Business Law at the Ural State Law Academy, did not disclose that Professor Bublik, one of the experts instructed by the Claimant, also from the same Academy, was Rector of it, and therefore that he was similarly subordinate to him. The position of subordination alone (i.e. not the fact of their being based at the same Institution) was not disclosed, and there was not specifically any discrete finding by Judge Shulimina as to whether that was material to disclose (and Professor Karabelnikov is of the view that the question of alleged subordination as between such distinguished academics is of no materiality).

The Claimant complains as evidence of bias of the way in which the issue of waiver was addressed by Judge Shumilina (and the FAC). The Claimant submits that there was evidence before Judge Shumilina

which she could and should have considered, as to what precisely was or could have been known to the Defendant by the expiry of the 15 day period limited for a challenge to the Arbitrators, and certainly long before the Award was delivered. Judge Shumilina made no such finding and concluded, as did the FAC, that such waiver was irrelevant. The SAC does not seem to have addressed the issue at all.

(2) The Public Policy ground. This ground was not raised by either party at the hearing before the judge and she did not raise it herself until it appeared for the first time in her judgment. She concluded that the Arbitrators, in making their assessment of the Net indebtedness of the Maxi-Group companies for the purpose of calculating the amount of Overall Business Value in clause 4 of the SPA, and hence the price payable by the Defendant, did not follow the terms of the SPA and hence (i) there was a breach of the obligation that is imposed (I assume upon the arbitrators as well as the parties) by Article 424 of the Civil Code of the Russian Federation ('the Civil Code') that "*performance of a contract is paid for at a price established by agreement of the parties"* and (ii) consequently, as she put it, in breach of "*the fundamental principle of the Russian law i.e. the legality of the award and in conflict with the public order of the Russian Federation"*. This the Claimant contends to be a plain evasion of the well-established position, accepted in Russia as elsewhere, that even if arbitrators commit an error of law, that is not a ground for interference by a court with their decision. This ground was upheld by the FAC, and not addressed at all by the SAC. The Dutch Court of Appeal concluded that the SAC was not thereby upholding that ground, but the SAC did not, as it could have done, disapproved of it. The Claimant asserts that this conclusion was so manifestly wrong as to be evidence of bias.

(3) The Non-Arbitrability ground. Again, this was not a ground relied upon by the Defendant, and no notice of it was given to the parties, both of whom had of course consented to and taken part in the Arbitration. Judge Shumilina (upheld on appeal) concluded that (i) corporate disputes even between two parties were not arbitrable but could only be heard in the Arbitrazh Court (ii) the Claimant's claim for the purchase price, which was the only award made by the Arbitrators, was such a corporate dispute. The Claimant submits that this decision, and particularly (ii), was wrong and again evidence of bias.

The Law

15. Leaving aside for the moment the issue of *ex nihilo nihil fit*, I have already indicated in paragraph 2 above that there is no issue between the parties that:-

(1) The fact that a foreign court decision is manifestly wrong or is perverse is not sufficient (see for example **Dicey, Morris and Collins, The Conflict of Laws** 15th Ed at 14-163, **OJSC Bank of Moscow v Chernyakov** [2016] EWHC 2583 (Comm) and **Erste Group Bank AG (London) v JSC (VMZ Red October)** [2013] EWHC 2926 (Comm)). The decision must be so wrong as to be evidence of bias, or be such that no court acting in good faith could have arrived at it.

(2) The evidence or grounds must be '*cogent*'.

(3) The decision of the foreign court must be deliberately wrong, not simply wrong by incompetence.

16. The only issue between counsel was one which may be evanescent. Ms Hodges submits that it is enough if I were to find that one ground were biased, while Mr Brindle submits that if one or even two grounds were biased and could not be relied upon, then it would be enough that there were one ground which could not be challenged, just as in the ordinary case where two grounds fall away and one is enough. It can be seen that this must depend upon my conclusions, but if I concluded that a court was biased, it would be difficult to see how any of its decisions could be relied upon if they depended upon any balancing exercise – though different questions may arise if the answer were obvious. If a ground was felt by a biased judge to need bolstering by adding in another ground or two, which were themselves unsupportable, it would seem difficult to uphold the ground upon which the judge obviously must have felt an inadequacy.

17. The presence in the judgment of two grounds which the judge did not raise during the hearing is obviously a matter which is uncomfortable for an English court to address, and in any event one which raises issues under Article 6 of the ECHR. Professor Karabelnikov is very critical of this, particularly in relation to the introduction in the judgment for the first time of such an almost untested issue as arbitrability, but, as Mr Brindle points out, Professor Bevzenko has more recent experience of the Russian courts and he asserts that this kind of thing happens quite regularly, and has happened to him. Nevertheless, I conclude that he felt discomfort about this, and he faltered in his logic in attempting to defend it. He gave evidence that, if a judge raised in the hearing a point of his own motion which had not been raised by the parties, then this might give rise to a motion for him to recuse himself; but if the judge said nothing, and only raised the point in his judgment afterwards, that would not amount to a ground for recusal or challenge. This seems difficult to fathom. At the end of the day the point is either supportive of bias or it is not. If it were only an Article 6 point, it would be covered by being addressed on appeal, as these two grounds were, provided that the appeal courts were not similarly so biased.

Evidence

18. There were witness statements served by both parties, but they went largely to the issues referred to in paragraph 12(1) above. In the event none of the factual witnesses were called, and their statements were taken as read, and, as I have said above, it was impossible in particular for me to resolve the vexed dispute as to whether it was through the influence of Mr Lisin that the Claimant ended up heavily vanquished in the courts. In addition, there were expert witnesses. I shall refer later to the Dutch experts (French experts were instructed but their reports were taken as read) and because of the scaling down of the issues made by the Claimant in relation to Russian court procedure, save for the matters referred to in paragraph 17 above, Professor Bevzenko gave no evidence that was in the end material to my decision. The contest was between Professor Karabelnikov and Dr Rachkov and related to the three Grounds set out in paragraph 14 above.

19. I am in no doubt that I very much prefer the evidence of Professor Karabelnikov. He was on occasion, as Mr Brindle put it, 'over the top', he was trenchant in his views, and it is clear that he had read much about, and become critical of, Judge Shumilina's decision and the appeals therefrom as an independent commentator in academic works before he was selected, no doubt for that reason, as the expert for the Claimant. I was not persuaded by his analogy of the '*political cases'*. Those of which he gave examples all related to matters in which (as referred to in paragraph 12(1) above) the Russian Government had a direct or indirect interest, and he indeed found it difficult to explain why the Russian court had gone so wrong in the decisions which I am considering, but which led him in measured tones to conclude that they must have been affected by bias. He had been far more outspoken in his reports in the Dutch proceedings, in which he was also instructed, his task there being to address the two experts' reports commissioned by the Dutch court, and it is clear that he found it difficult to understand why those experts had also gone so wrong. Certainly it seems clear, after the investigation which this Court has carried out, with the benefit of cross-examination of the experts, which is not available in the Dutch courts, that those lawyers did fall into substantial error, and indeed because of the limited nature of his brief in the Dutch courts he has been able to explain his case much more fully before me.

20. I was, however, not so impressed by Dr Rachkov. As I shall briefly summarise, he was in the event compelled to abandon as insupportable a number of the propositions upon which he had given detailed exposition in his reports, and I do not, as Mr Brindle sought to suggest, compliment him on being prepared to accept those occasions on which he was wrong, but rather conclude there were contentions which he should never have pursued at all:-

    (1) He was driven to abandon as insupportable two of the propositions, highly developed in his reports, in relation to the Non-Disclosure Ground, namely that at Russian law non-disclosure was not waivable (notwithstanding the terms of the Rules), and that the time for challenge did not expire 15 days after awareness of the relevant matters which had allegedly not been disclosed, but 15 days after a disclosure, so that if there was no disclosure then time never ran, meaning that the party could sit on a known defect and only raise it after the arbitration had been completed.

    (2) He also abandoned two of his prime propositions in relation to Ground 2, Public Policy. He withdrew his case that the Arbitrators should have determined the purchase price in accordance with the PricewaterhouseCoopers report which they (rightly) found to be totally flawed by virtue of its lack of independence, and he also abandoned his case that the Arbitrators changed or created their own formula for calculation of the price; and he came up with a criticism, not suggested by anyone previously, that the Arbitrators ought to have, on their own account, instructed their own experts. He should have, in my judgment, abandoned, but did not abandon, the rest of his support of Ground 2, given that he was unable satisfactorily to explain what universal principle of public policy the Arbitrators had breached.

21. He was I felt selective as to the exhibits and as to the parts he translated. In particular he knew of two cases which in my judgment put beyond doubt that an infringement of

Article 424 (referred to in paragraph 14(2) above) did not amount to a breach of public policy, and did not put either of them forward even though they were plainly relevant to, and indeed damaging to, his case.

22. As to the Non-Arbitrability Ground, which was, as he described, a topic which '*Judge Shumilina invented… without any hint from either party*' much to the surprise, he imagined, of both of them, he strangely described the judge as *reprimanding* the Arbitral tribunal for having reached its conclusions as to arbitrability, which, it must be recalled, they had not in fact made, and neither party had asked them to make. In general, I was much more assisted by the arguments of Mr Brindle and his team in their closing submissions than by anything that Dr Rachkov said on this (or any) topic.

Ground 1: Non-Disclosure

23. As discussed above, the issue before me was as to non-disclosure of the '*subordination*' of Arbitrator Professor Zykin to expert Professor Shulzhenko and Arbitrator Professor Belykh to expert Professor Bublik. The relevant provisions are:-

(1) The Law of the Russian Federation "On International Commercial Arbitration" dated 7 July 1993 5338-1

"***Article 4. Waiver of Right to Object***

A party who knows that any provision of … this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

…

Article 12. Grounds for challenge of an arbitrator

1. When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose the emergence of any such circumstances to the parties unless they have already been informed of them by him.

2. An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not meet the requirements imposed by the law or the agreement of the parties. A party may challenge an arbitrator appointed by him, or in whose

appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Article 13. Challenge Procedure

1. The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph 3 of this article.

2. Failing such agreement, a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in article 12(2), communicate the reasons for the challenge in writing to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge."

(2) Rules of ICAC

"§ 18. Challenge of an Arbitrator

1. Either of the parties may challenge an arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence, in particular, if it may be assumed that he personally, directly or indirectly, is interested in the outcome of the proceedings. A challenge also may be made if an arbitrator lacks the qualifications stipulated by an agreement between the parties.

A party may send a written notice of challenge stating the reasons therefore to the ICAC within 15 days after being notified of the composition of the arbitral tribunal, or having become aware of circumstances that can serve as a reason for challenge. Unless a party makes a challenge with the period of time referred to above he shall be deemed to have waived his right to challenge."

24. There is then further guidance which was issued by the President of the CCI dated August 27 2010. It is plain that the guidance was intended to explain rather than supplement the Articles set out above, but also plain, contrary to the view of Professor Kabelnikov, that, albeit that the guidance did not come into force until after the commencement of this Arbitration on 21 December 2009, it would have a role to play in any continuing obligations to disclose, and there was specific reference (in section II) to the need to consider relationships between the arbitrators and (inter alios) the parties' experts. The reports of Professor Shulzhenko (signed as Deputy Director at the Russian Academy of Sciences Institute of the State and Law) and of Professor Bublik, (who signs himself as such, but not as Rector, at the Urals State Law Academy), were served in June 2010.

25. The Claimant asserts that, quite apart from the fact that the professional address of both the Arbitrators and the experts were known, and that the position of Professor Shulzhenko as Deputy Director was known, the Defendant knew or ought to have known from the website of the Institutions anything further that was needed to be known about the respective positions of the Professors and in particular a screenshot showing Professor Bublik as Rector was produced at the hearing. A transcript of the hearing with two rival translations has been produced, which is not entirely clear, not least because the proceedings themselves appear to have been somewhat chaotic with the parties' representatives intervening and speaking across each other, and although both sides have referred me to various submissions that are there recorded it seems to me that the position was not well explored prior to the judge giving her immediate decision at the end of the hearing, as she was required to do.

26. Quite apart from the lack of satisfactory exploration of the factual position relating to the issue of waiver, there is an additional issue as to what test was required for waiver, whether it was necessary to show that a challenge could have been and was not made, within the relevant 15 days, of matters of which the challenger was aware (as would appear to be the case from the terms of the words of the Articles themselves set out in paragraph 23 above) ("actual notice") or whether the test for making a challenge is by reference to facts and matters of which the party should or could have been aware or could reasonably have discovered ("constructive notice"). The Claimant relies upon an important commentary on the ICAC Rules published in 2012 by a very distinguished academic, Professor Komarov, who was for many years President of ICAC, to support the latter proposition, although Dr Rachkov does not accept that this was an official commentary, and it is pointed out that in academic work published many years earlier, in 2006, Professor Komarov had been of a different view. In any event the Claimant relies, with the benefit of Professor Karabelnikov's advice, upon two decisions of the FAC, Balayan of March 2010 and Sberbank of 31 January 2013, to support Professor Komarov's position, and the proposition that in the context of waiver parties are taken to be aware of what could and should have discovered e.g. from a website. Neither Balayan nor Professor Komarov's view was cited to Judge Shumilina, according to the transcript of the hearing, but given her experience as a regular judge of the Arbitrazh Court dealing with applications to set aside arbitrations, she may well have known of them herself.

27. As is however clear from the judgments which I shall cite, Judge Shumilina did not consider the facts as to waiver by reference to either test, actual or constructive notice, and reached no factual decision at all as to waiver. In the course of Dr Rachkov's abandonment of his two propositions in relation to waiver and waivability referred to in paragraph 20(2) above he himself expressed the view, in answer to a question in cross-examination by Ms Hodges as to whether there was an onus on the judge to investigate what the parties knew or did not know, that he thought "*a reasonable judge acting in good faith should have investigated this, yes*": and further, when asked by Ms Hodges whether "*if a party has actual knowledge of circumstances that would give rise to a conflict of interest, that they should use that right or lose it, it wouldn't be reasonably open to a rational court to ignore the fact that that right had been waived, would it*?" Dr Rachkov agreed "*It would not*".

28. Judge Shulimina in her written reasons set out the facts relating to the Arbitrators and experts and their employment at the relevant Institutions and made reference to the

Articles set out above, including the new guidance of 27 August 2010, and she concluded as follows:-

> *"However, in breach of above-mentioned provisions arbitrators Zykin L.S. and Belykh V.S. who took part in case consideration did not disclose the information about the inferior relations between them and the consultants who provided the opinions.*
>
> *Said circumstance is confirmed by the data from official websites of RAS Institute and USLA.*
>
> *Taken that the parties agreed on the procedure including the determination of the composition of arbitral tribunal according to the Rules providing both the procedure for determination of composition of the tribunal and reasons for challenge of arbitrators, the violations committed testify the violation of the provisions of the Law of the Russian Federation "On International Commercial Arbitration" and the Rules of ICAC at the RFC CI which is reason for setting aside the arbitral award because the composition of the arbitral tribunal and arbitral procedure was not in accordance with the agreement of the parties.*
>
> *The reference of the interested person's representative to Art.4 of the Law of the Russian Federation "On International Commercial Arbitration" is unsound because the waiver of the right to traverse has no cause-effect relation with the violation by the arbitrator of his duties.*"

29. Some argument before me revolved around the meaning of that last paragraph. Mr Brindle said that what the judge was saying was that there was insufficient evidence of waiver. I am persuaded however that she was in fact concluding that waiver, which is the subject of Article 4 to which she refers, was <u>not applicable</u>:-

    (1) The Defendant had so submitted in the court of argument, as is clear from the transcript.

    (2) It formed a significant part of the Claimant's submissions to the FAC on appeal that the judge had (wrongly) so decided.

    (3) This was plainly the interpretation of her words by the FAC, which as will be seen below, upheld it on appeal

    (4) Although Professor Karabelnikov agreed with Mr Brindle that it was unclear, Dr Rachkov accepted that this is what the judge was saying.

I am satisfied that she was saying that a non-disclosure was not waivable and Dr Rachkov accepted in his evidence that this was wrong.

30. In his appeal to the FAC, the Claimant submitted that his attorney had "*proffered particular explanation* [which had] *reliably demonstrated ….what positions the advisors held in the said institutions*" and that "*what stands out is the technicality of the argument of the court*", but to no avail. I cite the relevant parts of the FAC judgment:-

> *"The court gave the reasoning that the arbitrators had failed to disclose the fact that they and the signatories of the expert opinions provided by the applicant as part of the arbitration case files were employed in the same educational and scientific research institutions, which raised reasonable doubts with respect to the impartiality and independence of the arbitrators…*
>
> *The judicial panel of the court cassation instance also agrees with the conclusion of the court of first instance on the contravention of the arbitral award to public order as a result of the violation of the principles of independence and impartiality…..*
>
> *The judicial panel rejects the objections of the representatives of N.V. Maximov that such circumstances could be established by the counterparty independently on the basis of the case files and that the counterparty was familiar therewith and that the provisions of the relevant Articles 4,13(2)(3)….were not applied; because in this situation it is of legal relevance to exclude doubts as to the impartiality of the tribunal during the arbitration proceedings by way of fulfilment by the arbitrators of their obligations to disclose the circumstances…. Herewith it is not of legal relevance whether a party would have in fact realised its right to oppose the attachment of the expert opinion to the case files or its right to challenge the arbitrators, or the possibility (or lack thereof) of satisfying the challenge [to] arbitrators on such grounds.*
>
> *It is a fact that the arbitrators did not fulfil their legal obligations to disclose circumstances which would cause reasonable doubts that it is a violation of the principle of impartiality and independence. Such violation of law by the arbitrators is irreversible and undermines the legality of the arbitral award."*

31. As to this judgment of the FAC, there was in fact no mention of the basis upon which (alone) the finding of non-disclosure was made, namely by reference to the relationship of subordination. As to the question of waiver, it is plain they are excluding consideration of the facts as a matter of law, regarding the non-disclosure as "*irremediable*", i.e. non-waivable, and in that regard upholding the decision of Judge Shumilina. Dr Rachkov agreed that that is what the FAC found, and that it was a wrong decision.

32. As for the SAC, in dismissing the application on paper, the Court dealt very shortly with this issue:-

> "*The courts have found that the arbitrators had failed to disclose the information that they and the signatories of the expert opinions adduced by N.V. Maximov to the case files had employment relations with the same educational and scientific research institutions, which raises reasonable doubts as to the impartiality and independence of the arbitrators.*"

33. This is clearly addressing an alleged non-disclosure of the employment by the Arbitrators and the experts by the same Institution, which was not the case, and does not address the case of subordination. There is no mention at all of the question of law which had led to neither Judge Shumilina nor the FAC considering the issue as to whether there had in fact been waiver.

Ground Two: Public Policy

34. As discussed in paragraph 14(2) above, this was raised by the judge of her own motion, and it relates to the Arbitrators' conclusions in relation to the contract price pursuant to the SPA, the relevant provisions of which read as follows:-

> *"4. Overall Business Value*
>
> ….
>
> *For the purposes of this Agreement and for the Transaction B the Overall Business Value shall be calculated according to following formula: 73,298,400,000…rubles minus "net" indebtedness of the Group's Companies. "Net" indebtedness of the Group's Companies shall be considered as a difference between (i) total sum of short-term and long-term indebtedness of the Group's Companies and (ii) total sum of current assets of the Group's companies (in each case as per Closing Date).*
>
> *For the purposes of Overall Business Value calculation the Parties shall arrange due diligence procedures in relation to the Group's Companies with participation of (in the part of financial audit) external financial advisor – PricewaterhouseCoopers, which shall draw up an unqualified reasonable assurance engagement report prepared in accordance with International standard on Assurance Engagements (ISAE) 3000, … regarding accuracy of calculation of the Group's Companies "net" indebtedness (for the purposes of Transaction B, the data of RAS financial accounting of the Group's Companies as per date of transfer of OSJC Maxi-Group shares in favor of OJSC NLMK shall be used….). The Parties shall do their best to calculate Overall Business Value within 90 days from the date of this Agreement…*"

35. The major issue before the Arbitrators in resolving the disputes between the parties was as to the proper accounting approach to accounts receivable in the context of Net Indebtedness. They resolved this issue in favour of the Claimant. They then turned to consider two rival sets of accounts, Source Data 1, supported by the Claimant, and Source Data 2, for which the Defendant contended, which had been utilised by PricewaterhouseCoopers, but not prepared in accordance with the SPA and on the basis of unilateral instructions, in respect of which the Arbitrators carried out a detailed critique, and then concluded as follows:-

> *"6.4. Given these circumstances the arbitrators find that (i) the case files contain various financial report date from Group Companies (Source Data 1and Source Data 2) presented by the same party – OJSC "Maksi-Grupp" with a gap of more than 1 year (September 2008 and December 2009); (ii) neither of the Parties presented evidence unambiguously showing that the source data to which the other Party refers to was inaccurate; (iii) the numbers in the source data do not match.*
>
> *6.5. The arbitral tribunal has repeatedly taken steps to establish the causes for the discrepancies between the figures in Source Data 1 and Source Data 2 and suggested that the Parties compare the Source Data used in the Net Indebtedness calculation or present joint suggestions regarding a third-party expert evaluation of the disputed issues (letter from ICAC of May 25, 2010, ICAC ruling of September 6, 2010).*
>
> *The Parties elected not to have a third-party expert review conducted, despite the fact that the arbitrators repeatedly pointed out to the Parties' representatives that appointing a third-party expert panel review would be in the interest of both Parties, since such a review, in any scope, given the serious disagreements between the Parties, carried out by a competent and independent party could help determine the correct amount of the Net Indebtedness and, consequently, the price of Shares.*
>
> *Despite the suggestions of the arbitrators, the Parties also failed to compare Source Data 1 or Source Data 2 and establish the reasons for the discrepancies in their numbers.*
>
> *Moreover, according to the Parties, confirming the reliability of Source Data and identifying the reasons for the divergences between their figures is no longer possible because, inter alia, neither the Parties nor the Issuer are able to present the original financial documents of all the Group Companies as of December 3, 2007 for an expert to review.*
>
> *In these circumstances, the arbitrators, in accordance with the authority granted to them under article 19, paragraph 2 of the Law on the ICA and paragraph 31 of the ICAC rules, are forced to use their own estimate of the accuracy and reliability of any given data which was used to calculate the Net*

Indebtedness on the basis of the evidence available in the case files..

….

7.1 Since in these circumstances the unreliability of Source Data 1 and Source Data 2 cannot be unambiguously established, there is insufficient grounds for not taking these data into consideration in the Net Indebtedness calculation and performing the calculation using solely Source Data 1 or Source Data 2. However as mentioned in paragraph 4 of the Opinion, for the purposes of calculating the Net Indebtedness the accounts receivable must only be include as current assets of the Group Companies.

Accordingly, the amount of the Net Indebtedness has been calculated based on Source Data 1 and Source Data 2."

36. The Arbitrators accordingly, with considerable explanation of their workings, arrived at a finding, following the requirements of the SPA, but in order to resolve the minor accounting disputes averaging the figures in the two sets of Source Data, so far as the majority was concerned, while the minority Arbitrator accepted all the figures in Source 2 (with a very immaterial difference in result). The more material of the provisions referred to by the Arbitrators in the passage above by reference to their assessment of the evidence was Paragraph 31 of the ICAC Rules, which included at sub-paragraph 4: "*Arbitrators shall assess the evidence according to their sole discretion*".

37. Judge Shumilina concluded that this constituted a breach or, given that the criticism was aimed at the Arbitrators, a contravention, of Article 485 of the Civil Code. The relevant provisions are as follows:-

"***Article 421. The Freedom of the Contract****…*

4. The contract terms provisions) shall be defined at the discretion of the parties…

Article 422. Contract and the Law

1. A contract must comply with the rules mandatory for the parties established by law as well as other legal acts (imperative norms) which are in effect at the time of its conclusion…

Article 424. Price

1. Performance of a contract is paid for at the price established by agreement of the parties…

3. In cases when in a compensated contract a price is not provided and may not be determined proceeding from the terms of the contract, performance of the contract must be paid for at

the price that, under comparable conditions, usually is taken for analogous goods, work or services.

…

Article 485. The Price of the Goods

1. The buyer has the duty to buy the goods at the price provided by the contract to purchase and sale or, if it is not provided by the contract and cannot be determined proceeding from its terms, at the price determined in accordance with paragraph 3 of article 424 of the present code…"

38. Her judgment on this issue was as follows:

"The above-mentioned arbitral award is in conflict with the public order of the Russian Federation.

In accordance with Art 1193 of RF CC, the public order is understood as the basics of the law and order of the Russian Federation including, above all, the fundamental principles of the Russian Law, i.e. the principle of independence and impartiality of tribunal and the principle of legality of the award.

Item 1 of Art. 485 of RF CC states that the buyer is obliged to pay for goods at the price, specified by the contract of sale or, if it is not provided in the contract and may not be defined proceeding from the contract terms, at the price fixed in accordance with Item 3 of Article 424 of this Code.

In accordance with Clause 3 of Art.424 of the RF CC, in the cases, when the price in the pecuniary contract has not been stipulated and cannot be defined proceeding from the contract terms, the performance of the contract shall be re-numerated by the price, which is usually paid under the comparable circumstances for the similar kind of commodities, works or services.

The above norms are imperative and establish the procedure for the definition of the price and are not subject to extended interpretation.

However, the arbitral award goes that the price of shares was calculated by arbitrators as a sum of two summands: the purchase price of shares based on the data submitted by the parties divided by two(item 8.2 page 73 of arbitral award).

That this method of price definition is in conflict with the civil legislation.

> *Based on the above, the tribunal comes to a conclusion that the challenged arbitral award is not in compliance with the fundamental principle of the Russian law, i.e. the legality of the award, and is in conflict with the public order of the Russian Federation which is a reason for setting aside the arbitral award (paragraph 2 of clause 2 of items 2 of Art.34 of the Law of the Russian Federation "On International Commercial Arbitration*"

The judge did not address the fact that in carrying out the exercise the Arbitrators had resolved the disputed issue of accounts receivable.

39. The FAC addressed the Claimant's argument that Judge Shumilina had raised Grounds 2 and 3 of her own motion, and concluded that it was her obligation to verify the conformity of an award with public policy "*irrespective of whether such violations were announced as the grounds for the setting aside*" and upheld her decision that "*the arbitration tribunal did not apply the imperative provisions of civil law on the calculation of the purchase price*", agreeing with such conclusion as "*it reflects verifying the compliance with fundamental rules of law which have a universal and imperative character and are of extreme importance, rather than the correctness of application by the arbitration of particular provisions of substantive law."*

40. There are three questions which underlie these conclusions:-

(1) Whether the Arbitrators failed to comply with the contract.

(2) Whether there was a breach of Articles 424/485.

(3) Whether this, if a breach at all, amounts to more than an error of law, i.e. a breach of fundamental and universal rules of law.

41. As to the first and second questions, I have already referred, in paragraph 20(2) above, to Dr Rachkov's correct abandonment of his first and second propositions. It seems clear that the Arbitrators were indeed following the formula, and hence Article 424.3, applicable when a price could not be determined "*proceeding from the terms of the contract*", did not apply. The only variable was the substantial difference between the parties in respect of how to account for accounts receivable, which then left the (relatively minor, as can be seen from the one percent difference in the approach arrived at by the majority and minority) differences between Source Data 1 and Source Data 2. The Arbitrators were put into considerable difficulty by the parties, as described by them in their Award. Dr Rachkov's suggestion that the Arbitrators could have instructed an expert on their own account hardly seems apt, and would in any event only have been another way of doing what they were in fact doing, namely assessing the evidence. Professor Karabelnikov's evidence was that the arbitrators were doing their best to arrive at a figure in accordance with the contract. It is difficult to see that the Arbitrators were in any way in contravention of Articles 424 and 485.

42. If however there was a breach of Articles 424/485, and hence as Judge Shumilina described it "*conflict with the civil legislation*", it seems impossible to see how this is more than an error of law. The only basis for this was said by Dr Rachkov to be that,

by reference to Article 422, Article 424 was "*mandatory*", although such is not expressly provided. Professor Karabelnikov however produced two cases (to which I refer in paragraph 21 above), both being decisions of the FAC, in 2008 and 2012, which made it clear that a contravention of Article 424 would only amount to an error of law and would not "*violate the fundamental principles of the Russian law*". The 2008 case was not cited to Judge Shumilina, and the 2012 decision post-dated this case. However it seems clear that any error was only an error of law, and Judge Shumilina had in a number of previous cases, to which Professor Karabelnikov referred, herself drawn a careful distinction between an error of law, not enough to set aside an award, and a fundamental violation of public policy and universal principles. Neither Judge Shumilina in her judgment nor Dr Rachkov in his evidence gave any satisfactory explanation of this breach of universal law: save by reference to freedom of contract, which seems to me to be circular.

Ground Three: Non-Arbitrability

43. There were two bases for this proposition, first that corporate claims are not arbitrable and secondly that this claim for the purchase price was indeed a corporate claim. I shall deal first with the first issue.

44. There were two different approaches to this question, which can be seen as rooted in the approach of the Russian courts to international arbitrations (referred to in paragraph 12(3) above). The derivation of the argument could be found in two Articles of the Arbitrazh Procedural Code:-

> "***Article 33. Special jurisdiction of the arbitrazh courts over cases***
>
> *1. Arbitrazh courts shall consider the following cases:*
>
> …
>
> *(2) Over the disputes specified in article 225.1 of this Code.*
>
> …
>
> ***Article 225.1 Cases involving corporate disputes***
>
> *The arbitrazh courts try cases involving disputes connected with incorporation of a legal entity, its management or participation in a legal entity which is a commercial organisation, as well as in a non-profit partnership, association (union) of commercial organizations, other non-profit organization which unites profit-making organizations and/or sole proprietors, a non-profit organization with the status of a self-regulating organization in accordance with the federal law (hereinafter referred to as corporate disputes) including inter alia the following corporate disputes:*
>
> …

2) disputes connected with the ownership of stocks, shares in the authorized capital of business companies and partnerships, participatory interest of cooperatives' members, creating of their encumbrance and exercise of the rights arising out of them, except for disputes resulting from the depositaries' activity connected with registration of rights to stocks and other securities, disputes appearing from distribution of inherited property or severance of community property including stocks, shares in the authorized capital of business companies and partnerships, participatory interest of cooperatives' members"

45. The differences between Professor Karabelnikov and Dr Rachkov, both of whom had taken more extreme positions than were justified, in the event narrowed considerably, such that the following was common ground or was at any rate not capable of any dispute:-

(1) The contention which was relied upon to suggest that corporate disputes had to be tried in the Arbitrazh Court, and could not thus be arbitrated, was dependent upon an interpretation of Articles 33 and 225.1 set out above. However it is clear that Article 225.1, which was brought in by amendment in 2009, was intended to address allocation between courts, and neither it, nor any of the transitional provisions when it was introduced, in any way addressed arbitration.

(2) There were academic commentators taking opposite positions. Professor Komarov, the leading Russian exponent of arbitration and arbitrability, explained, as did Professor Karabelnikov, that the overriding legal position at Russian law was that arbitration was permitted unless expressly prohibited. Notwithstanding this, Professor Karabelnikov confirmed that there were "*divergent opinions*".

(3) Only one decision was referred to prior to Judge Shulimina's decision, in the FAC in 2006, which suggested that a corporate claim was not arbitrable, though it was not based upon Article 225.1, which it long antedated, and there were several decisions to the contrary: though Professor Komarov had in 2010 written that an appellate decision would be welcome.

(4) A Constitutional Court decision (10P) of 26 May 2011 dealing with Article 248 of the Arbitrazh Procedural Code which expressly provides for "*exclusive jurisdiction of the arbitrazh courts of the Russian Federation over cases involving foreign persons*", concluded, notwithstanding the express use of the word *exclusive*, that Article 248 did not rule out arbitration.

(5) Judge Shumilina's decision on arbitrability was contrary to the decision made only two months earlier by another judge of the Arbitrazh Court, upholding the Claimant's jurisdiction challenge and dismissing the defendant's claim to set aside the SPA on the basis that it should be heard in arbitration, consistent with the earlier decisions on arbitrability to which

I refer above. After Judge Shumilina there are many decisions to the same effect as hers, although there continued to be decisions to the contrary until in 2016 the law was changed (though not retrospectively) to encourage and facilitate arbitrability.

(6) The experts have differing views as to the import of the two applications made by the Claimant to the Constitutional Court in this case, and I do not draw any conclusions on them.

46. What is clear is that, whether or not Judge Shumilina was a pioneer in concluding that a corporate dispute was not arbitrable, there is no decision found by either expert to the effect that a claim for a purchase price pursuant to an SPA was non-arbitrable, although Dr Rachkov relied on one case which he asserted, and Professor Karabelnikov denied, had some similarity, being by way of the calculation of an exit price payable to a shareholder, but in any event was in 2012, post-Shumilina.

47. This second issue was the major battleground between the parties. Ms Hodges submitted that, even if it was possible for Judge Shumilina to have decided, albeit as a pioneer and albeit without hearing any argument, that a corporate claim was non-arbitrable, she could not without bias have reached a conclusion that the straightforward claim for the purchase price was such a corporate dispute, and she submitted, supported by Professor Karabelnikov, that her judgment and that of the FAC could not be explained except on that basis. The central core of her judgment was that *"the dispute related to the transfer of the title falls into the category of corporate disputes"*, and Ms Hodges submitted there was no dispute relating to the transfer of the title. The Arbitrators had ruled out the counterclaim for fraud/breach of contract, and only dealt with the price, and made no decision about the title at all, which was not in issue before them. There is simply a recitation in the Award (by reference to the Defendant's own defence and counterclaim) that *"the terms of the Agreement regarding transfer of title to Shares from the Individual to the Company and payment of the Advance Payment were performed"* and at paragraph 3 that *"on December 4 2007 the shares were transferred by the Individual into the Company's ownership"*. Insofar as there had been a counterclaim, this had been ruled out, as appears from paragraph 3 above.

48. Judge Shumilina's judgment reads as follows:

> *"In accordance with …. Article 33 of the Civil Procedural Code…, disputes stated in Article 225.1 .. fall within the jurisdiction of* [arbitrazh courts]. *In accordance with … Article 225…* [arbitrazh courts] *consider disputes relating to the ownership of shares, stocks in the authorized (share) capital of corporations and partnerships, stocks of members of cooperative societies, define encumbrances thereof and exercise of rights arising therefrom except disputes arising from the activities of depositaries connected with the consideration of the title to shares and other securities, disputes arising in relation with the severance of property of spouses including shares, stocks in the authorized (share) capital of corporations and partnerships, stocks of members of cooperative societies.*

The text of the above-mentioned decision goes that the dispute was considered by the arbitral tribunal under the Agreement of 22.11.2007 which is a share purchase agreement in the legal nature. According to the said agreement, Maksimov N.V. undertook to transfer to OAO NLMK the title to 50 % plus one shares, and OAO NLMK undertook to pay the purchase price to Maksimov N.V.

Share is an equity security fixing the right of its owner (shareholder) to receive a part profit of the joint-stock company in the form of dividends, to participate in the management of the joint-stock company and to a part of property remaining after its liquidation. A share is a registered security …

The dispute related to the transfer of the title fall into the category of corporate disputes

……

*Whereupon, the arbitral award on the claim to collect money contains a conclusion about the performance of the agreement and the transfer of shares (page 59 of arbitral decision) while the conclusion relating to the ownership of shares recorded using a special procedure may be made only by the [*arbitrazh court]*"*

In accordance with Art. 33 of RF CPC containing a direct reference to Art. 225.1 of RF CPC, the case on the dispute between the parties is within the special jurisdiction of the [arbitrazh court], *and, consequently, was not subject to consideration by ICAC at the RF CCI.*

Said violation is a reason for setting aside the arbitral award on the basis of par. 1 of clause 2 of item 2 of Art. 34 of the Law of the Russian Federation "On International Arbitration."

49. The FAC expanded on the judgment of Judge Shumilina, and I prefer the view of Professor Bevzenko that if, as they were, they were upholding the decision of the judge below, that was open to them. The FAC in relation to this ground concluded as follows:

"The judicial panel of the court of cassation instance accepts that conclusion of the court of first instance as to the non-arbitrability of this dispute by reason of restrictions under federal law.

The court of first instance correctly referred to Articles 33 and 225.1 of the Arbitrazh Procedural Code of the Russian Federation which stipulate the special jurisdiction of arbitrazh courts in corporate disputes.

It was established by the court [of first instance] that the dispute considered by the ICAC was based on the shares in OISC 'Maxi-Group' on 22 November 2007

In addition the court [of first instance] correctly established that the agreement relates to the title to the shares in OJSC 'Maxi-Group'.

Based on a literal construction of the provisions of the agreement dated 22 November 2007, the agreement has a mixed nature. Transaction B (clause 3 of the agreement), being the subject matter of the dispute, does not merely govern the sale of shares but also represents a set of legal relations: the execution of the transaction was subject to the fulfilment of a number of conditions precedent, including the execution of an agreement on corporate governance (clause 3 para 5) an additional issue of shares equalling the total enterprise value and conditions for the payment of the additional issue of shares by the parties (clause 3 para 4). Taking into consideration the mixed nature of the agreement dated 22 November 2007 and the complexity of transaction B under the agreement, it is impossible to sever the payment for the shares from the other terms in transaction B without establishing whether the conditions precedent to the transaction have been fulfilled, the additional issue of the shares has been undertaken and the relevant payment terms complied with, and without considering questions as to the title to such shares. Accordingly, it is unlawful to consider the severability of the arbitrable private law dispute in relation to payment for the shares as a result of compliance with the entire set of conditions in the transaction B and in relation to corporate governance.

……

The judicial panel of the court of cassation instance has concluded that the indication in federal law (the Arbitrazh Procedural Code of the Russian Federation) of the special jurisdiction of corporate disputes not only evidences the delimination of jurisdiction between the courts of general jurisdiction and arbitrazh courts but also means that such disputes cannot be referred to arbitration. This is due to the specific character of the legal relations which give rise to such disputes in light of the systematic construction of the provisions of Articles 4 and 33 of the Arbitrazh Procedural Code of the Russian Federation. Such position does not contradict either the principle of discretion, which provides that citizens and legal entities acquire and realise their rights by their will and in the interest based on freedom of contract, or the power of the legislation to ensure the balance of public and private interests by way of determining the list of disputes which can be considered only by state courts. Based on the statutory criteria

set forth in the form of general rules, the state determines the proper court and procedure for consideration of a particular category of disputes, and thus ensures the balance between private and public interests and provides legal certainty in the state protection of such rights and freedoms. The panel further takes into consideration the fact that arbitral tribunals, by their nature, are private law institutions dealing with dispute resolution.

Given the above, the panel of judges considers that when determining the jurisdiction of the arbitral tribunal, the ICAC failed to examine the nature of transaction constituting the basis for the dispute in sufficient detail, its complexity exceeding the narrow limits of the civil law relations and preventing any severability of the private law dispute regarding the payment of the shares from the entire sent of legal relations in transaction B.

By virtue of Article 34(2)(2) of Law No. 5338-1 "On International Commercial Arbitration" dated 07 July 1993, an arbitral award may be set aside by the court if the court rules that the subject matter of the dispute cannot be the subject matter in arbitration proceedings under the law of the Russian Federation.

The court of first instance lawfully applied this rule of law."

50. The SAC simply said as follows:

"Furthermore the courts have agreed that the dispute considered by the ICAC is non-arbitrable pursuant to rules in Article 33 and 225.1 of the Russian Arbitrazh Procedural Code in support of such position relying upon paragraph 29 in Letter of Information no. 96 of Presidium of the Supreme Arbitrazh Court of the Russian Federation "Summary of the proceedings before and rulings of the Arbitrazh courts on recognition and enforcement of foreign judgments, challenging the awards of the arbitral tribunals and issuance of writs of execution in respect of the arbitral awards" dated 29.12.2005.

Accordingly, the first and second instance (cassation) courts have reached a proper conclusion to the effect that the ICAC had failed to examine in sufficient detail the nature of the transaction serving as the grounds for asserting a claim, which in turn, resulted in a wrong conclusion in respect of the arbitral tribunal's jurisdiction"

51. Ms Hodges refers in an article in a Russian daily business newspaper RBC Daily of 2 February 2012, which expressly refers to this case, headed "*Arbitral tribunals closed to shareholders"* to a quote from the SAC's presiding judge, Judge Sarbash, who was one of the judges in this SAC decision, namely "*the question is an entirely new one*

for us, but we will monitor the Commercial Court practice and we will say when we do or don't like something while it is still early. The [SAC] has not yet defined any positions in this regard". Ms Hodges refers to this as a deliberate ducking of the issue on this case in order to leave it unchallenged.

52. Mr Brindle accepts that the words used by Judge Shumilina cited in her judgment above *" the arbitral award on the claim to collect money contains a conclusion about the performance of the agreement and the transfer of shares"* were not apt, and the cross reference to page 59 of the SPA not seemingly relevant. However he explains the decision on Ground 3 in this way:-

    (1) The Claimant's representatives themselves had relied upon and drawn attention to Article 225 at the outset of the hearing in their very first motion made before Judge Shumilina to contend that the application should not be heard in the Arbitrazh Court, but in the ordinary courts because the claim was not a corporate dispute. A ruling was not made on that motion until the end of the hearing, but the application continued in the Arbitrazh Court.

    (2) Both parties referred to and relied upon the existence of the fraud allegations, which the Defendant was seeking to bring in by way of support for their set aside application and the Claimant successfully resisted. The Claimant's representatives themselves pointed out the potential inconsistency between the decision in their jurisdiction challenge recently made, and subject to appeal, in relation to the Defendant's claim to set aside the SPA on grounds of fraud, and the application before Judge Shumilina, on the basis that if the SPA were set aside then no purchase price would be due.

    (3) Mr Brindle heavily relied upon the use in Article 225 of the words "*connected with*" and submitted that the claim for the price was "*connected with the ownership of…shares"*.

    (4) The Arbitrators had only made an award on the price, having ruled out the counterclaim, but the SPA itself made clear the conditionality of the payment of the price with compliance by the Claimant with his obligations, and he submitted that, albeit that the Arbitrators only decided what was before them, the total dispute involved both the price and the claims of fraud/breach of conditions, with which they were "*connected"*. The arguments as to non-severability, by reference to which the FAC directed itself, and its reference to the "*mixed nature"* of the SPA, are derived from the Defendant's written submissions in support of their appeal. He submits, though it is not as clearly spelt out by Judge Shumilina as by the FAC, that the *dispute* could not be seen as one limited to the claim for the purchase price, even though that was the only subject matter of the Award.

Conclusions

53. I refer to paragraph 15 above. The Claimant bears a heavy burden to establish not only that a foreign court's decisions were wrong or manifestly wrong but that they are so perverse as for it to be concluded that they could not have been arrived at in good faith or otherwise than by bias.

54. This is the more so when the decisions were of three courts, including the SAC, even if, as the Claimant contends, the SAC simply shut its eyes to the obvious and avoided hearing a case which it would have to have overturned if acting honestly.

55. There was plainly a difficult and uncomfortable decision for Judge Shumilina in relation to the experts, whether or not she had first to make a decision as to whether constructive notice as well as actual notice would be sufficient. It seems to me that she ducked that decision, and fell back on an unsupportable conclusion that the non-disclosure could not be waived, which plainly contradicted the very terms of the Rules which I have set out in paragraph 23 above.

56. Although the basis upon which she found for the Defendant was not announced orally on the day, in her subsequent written reasons she bolstered the ground which had been relied upon by the Defendant of non-disclosure with two further grounds which had not been raised or argued before her. One of those, Ground 2, was in my judgment hopeless, and the Judge must have known it was borderline arguable at best, not least in the light of her own previous sceptical treatment of allegations of breach of public policy where error of law could not succeed. Ground 3 was adventurous, in the sense that there had been no or no material prior judicial decision in favour of it, albeit that there had been some academic support for the concept of non-arbitrability. The parties were not given any opportunity to address her on either of these points.

57. The FAC's upholding of Ground 1 was seemingly flawed by a misunderstanding of what the factual case was or would have been on non-disclosure and waiver and was in any event wrong in law about non-waivability. The SAC's decision was similarly so flawed and did not even mention the non-waivability point which had been the decisive determining factor below. The FAC upheld Ground 2 with similarly fragile reasoning, and the SAC did not even mention it. The SAC on any basis ought to have addressed the novel question of non-arbitrability, even though, as Professor Karabelnikov accepted, they did not give permission to appeal on many occasions (no doubt like our own Supreme Court).

58. The decisions were supported by Dr Rachkov, but he, rightly, effectively abandoned two of them: and by the lawyers who gave evidence to the Amsterdam Court of Appeal, but it is very difficult to see how they could have supported at least two of the grounds, and it seems likely to me that if they had been cross-examined they, like Dr Rachkov, would have to have abandoned them.

59. The mistakes were made, if mistakes they were, by a very experienced judge, though under considerable pressure of time so far as the hearing itself was concerned.

60. So far as Ground 3 is concerned, the central question is whether this claim was a corporate dispute which could qualify for Judge Shumilina's novel conclusion about non-arbitrability: -

    (1) Although in general terms academic views were divergent, I am satisfied that there was no or no material judicial authority and certainly none in relation to a case in any way similar to that before her.

(2) It was not raised by the parties. Both of them had taken part in the arbitration, both advised by experienced lawyers, and had appeared before Arbitrators who too were very experienced.

(3) The claim was simply a claim for the price of shares which had been delivered.

(4) Judge Shumilina's own first instance decision, before it was flavoured by non-severability, *mixed nature* and the persuasive submissions of Mr Brindle, was very thin indeed as her second method of bolstering up the original flawed first ground: the Award contained no "*conclusions relating to the ownership of shares*".

61. However:-

(1) Mr Brindle may be right, although she did not make this clear, that Judge Shumilina derived the argument about corporate dispute and Article 225 from the submissions that had been made before her at that very hearing, and was influenced in her thinking by it.

(2) The counterclaims had been part of the arbitration until they had been ruled out, and it is right to say that the two are interrelated in the sense that if, as unfortunately for the Claimant subsequently occurred, the SPA were set aside, the claim for the purchase price would fall with it. This would not be a ground for refusing to enforce an award, but it might be a ground for concluding that the whole question ought to be heard in one place and, in the light of Article 225, in the Arbitrazh Court.

(3) Although as I have said in paragraph 22 above, I have derived most of the support for the decisions on Ground 3 from Mr Brindle and his team, it is fair to say that Dr Rachkov, albeit with no great persuasiveness, supported those decisions, and, with a degree of uncertainty, so did the Dutch Court.

62. Notwithstanding my severe criticism of, and doubt about, Grounds 1 and 2, and the fact that Grounds 2 and 3 were unfairly not canvassed at first instance and had become almost writ in stone by the time they went up on appeal, I am unpersuaded that these decisions are so extreme and perverse that they can only be ascribed to bias against the Claimant. I have considered, in the light of my conclusions about Grounds 1 and 2, whether, albeit ground 3 may otherwise be arguable, it is tainted by the unarguability of the balance of the grounds, but I am similarly not so persuaded. Judge Shumilina did not let in the fraud allegations as a basis for setting aside the Award, which she could have done if she was determined to find against the Claimant. She rested a shaky decision, on which she was perhaps very uncertain, as to Ground 1, on a basis, as to non-arbitrability, that she knew was contrary to the decision of her fellow Arbitrazh judge two months earlier, but her judgment was a public judgment, and it has not been regarded as an outlier, or a one-off, but was regularly followed by later judges.

63. The fact that such a harsh decision should have been made in respect of the work of these very distinguished Arbitrators, involving apparent conclusions about their lack of independence by virtue of their alleged subordination to their colleagues and

leading to the somewhat extraordinary criticism of them by the FAC that they "*did not apply the imperative provisions of civil law on the calculation of the purchase price"*, and even more so that "*when determining the jurisdiction of the arbitral tribunal, the ICAC failed to examine the nature of the transaction"* appears to me to be more indicative of the approach of the Russian Court towards arbitration, to which I have referred in paragraph 12(3) above. I do not however find that there is cogent evidence of bias against the Claimant.

64. I therefore do not need to address the interesting topic of *ex nihilo nihil fit*, by reference to various academic journals, to Commonwealth decisions and to such scraps of support as Mr Brindle was able to identify in English case law. My own view would be that an English court should not simply accept that a foreign court had set aside an arbitration award, particularly one within its own jurisdiction, if there were at the least an arguable case that the award had been set aside in breach of natural justice. In any event, I have not needed to resolve this interesting point.

Issue Estoppel

65. Particularly in the light of the fact that, as referred to in paragraph 11 above, the Defendant did not pursue any independent defences, the questions arising out of the decisions of the French court did not need further consideration by me. On any basis, the French court was not considering any question of Russian law, but reached its conclusion as to whether to enforce the award by reference to its own concepts of non disclosure etc.

66. The Dutch courts however remained relevant, and it was complicated by the fact that although the Court of Appeal in Amsterdam has delivered its judgment, and it is common ground that if it remained unchanged there would be issue estoppel on many if not most of the issues which fell to be determined by me, there is an outstanding appeal on two grounds by the Claimant to the Dutch Supreme Court. Those two grounds are (1) that the Court of Appeal of Amsterdam did not exercise its discretion correctly by limiting it to a discretion by reference to Article 6 of the ECHR and not an allegedly broader discretion by reference to Article V of the New York Convention, and (2) that the Defendant was in breach of Dutch procedural law by failing to make an application to a Dutch court for recognition of its judgment rather than simply defending an application to enforce the award made by the Claimant.

67. As far as the latter ground is concerned, it is common ground that it is possible that the Dutch Supreme Court, if it were attracted by the argument, might order a complete rehearing by a different court. So far as the first ground is concerned, the Dutch experts whom I heard, Mr Willem Van Baren for the Claimant and Professor Steven Bartels for the Defendant, were largely ad idem. A large number of findings by the Amsterdam Court, both factual and in relation to Russian law, including findings at least in relation to Ground 1, would be likely to remain binding, even if the appeal to the Supreme Court on that ground were successful. There is however an uncertain category which was addressed on the basis of there being findings which the Supreme Court, or perhaps the court to which the Supreme Court referred the case back if they did, would have to re-address as being '*inextricably intertwined'* with any conclusion which the Supreme Court reached. I benefited greatly from both experts. Professor Bartels was very clear and though at the end of the day prepared in certain circumstances to say "*anything is possible"*, gave me a picture of the likelihood of

outcome in Holland which left little room, even by reference to the doctrine of inextricable entanglement, with which he agreed, for the reopening of any material factors. Mr Van Baren was more cautious and, though naturally doing his best, subject to his independence as an expert, to assist his client, wanting to paint a more flexible picture. I found them both reliable and persuasive.

68. I do not in the end need to resolve this issue, and am pleased not to do so, because there might otherwise have been a temptation to have adjourned the case to await the outcome of the Supreme Court, because this is a case in which I am not so much being asked to say what the Dutch law is as what the conclusions of the Dutch court might be. This is because it is common ground between the experts that as a matter of Dutch law an outstanding appeal means that there may not be res judicata, which would mean that there was an exception, all by reference to Dutch law, to the normal English court approach that an outstanding appeal is irrelevant to the final and binding nature of a foreign judgment.

69. If I did have to reach a conclusion about the appeal, I would be of the view that the second ground is unlikely to succeed and if it did succeed unlikely to achieve the result of having a complete rehearing of the case. I am far from being so clear about the outcome of the first ground. There may well be success on the first ground, and if there were then it seems to me possible that some of the conclusions of the Court of Appeal of Amsterdam – not those relating to alleged procedural faults which are no longer pursued, but in the light of (a wider) discretionary approach by reference to the three grounds as here analysed by me and the evidence of Dr Rachkov set out in paragraph 12(4) above – may be reopened.

70. Given that the question of issue estoppel does not arise in the light of my findings, I also do not need to address the interesting submissions of Ms Hodges that if there had been an issue estoppel by reference to the Dutch court decision, I should exercise a discretion not to be bound by it by reference to a residual discretion derived from **Arnold v National Westminster Bank plc** 1991 2 AC 93. Ms Hodges submitted that I should follow and adopt the reasoning of Rix LJ in **Yukos Capital SARL v OJFC Rosneft Oil Co (No.2)** 2012 EWCA Civ 855 at paragraph 155, whereby if he had found (which he did not) that there was an issue estoppel that the Russian Court's decision should not be enforced, he would have concluded that in relation to such a matter, involving an attack on a foreign judgment, the English court should be obliged or at any rate entitled, to look at the matter again. On this application by the Claimant I have indeed looked at the matter again, and for very different reasons from those given by the Dutch court, which seem to me to have been very much based upon the advice they there received, which I am satisfied must have been inaccurate in a number of respects, I have nevertheless come to the same conclusion.

Result

71. For the reasons I have given I dismiss the Claimant's application to enforce its award, and I have not considered the issues of interest which do not now arise.