

# Arbitrability of Real Estate Disputes

## Introduction

On 26 May 2011 the Constitutional Court of the Russian Federation ("**Constitutional Court**"), in response to a request by the Supreme Arbitrazh Court of the Russian Federation ("**Supreme Arbitrazh Court**"), issued a decree clarifying whether or not domestic arbitral tribunals may resolve real estate disputes and render awards giving rise to the transfer of rights to and state registration of such property or to mortgage foreclosure. The Constitutional Court decree also sets out conclusions as to the arbitrability of disputes (i.e. the possibility of disputes being heard by arbitral tribunals) that are within the exclusive jurisdiction of Russian state arbitrazh (i.e. commercial) courts. The Constitutional Court's approach can be applied not only to domestic tribunals, but also to international commercial arbitrations.

## Background

In many cases federal laws envisage the possibility of the official registrar, the Federal Service for Registration, the Cadastre and Cartography, making registration entries on the basis of an arbitral award. However, as the Constitutional Court noted, in arbitrazh court practice since 2005 the state registration of transactions and other legally significant actions with real estate has been treated as a "public element", meaning that arbitral tribunals are precluded from hearing civil law disputes involving real estate. The arbitrazh courts have taken a similar approach in regards to international commercial arbitration (see clause 27 of the Informational Letter of the Presidium of the Supreme Arbitrazh Court No. 96 of 22 December 2005 "Review of arbitrazh court practice in cases on recognition and enforcement of foreign court judgments, on challenging arbitral awards and on issuance of writs of execution for enforcement of arbitral awards").

## The Constitutional Court's position

The Constitutional Court disagrees with the position of the Supreme Arbitrazh Court and has come to the following conclusions.

Disputes arising out of civil law relations are arbitrable. A dispute cannot be held to be of a public law character solely due to the fact that the subject matter of the dispute is real estate. It is the specifics of the legal relations from out of which a dispute arises and the specifics of the parties to the dispute that determines whether a dispute is a public law dispute. The state registration requirement applicable to real estate is not connected with the parties to a dispute, nor the character of the legal relations out of which it arises; it is connected only with the specifics of the subject matter of the dispute. Therefore, disputes arising out of civil law relations (including, without limitation, disputes relating to mortgage foreclosure and disputes arising out of agreements stipulating the transfer of title to real estate, etc.) may be heard by arbitral tribunals.

The Constitutional Court also noted that disputes arising out of administrative law and other public law relations may not be referred to arbitration, nor may disputes that are heard through special proceedings and do not have the traditional characteristics of disputes over a right (e.g. cases on establishing facts of legal significance, etc.). The legislators may set out and refine a list of types of disputes that are arbitrable.

## Key Issues

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### Background

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### The Constitutional Court's position

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The Constitutional Court's position is universally binding, so any alternative interpretation of the laws by courts is excluded.

### **The Constitutional Court's interpretation of the provisions of law on the exclusive jurisdiction of arbitrazh courts in disputes involving foreign parties**

The Constitutional Court has expressly stated that its position relates only to domestic arbitrations (which are regulated separately from international commercial arbitrations). Nevertheless, its interpretation of Art. 248 of the Arbitrazh Procedure Code of the Russian Federation ("APC"), which establishes the exclusive jurisdiction of Russian arbitrazh courts in cases involving foreign parties, may also be applied to international commercial arbitrations. Disputes that are within the exclusive jurisdiction of Russian state arbitrazh courts include, without limitation, disputes over real estate or rights to real estate located in the Russian Federation (Art. 248(1)(2) of the APC).

According to the Constitutional Court's interpretation, Art. 248 of the APC is meant to delineate the jurisdiction of state courts of various countries in trans-border disputes, not to exclude the possibility of disputes within the exclusive jurisdiction of Russian arbitrazh courts from being referred to arbitration. Hence Art. 248 of the APC does not preclude parties from availing themselves of alternative dispute resolution mechanisms.

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