

# Selected Issues of Arbitrability of Disputes Related to the Purchase of Goods for State and Municipal Needs

**Albina Yu. Piddubrivnaya**

Associate Professor of the Department of Civil Law and Civil Procedure of the St. Petersburg University of the Ministry of Internal Affairs of Russia, Saint Petersburg, Russian Federation, PhD in Jurisprudence, Associate Professor; alba.78@mail.ru

## ABSTRACT

The article highlights issues related to determining the jurisdiction of disputes related to the purchase of goods, works and services to meet state and municipal needs. The author comes to the conclusion that the law enforcement practice and the positions of the highest courts of the Russian Federation confirm the possibility of considering disputes arising from contracts related to supplies for state and municipal needs in the framework of arbitration proceedings.

**Keywords:** purchase of goods, works, services to meet state and municipal needs, jurisdiction, arbitrability, Supreme Court of the Russian Federation, Constitutional Court of the Russian Federation

Issues related to the relationship between «private» and «public interest» in civil law remained the subject of scientific debates. Traditionally, we are accustomed to associate private law with the interests of individuals, and public law with the interests of the state. However, this is not the only one correct approach. Thus, G.D. Considering and justifying the social essence of law, D. Gurvich said that «... private law along with individual law can include many layers of integrating law (social law), and subordinating law, «public law», can include and does indeed often include significant areas of individualistic law and order...»<sup>1</sup>. F. Shershenevich argued that civil law aims to protect the interests of the society by protecting the interests of an individual<sup>2</sup>.

The contradiction of scientific approaches has entailed similar contradictions in the legislation and the lack of uniformity in its interpretation. In particular, it concerns the issue of jurisdiction of disputes related to the purchase of goods and services to meet the state needs. The court order which are issued as a result of the resolution of such disputes are very heterogeneous. The court rulings issued as a result of the resolution of such disputes are very heterogeneous. It is no coincidence that the Supreme Court of the Russian Federation, having considered the case No. A33-21242/2018<sup>3</sup>, drew attention to the fact that it is necessary to distinguish between the legal relations regulated by the Law on Procurement of Goods, Works, and Services by Certain Types of Legal Entities No. 223-FL<sup>4</sup>, on the one hand, and the Law on the Contract System in the Field of Procurement for State and Municipal Needs No. 44-FL<sup>5</sup>, on the other (Ruling No. 302-ES19-16620)<sup>6</sup>.

The Supreme Court of the Russian Federation and the Constitutional Court of the Russian Federation recognize the arbitrability of disputes arising from these legal relations, that is an important step in resolving issues related to purchase for state needs.

The Supreme Court of the Russian Federation considered a case in cassation between two joint – stock companies-JSC «Mosteplosetstroy» and JSC «Mosinzhpoeekt» (the city of Moscow owned hundred percent of the last-named company's shares), which concluded a general contract agreement, contained an arbitration clause obliging the parties to

<sup>1</sup> Gurvich G. D. Philosophy and Sociology of Law. Selected works / tr. M.V. Antonova, L. V. Voronina. St. Petersburg: Publishing House of St. Petersburg State University. 2004. P. 53.

<sup>2</sup> Shershenevich G. F. Textbook of Russian Civil Law. Moscow, 1911. P. 5.

<sup>3</sup> Arbitration Court of the Krasnoyarsk Territory: decision of January 25, 2019, case no. A33-21242/2018. Krasnoyarsk. The operative part of a resolution was announced at the court hearing on January 18, 2019. In full, the court decision was made on January 25, 2018. [Online source]. URL: <https://kad.arbitr.ru/Kad/Card?number=A33-21242/2018> (date of request: 10.11.2020).

<sup>4</sup> On Procurement of goods, Works, and Services by Certain Types of Legal Entities: Federal Act No. 223-FL of 18.07.2011 [Online source] // Access from the RLS «Consultant Plus». URL: [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_116964/](http://www.consultant.ru/document/cons_doc_LAW_116964/) (date of request: 18.02.2021).

<sup>5</sup> On the contract system in the field of procurement of goods, works, and services for State and Municipal Needs: Federal Law No. 44-FL of 05.04.2013 [Online source] // Access from the RLS «Consultant Plus». URL: [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_116964/](http://www.consultant.ru/document/cons_doc_LAW_116964/) (date of request: 18.02.2021).

<sup>6</sup> The Supreme Court of the Russian Federation. Ruling No. 302-ES19-16620. Moscow, case no. A33-21242/2018. The resolute part of decision was announced on 03.03.2020. The full text of the decision was made on 11.03.2020 [Online source]. URL: [https://kad.arbitr.ru/Document/Pdf/9adc3126-16c3-4cbc-84fa-fb35d1f867c8/d2a7297a-570b-4b47-9986-f2ced8575814/A33-21242-2018\\_20200311\\_Opredelenie.pdf?isAddStamp=True](https://kad.arbitr.ru/Document/Pdf/9adc3126-16c3-4cbc-84fa-fb35d1f867c8/d2a7297a-570b-4b47-9986-f2ced8575814/A33-21242-2018_20200311_Opredelenie.pdf?isAddStamp=True) (date of request: 10.11.2020).

apply to the arbitration court in case of disputes. In 2016, the failure of Mosinzhproekt JSC to fulfill its obligations resulted in arbitration proceedings, followed by an appeal to the arbitration court for enforcement of the arbitration court's decision. JSC «Mosinzhproekt» directed a cassational appeal to the board of the Supreme Court of the Russian Federation, referring to the special legal nature of the legal relations between the parties to the dispute and in accordance with the federal law «On Purchase of Goods, Works, Services by certain Types of Legal Entities» No. 223-FL, insisted that the purchase rules for state and municipal needs should be applied in these legal relations.

During the consideration of the cassation appeal the economic Board of the Supreme Court suspended the proceedings and appealed to the Constitutional Court of the Russian Federation with a request regarding the arbitrability of such disputes. The Constitutional Court of the Russian Federation indicated in its decision<sup>7</sup> that the subjects of law covered by the statute of Federal Law No. 223-FL, do not act as administrative subjects, but as equal participants in civil turnover, acquiring all the relevant rights and obligations when concluding public procurement contracts. The ability to transfer a dispute from a contract to an arbitration court is an integral part of the principle of freedom of contract, which means that the parties to the procurement contract both for state and municipal needs also have this opportunity.

During the consideration of the dispute by the Supreme Court of the Russian Federation, the Association of Participants for Assistance in the Development of Arbitration Proceedings (Arbitration Association) sent a letter to the Supreme Court, which contained an overview of the arbitrability of disputes involving public entities in foreign countries. The letter also noted that the European Convention on Foreign Economic Arbitration, to which the Russian Federation is a party, explicitly provides for the right of «legal entities of public law» to conclude arbitration agreements while conducting foreign trade transactions<sup>8</sup>.

The review pointed out that the jurisprudence of individual States confirms the arbitrability of disputes, regardless of the presence of a «public element»<sup>9</sup>. Thus, the High Court of London confirmed the arbitrability of the dispute in the case of *Nori Holdings Ltd. and ors. v. Public Joint-Stock Company Bank Otkritie Financial Corporation*<sup>10</sup>, noting in particular that disputes arising from public procurement contracts are always arbitrable. The practice of hearing such cases in Brazil is based on the fact that any disputes arising from legal relations that have a certain monetary value in one way, or another will be considered arbitrable, as confirmed by the decisions of the Supreme Court of Brazil<sup>11</sup>. Similarly, the arbitrability of disputes is regulated in the legislation of Sweden<sup>12</sup> and Finland<sup>13</sup>, where it is assumed that the arbitral tribunal can consider any dispute by agreement of the parties.

In July 19, 2018 Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation, having considered in cassation the case on the claim of JSC Mosteplosetstroy against JSC Mosinzhproekt, based on the earlier order of the Constitutional Court of the Russian Federation, decided to enforce the decision of the arbitration court, leaving in force the decisions of the courts of the first and second instances, pointing to the equality of the parties to the contract on procurement for state and municipal needs, as well as the applicability to their relations of the principle of freedom of contract<sup>14</sup>.

Thus, we can say that the Supreme Court of the Russian Federation confirmed by its decision the thesis that civil law regulation can fulfill its main purpose in a harmonious combination of private and public interests<sup>15</sup>.

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<sup>7</sup> At the request of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation on checking the constitutionality of the Provisions of the Arbitration Procedure Code of the Russian Federation, as well as the federal Laws «On Procurement of Goods, Works, Services by Certain Types of Legal Entities», «On Arbitration Courts in the Russian Federation» and «On Arbitration (Arbitration proceedings) in the Russian Federation» [Online source]: ruling of the Constitutional Court of the Russian Federation dated April 12, 2018 No. 865-O. URL: <https://legalacts.ru/sud/opredelenie-konstitutsionnogo-suda-rf-ot-12042018-n-865-o/> (date of request: 10.11.2020).

<sup>8</sup> Amicus curiae of the Arbitration Association (AAA) to the Supreme Court of the Russian Federation // Bulletin of International Commercial Arbitration. 2018. № 1. P. 245-258.

<sup>9</sup> Ibid.

<sup>10</sup> Text of the decision in the case of *Nori Holdings Ltd. and ors. v. Public Joint-Stock Company Bank Otkritie Financial Corporation* [Online source]. URL: <https://www.casemine.com/judgement/uk/5b2898012c94e06b9e19ed4b> (date of request: 10.11.2020)

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<sup>15</sup> Schennikova L. V. Civil-legal regulation: public interests, general benefits, good morals: monograph / L. V. Shishkin. V. Schennikova. Moscow: Norma: INFRA-M. 2019. P. 23.

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