No Settlement Agreement in Proceedings on the Enforcement of Foreign Arbitral Awards? A Controversial Stance of Russian Courts

Aleksandr Muranov / Dmitrij Davydenko

A. Gist of the problem

At times commercial courts have to deal with requests for writs of execution for the enforcement of arbitral awards. Yet different judges still tend to treat various issues which arise in the course of such proceedings other than in a uniform fashion – a situation entailing such difficulties for the litigants as are unwarranted and undesirable from the standpoint of both the law and the interests of legality and the economy.

One such issue is the possibility for a court to approve an amicable settlement in a case opened upon a request for a writ of execution to enforce an arbitral award or by a challenge to an arbitral award.

The problem rose squarely before the Russian state commercial judicial system (so-called *'arbitrazh'* courts) yet again in 2007 and the early 2008 when the Moscow City Commercial Court considered a case based on a request for a writ of execution to enforce an award delivered by the Maritime Arbitration Commission at Russia's Chamber of Commerce and Industry (the "MAC") on a dispute having resulted from a contract of marine insurance. The Russian insurance company ordered by the MAC to pay the insurance indemnity sought by the claimant had taken issue with that award as being contrary to the public policy of the Russian Federation. The foreign insured party (the "Award Creditor") went to the Moscow City Commercial Court for a writ of execution to enforce the MAC award. Opposed to the payment of the insurance indemnity under the circumstances, the insurer (the "Debtor"), for its turn, applied to the court for that award to be set aside.

The case was heard for more than one year – by different judges. The initial judgment was to overturn the MAC award, but then the Federal Commercial Court of the Moscow Circuit granted the Award Creditor's appeal and sent the case back for retrial to the Moscow City Commercial Court[1]. The same judge who had first considered the request for a writ of execution to enforce the MAC award conducted the retrial.

So as to avoid further serious litigation costs as the Moscow City Commercial Court carried on the proceedings, the parties agreed upon an amicable settlement and filed a petition at the hearing for its approval by the court. Under the terms of the settlement, the Debtor agreed to pay a certain monetary amount to the Award Creditor by way of resolving their argument fully and finally, while the Award Creditor undertook to give up its claims related to or based on the MAC award, including the request for a writ of execution for its enforcement.

The judge began by taking up the above petition, but then declared, after discussing the matter with colleagues remaining unknown, that no amicable settlement could be approved in the case. She explained that decision by arguing that the Russian Commercial Court Procedure Code [the "CCPC"] prescribes imperative procedures for the consideration of cased based on requests for writs of execution to enforce arbitral awards, which do not provide for the possibility of any amicable arrangement made in the process of their examination. The judge also asserted that such settlement agreement should have been executed earlier, as the dispute was still being heard by the MAC, and that approving such arrangement would be tantamount to the Moscow City Commercial Court's breach of the arbitral tribunal's jurisdiction and inadmissible revision of a case already resolved by the MAC upon its merits.

The judge backed her decision by referring to Resolution No. F04-12/2007 by the Federal Commercial Court of the Western-Siberian Circuit, dated December 13, 2007[2]. That resolution validated the conclusion drawn by the Omsk Region Commercial Court that it was impossible to approve an amicable settlement in a case over a request for a writ of execution for the enforcement of an award made by the Arbitration Court of the Siberian Federal Circuit. The amicable settlement the parties to the dispute wanted approved was based on such terms as were similar as those agreed upon by the parties in the case heard by the Moscow City Commercial Court: the Award Creditor was withdrawing its request for a writ of execution to enforce the arbitral award in return for the respondent's payment of the specified amount according to the agreed schedule. The Federal Commercial Court of the Western-Siberian Circuit said: *"The court refused to approve the amicable settlement and to issue the writ of execution sought for enforcement purposes on*

[1] Case No. A40-46792/06-60-415 (has not been published, but can be found in the Konsultant-Plus electronic database [available by private subscription]).

[2] Has not been published, but can be found in the Konsultant-Plus electronic database [available by private subscription].

*the grounds that the amicable settlement reached by the parties **must be approved by an arbitral tribunal**.*

"After weighing the arguments raised in the cassation appeal, the cassation authority finds that the trial court was right in denying approval for the amicable settlement, as no writ of execution had been issued and the request by Favorit LLC for the amicable settlement's approval could not be deemed to have been filed at the enforcement phase in the proceedings.

"Furthermore, applicable legislation **does not provide for a commercial court's approval** of an amicable settlement during its consideration of a case based on a request submitted for a writ of execution for the enforcement of an arbitral award" (here and later on, italicizing is by the authors).

The judge could also have referred to Resolution No. A33-8956/04-S1-F02-4129/04-S2 by the Federal Commercial Court of the Eastern-Siberian Circuit, dated October 5, 2004[3]: *"By its ruling dated June 21, 2004, the Krasnoyarsk Region Commercial Court granted the application of Katren Science-and-Production Company CJSC for a writ of execution to enforce the Siberian Arbitration Court's award.*

"As the Krasnoyarsk Region Commercial Court was examining the case, the parties filed a petition for the approval of an amicable settlement.

"The Krasnoyarsk Region Commercial Court rejected that petition by a ruling dated June 21, 2004…

"The cassation appellant believes that when issuing that judicial act, the court misapplied relevant procedural legislation, namely: Articles 138, 139, 140, 238, and 239 of the Commercial Court Procedure Code of the Russian Federation.

"The stand taken by the Krasnoyarsk Region Commercial Court, in the appellant's opinion, has significantly restricted the parties' rights available under, and narrowed the applicability of, the Commercial Court Procedure Code of the Russian Federation. The court has breached Article 138 of the Commercial Court Procedure Code of the Russian Federation, which instructs the courts to take steps towards the parties' reconciliation and to assist them in having their disputes settled

"Upon verifying evidence admitted to the case file and investigating the arguments marshaled in the cassation appeal, the Federal Commercial Court of the Eastern-Siberian Circuit concludes as follows…

"In its decision to satisfy the application, the Krasnoyarsk Region Commercial Court proceeded from the writ of execution sought being subject to issue, because the arbitral award had violated no fundamental principle of the Russian law and was consistent with applicable legislation.

"As the application for the writ of execution was being considered, the parties petitioned the court to approve an amicable settlement.

"In accordance with the amicable settlement, Central District Pharmacy No. 274, a state unitary enterprise, was to reimburse Katren Science-and-Production Company CJSC for its legal costs in the amount of 4,041 rubles 93 kopecks by June 30, 2004 in return for Katren Science-and-Production Company CJSC dropping its claims for late charges in the amount of 172,265 rubles 93 kopecks.

"When turning down the petition, the Krasnoyarsk Region Commercial Court proceeded from the understanding that the commercial court examining an application for a writ of execution to enforce an arbitral award does not consider the dispute capped by that award upon its merits".

The Federal Commercial Court of the Eastern-Siberian Circuit noted further in its act: "That conclusion was valid and **consistent with the special provisions of Paragraph 2 of Chapter 30** of the Commercial Court Procedure Code of the Russian Federation, and the Regulations on Procedures for the Trial of Cases Based on Requests for Writs of Execution for the Enforcement of Arbitral Awards." The "special provisions", as referred to in the resolution, obviously constitute the entirety of the rules set out in the paragraph, which do not mention any possibility for a commercial court to approve an amicable settlement during its consideration of an application for a writ of execution for the enforcement of an arbitral award.

The Moscow City Commercial Court's judge, however, chose to overlook the fact that with the 2002 CCPC already on the books, the Federal Commercial Court of the Moscow Circuit has once granted a petition from the parties to approve their amicable settlement in a case initiated upon a request for the recognition and enforcement of an award delivered by an international commercial arbitration court (i.e. the London Court of International Arbitration – the LCIA) and to quash the lower courts' refusals to do the same[4]. She also opted to disregard the arguments made below.

Under the circumstances, the parties were compelled to decide to enter into an amicable settlement at the enforcement phase and resolve their dispute as follows: the Debtor retracted its application for the MAC award to be set aside and the court ruled to issue a writ of execution for the recovery of the entire sum awarded by the MAC, following which the litigants executed a settlement agreement altering the procedure for their fulfillment of the MAC award (including a deferral of and a reduction in the payment), while the court approved that agreement. There was no other

[3] Has not been published, but can be found in the Konsultant-Plus electronic database [available by private subscription].

[4] Resolution No. KA-A40/4994-02 by the Federal Commercial Court of the Moscow Circuit, dated September 5, 2002 (has not been published, but can be found in the Konsultant-Plus electronic database [available by private subscription]).

way the judge was going to endorse the amicable settlement.

Are the courts right in concluding that amicable settlements may not be approved in cases opened upon requests for writs of execution for the enforcement of arbitral awards (including, but not limited to, those delivered by international commercial arbitration courts) until the proceedings reach the enforcement phase, because no legislation expressly provides for the possibility of such approval being granted earlier?

The above acts are the only ones in which state commercial courts authorities have formulated their position on the issue. Yet upon being requested to issue writs of execution for the enforcement of arbitral awards, commercial courts in their rulings to prepare the respective cases for trial and to schedule preliminary hearings have routinely mentioned the advice given to the parties on their right to enter into an amicable settlement. In Case No. A40-2778/03-16-27T opened on the basis of a request for a writ of execution to enforce an award made by the Commercial Arbitration Court at the Moscow Chamber of Commerce and Industry, the Moscow City Commercial Court on February 17, 2003 made a ruling on preparations for the trial, which noted the parties' right to enter into an amicable settlement[5]. Such circumstances, however, do not really mean anything: when issuing such measures, the judges use standard forms and neglect to cross out the optional wordings which are not applicable to the corresponding cases. In its ruling dated February 8, 2008, which ordered preparations to be made for proceedings and scheduled a preliminary hearing on a request for the recognition and enforcement of an LCIA award in Case No. A40-31732/07-30-319[6], the Moscow City Commercial Court said: *"The parties have been briefed on their rights to have the case heard by a jury, to submit the dispute to commercial arbitration, to apply to a conciliator for a settlement, or to enter into an amicable arrangement"*. Yet the parties in the case would certainly be unable to exercise their ostensible rights to have recourse to trial by jury or to submit the dispute to commercial arbitration.

B. Significance of a solution

The answer to the foregoing question is crucial. Even though cases based upon requests for writs of execution to enforce arbitral awards account for only a fraction of the cases handled by commercial courts[7], the outcome of the respective proceedings is of high importance to their parties and their business. The manner in which the corresponding cases are resolved is also critical considering the need to develop the private arbitration of disputes and to optimize the performances of commercial courts. This is why the question of whether amicable settlements are possible in such cases is vital from both theoretical and practical points of view. In addition, the way the question is answered will reflect the role and place of amicable settlements in the Russian law and the existing understanding of the nature of such kind of cases in Russian practice.

It will also demonstrate the direction in which Russian procedural legislation is developing by providing an indication as to whether the principles of optionality and the autonomy of the parties' will are taking hold (in the best interest of legal and economic practices) or the inquisitional system of procedures is still catching on.

Although this article will only analyze the admissibility of amicable settlements in cases based on requests for writs of execution for the enforcement of arbitral awards (including, inter alia, those by international commercial arbitration courts) made in Russia, the authors take the view that the respective conclusions will also be applicable, *mutatis mutandis*, to the following legal actions:

- requests for the enforcement of awards made by international commercial arbitration courts abroad;
- requests for the enforcement of foreign judgments in Russia; and
- challenges to arbitral awards, including, but not limited to, those by international commercial arbitration courts, made in Russia or abroad.

As in the proceedings instituted over requests for writs of execution to enforce arbitral awards (including, inter alia, those by international commercial arbitration courts) made in Russia, awards upon the merits of all of the above cases have already been pronounced by other authorities, leaving the Russian courts to examine only the existence or absence of grounds for the recognition and/or enforcement of such awards.

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5 Treteisky Sud [Arbitral Tribunal], Issue No. 3 (27), 2003, p. 85.

6 Has not been published.

7 Of the 1,080,154 cases heard by the trial courts in 2006, for example, only 1,704 (or 0.157% of the total) were based on challenges to arbitral award or motions for writs of execution for the enforcement of arbitral awards and merely 73 were initiated upon requests for the recognition and enforcement of foreign judgments or arbitral awards (or less than 0.0067% of the total) (Table showing basic indicators concerning work done by commercial courts in the Russian Federation in 2002-06 // http://www.arbitr.ru/_upimg/57605A349468E3993D142B3AD5AB4ABB_2006_vas-s_3.pdf (website of the Russian Supreme Commercial Court)).

C. Admissibility of amicable settlements being approved in cases under review in the light of applicable legislative provisions

I. Rationale behind the courts' unwillingness to approve amicable settlements in the cases in question: an unduly formal approach to the applicable provisions of the CCPC

It appears that the courts dealing with the aforementioned cases, which have concluded that it is impossible to approve amicable settlements in the course of such proceedings, have obviously taken their cue from the fact that Chapter 15 of the CCPC ["Conciliation Procedures. Amicable Settlements"] is found in Section II of the CCPC, "Trial Proceedings. Action Proceedings", while the rules governing the issue of writs of execution for the enforcement of arbitral awards are contained in Section IV, "Special Aspects of Proceedings in Separate Categories of Cases", with no action proceedings any longer taking place after being wound up by the arbitral tribunals having heard the disputes upon their merits.

This is precisely why the courts in such cases have said that they were not going to take them up upon their merits, that amicable settlements were to be approved during the examination of those cases upon their merits, and that the special rules applicable to such instances did not provide for the approval of amicable settlements and prevented Chapter 15 of the CCPC, "Conciliation Procedures. Amicable Settlements", from being invoked.

Is such posturing rightful or formalistic and basically flawed?

II. Clause 238.1 of the CCPC offers no clue to answering the question

Clause 238.1 of the CCPC mandates as follows: "An application for a writ of execution to enforce an arbitral award shall be subject to consideration by a sole judge **in accordance with the rules established by this Code** and within one month of the day on which the application reached the commercial court, including the time needed to prepare the case for trial and to issue a ruling."

What is meant by the *"rules established by this Code"*: just the provisions of Paragraph 2, "Proceedings in Cases Opened on the Basis of Requests for Writs of Execution for the Enforcement of Arbitral Awards," of Chapter 30 of the CCPC, which say nothing of the possibility for the parties to end their dispute by an amicable settlement and tend, for this reason, to be interpreted by the courts as making it possible for them to refuse to approve such arrangements in the cases under review, or also Clause 49.4 of the CCPC[8], if understood as entitling the parties to end absolutely any case before commercial courts by an amicable settlement?

One's impression is that judges with commercial courts may opt for either of the answers, depending on their own notions of applicable legislation, the facts of the case, or the status of a litigant (even if such understanding is in conflict with the law).

From the standpoint of terminology, it is interesting to note that Article 217 of the CCPC provides for commercial courts to hear cases based on requests to establish facts of legal relevance in accordance with the general rules for action proceedings established by the CCPC, subject to the special aspects covered by Chapter 27, "Examination of Cases Based on Requests to Establish Facts of Legal Relevance". Although Chapter 27 and Chapter 30, "Proceedings in Cases Based on Challenges to Arbitral Awards and Requests for Writs of Execution for the Enforcement of Arbitral Awards", both make part of Section IV, " Special Aspects of Proceedings in Separate Categories of Cases", Chapter 27 speaks of cases being heard in accordance with the general rules for action proceedings, while Chapter 30 speaks of cases being heard in accordance with the applicable rules established in the CCPC. It should really be vice versa: proceedings in actions to verify facts of legal relevance resemble action proceedings to a lesser extent than cases initiated by challenges to arbitral awards and requests for writs of execution to enforce arbitral awards.

III. Need to consider that the possibility of disputes being ended by amicable settlements is provided for not only in Section II, "Trial Proceedings. Action Proceedings", of the CCPC but also in Section I, "General Provisions", of the CCPC, which is applicable, by general rule, to all matters taken up by commercial courts

According to Clause 49.4 of Article 49, "Change to Causes or Subject Matter of Action, Change to Amount Claimed, Withdrawal of Action, Admission of Action, and Amicable Settlement", which is found in Section I, "General Provisions", of the CCPC, *"Litigants may end the case by means of an amicable settlement achieved in the manner provided for by Chapter 15 of this Code."*

It is apparent that the rules established in Section I, "General Provisions", are applicable, by general rule, during the trial by commercial courts of any cases, among them those opened upon requests for writs of execution to enforce arbitral awards.

The fact that the heading of Article 49 and Clauses 49.1, 49.2, 49.3, and 49.5 speak of actions and claims, i.e. the examination of disputes upon their merits, does not at all mean that Article 49.4 should be interpreted as holding precisely that amicable settlements may only be made during the hearing of claims upon their merits. The contents of Clause 49.4 suggest nothing of the kind.

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[8] "Litigants may end the case by means of an amicable settlement achieved in the manner provided for by Chapter 15 of this Code."

As to the words *"in the manner provided for by Chapter 15 of this Code"*, they should be held to relate to the procedural aspects of approval for an amicable settlement, irrespective of the cases in which such approval is sought, rather than suggesting that an amicable settlement may only be endorsed as part of action proceedings.

Nothing in the CCPC indicates that the general rules set out in Section I, "General Provisions", are inapplicable to those cases the special aspects of proceedings in which are established by Section IV of the CCPC. The rules of the CCPC, in particular, those on proof, the production of evidence, or representation, are indeed at all times applicable to the examination of cases based on requests for writs of execution to enforce arbitral awards. So why may not the rule made in Clause 49.4 of the CCPC to allow the litigants to end disputes by amicable settlements be applicable in such cases?

The stipulation appearing in Section I, "General Provisions", of the CCPC to authorize the litigants to dispose of their dispute by working out a settlement agreement should be held to suggest that amicable arrangements may actually be made and approved in such cases based on requests for writs of execution to enforce arbitral awards as are in some way special.

IV. Futility to rely upon the principles "What is not prohibited is permitted" and "What is not permitted is prohibited" in the light of judicial practices

It should be noted in connection with the above that amid the new market conditions, Russian state commercial courts authorities have long ceased to be bothered by the question of which of the two principles – "What is not prohibited is permitted" and "What is not permitted is prohibited" – should be preferred in a specific situation; they have learnt, alas, the lesson that, from the standpoint of their own interests, it is much more opportune not to follow any clear-cut rules dictating the choice of such tenet, but to elect whichever is the more advantageous to themselves under the circumstances.

This is why it is useless – for the purposes of finding a final answer to the question in hand – to rely on both two principles by analyzing the trends showing in judicial practices. The conjunctural attitudes taken by commercial courts to the choice of either of those principles leaves no alternative to treating such practices as a lottery the winnings in which turn on a number of factors, including the professionalism and independence of individual judges, the administrative weight wielded by a particular litigant, and its prowess in buying its way around the law, among other things.

V. Implicit need to invoke the principle "What is not prohibited is permitted" from the standpoint of what is just by common sense and Article 2 of the CCPC

The above, however, does not at all mean that efforts to find the answer sought to the question being analyzed should steer clear of the two foregoing principles in the search for what is proper. From the standpoint of what is just, preference in the situation under review should clear go to the principle "What is not prohibited is permitted".

This choice is supported, among other things, by Article 2, "Purposes of Proceedings in Commercial Courts", of the CCPC: *"The purposes of proceedings in commercial courts shall be:...*

"(6) to facilitate the establishment and development of collaborative business relations and to cultivate good business customs and ethics."

But can the refusal of commercial courts to approve such amicable settlements in cases based on requests for writs of execution to enforce arbitral awards as are made by the parties, inter alia, by way of collaboration facilitate the establishment and development of collaborative business relations? The reply is an emphatic no.

Although the above is sufficient, in principle, to remove the last remaining doubts as to the possibility for the courts to approve amicable settlements in proceedings instituted upon actions for writs of execution for the enforcement of arbitral awards, is there any other argument in support of that possibility?

VI. An amicable settlement is made at a stage in commercial court proceedings constituted by the court's examination of a case based upon a request for a writ of execution to enforce an arbitral award

This appears to follow from the rules of the CCPC on specific conditions and procedures for the execution and approval of an amicable settlement within the frameworks of a case tried by a commercial court.

According to Clause 139.1 of the CCPC, which makes part of Chapter 15, "Conciliation Procedures. Amicable Settlements", "Litigants may enter into an amicable settlement at **any stage in commercial court proceedings** or during the fulfillment of a judicial act". Clause 139.2 of the CCPC stipulates that "an amicable settlement shall be possible **in any case**, unless otherwise is provided for in this Code or other federal law".

The above suggests, inter alia, the following:

1) an amicable settlement for which the commercial court's approval is sought must be made in respect of a particular **case** which can only be understood as a case before the court. In the light of Article 31 of the CCPC, "Jurisdiction Over Cases Based on Challenges to Arbitral Awards or on Requests for Writs of Execu-

tion to Enforce Arbitral Awards" (*"Commercial courts shall hear the following cases in accordance with Chapter 30 of this Code: (1) those based on challenges to arbitral awards in disputes having arisen out of business or other economic operations; and (2) those based on requests for writs of execution to enforce arbitral awards in disputes having arisen out of business or other economic operations"*), a commercial court's examination of an application for the issue of a writ of execution for the enforcement of an arbitral award does constitute a case; and

2) an amicable settlement for which the commercial court's approval is sought must be made either at any stage of its examination of the case or during the fulfillment of the resulting judicial act. Does the examination of a case based on a request for a writ of execution for the enforcement of an arbitral award constitute commercial court proceedings? It definitely does, thus meaning that the condition requiring that an amicable settlement for which the commercial court's approval is sought should be made at a certain stage in its proceedings is likewise met.

VII. Cases initiated upon requests for writs of execution to enforce arbitral awards do have disputes between the parties as their basis, meaning that it is admissible to approve amicable settlements in the course of such proceedings

It is relevant to point to Article 138 of Chapter 15 of the CCPC, in which one's attention is called to the term "dispute": "1. A commercial court shall take steps towards the parties' conciliation, and shall assist them in settling their **dispute**.

"2. Litigants may settle their **dispute** by means of an amicable settlement or other conciliation procedure, unless prohibited by federal law".

It should be recalled that one of the main arguments regarding the inadmissibility of amicable settlements being approved within the framework of cases based on requests for writs of execution to enforce arbitral awards is that about the special nature of this category of cases. It is alleged that they are devoid of a dispute, as the arbitral tribunal has already delivered its award on the dispute between the parties which henceforth begin to be called the "award creditor" and the "debtor", and that all proceedings only aim to ascertain those circumstances the presence of which, if verified, will necessitate refusal to issue the writ of execution sought.

However, even if such cases do not have the nature of action proceedings indeed, this does not at all mean that they have no underlying dispute. Chapter 15, "Conciliation Procedures. Amicable Settlements", of the CCPC requires, however, that a case should be based exactly on a dispute between the parties rather than having the nature of action proceedings.

A review of the array of relevant provisions found in the CCPC suggest that the non-action nature of proceedings in certain cases may be due not to the want of a dispute between their parties, but to the special nature of requests for relief which constitute their subject matter. Non-action proceedings are no synonym for dispute-free proceedings. One can hardly argue that cases based on **challenges** to arbitral awards do not make action proceedings. Yet even their description ("cases based on challenges to arbitral awards") makes it clear that they amount to nothing other than a dispute over whether the disputed arbitral awards should be set aside[9].

There is hardly any doubt also in that the examination of requests for writs of execution for the enforcement of arbitral awards adds up to the resolution of a special type of dispute, which shows even in the adversary nature of such proceedings. If one takes a look at what they are actually about, it will be utterly impossible to deny the existence of a dispute between the parties. The award creditor pleads the court to compel the debtor to comply with the arbitral award that the latter has refused to fulfill voluntarily, while the debtor may argue against being forced to do that by claiming the existence of grounds for refusal to issue the requested writ of execution. The award creditor, for its part, moves to debunk the reasons cited by the debtor and to argue the absence of any such grounds. In other words, the parties oppose each other by furnishing evidence and arguments to scuttle the other's case and engaging in verbal battles, for example, over whether the arbitral tribunal is competent to hear the action or whether the proceedings have been compromised by any procedural irregularities. Does this amount to anything other than a dispute?

The conclusion about such cases being based on a dispute between the litigants has been repeatedly backed by commercial courts themselves. In its ruling dated July 25, 2007 and handed down in Case No. A40-31695/07-13-318[10] based on a request for the recognition and enforcement of an LCIA award, the Moscow City Commercial Court instructed *"the applicant to produce, as part of preparations for the case to be heard, ... a statement on its outstanding debt, if*

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9 It is to be regretted that for too many litigants being parties to disputes tried by commercial courts and seeking to find mutually acceptable terms for their reconciliation through settlement agreements, the range of the latter's conditions subject to approval by the judges may be restricted to only the subject matter of the dispute. This follows from the most restrictive posture taken by the Presidium of the Russian Supreme Commercial Court in its Resolution No. 4774/96 dated June 3, 1997: *"The commercial court has failed to assess the legality of that settlement agreement and its consistence with the requests for relief. The action had included no request to invalidate Dubna Mayoral Resolution No. P-1485 'On the Recording of the Store at 4 Kurchatov Street in the Municipal Property Register', dated December 4, 1995, and yet the settlement agreement decided on the inclusion of those premises among municipally-owned property"* (Vestnik Vysshego Arbitrazhnogo Suda Rossiyskoi Federatsii [Newsletter of the Supreme Commercial Court of the Russian Federation], Issue No. 9, 1997, p. 31). This approach can hardly be seen as justified, but this is a matter for a separate discussion.

10 Has not been published.

any, as on the date of the consideration of the dispute". The Moscow City Commercial Court's judges themselves thus see this category of cases as being marked by disputes.

The Federal Commercial Court of the Moscow Circuit in the above Resolution No. KA-A40/4994-02 dated September 5, 2002 granted the parties' motion for the approval of their amicable settlement in respect of none other than *"the dispute over the recognition and enforcement of the award by the London Court of International Arbitration"*.

Even though during its resolution of a dispute upon its merits, a commercial court may help the parties remove the existing dispute from the substantive-law relationship covered by their settlement agreement, the parties may in any case come to have some subsequent differences and disputes over whether there are grounds for refusal to issue the requested writ of execution to enforce the corresponding arbitral award. One can hardly seriously maintain that a writ of execution for the enforcement of an arbitral award is issued automatically and in a dispute-free manner or that the respective issue procedures boil down to a simple check on whether certain circumstances are in evidence by hearing out the parties concerned, among other steps. The debtor may indeed raise its objections to the issue of the writ of execution and this is precisely why there is no way such cases may be treated as being devoid of a dispute. If there were no dispute, why the debtor's objections after all?

One example of cases marked by the absence of a dispute between participants in commercial court proceedings and by want of any matters to be settled by a settlement agreement is cases based on requests for the ascertainment of facts of legal relevance. In such cases, there is simply no-one to argue with about the subject matter of the action and, hence to enter into a settlement agreement with: although the participants in such cases may include, in addition to the applicant, also "other interested parties" whose rights may be affected by the verification as to the existence of the facts concerned, their interests are not opposed to those of the applicant, there are no claims traded between those participants, the parties have no argument and raise no objection to each other's pleadings. Otherwise, the court dismisses the action and briefs the parties on their right to have their dispute resolved by submitting it to action proceedings (Clause 217.3 of the CCPC). By the implication of the provisions governing the examination of this category of cases, there is nothing the parties can come to terms on prior to the establishment of a fact of legal relevance: any subject matter for negotiations between them is simply missing. This is exactly why, in our opinion, Chapter 27, "Examination of Cases Based on Requests to Establish Facts of Legal Relevance", of the CCPC does not provide for any possibility of amicable settlements being made in the cases it covers.

In contrast, cases based on requests for writs of execution to enforce arbitral awards are keynoted by the existence of certain subject matter for negotiations and a dispute, considering that:

- the purpose of the award creditor is to compel the debtor to comply with the respective arbitral award that the latter has failed to fulfill voluntarily, because the parties have opposite interests; and

- the debtor is entitled to put up active resistance to the award creditor by questioning the existence of grounds for the enforcement of the award in question. In other words, the cases falling under the category concerned are such as make for the parties to lock procedural horns.

Therefore, there may well exist a dispute between the award creditor and the debtor, but it may be over a different subject matter compared with the argument they had before the delivery of the award in controversy. With that dispute having evolved to assume a different legal nature, the matter at stake now is the question of whether there exist grounds for the issue of a writ of execution to enforce the award having been made to resolve the parties' dispute upon the merits of the requests for relief submitted to the arbitral tribunal.

The requirements of Article 138 of the CCPC, which speaks of nothing other than a dispute that can be reconciled by the litigants' settlement agreement, are thus duly observed in the case under review, meaning that even from the standpoint of Chapter 15, "Conciliation Procedures. Amicable Settlements", of the CCPC, all of the conditions required for the approval of settlement agreements in the cases concerned are in evidence.

VIII. The imperative nature of regulation for proceedings in cases based on requests for writs of execution to enforce arbitral awards does not rule out the possibility of amicable settlements being approved in such cases

Commercial courts substantiate their refusal to approve amicable settlements in cases based on requests for writs of execution for the enforcement of arbitral awards, inter alia, by claiming that the procedure prescribed for their examination of such cases is imperative and does not provide for any possibility of granting such approval.

This is also the logic of M. A. Rozhkova who finds it impossible for amicable settlements to be okayed in cases based on requests for writs of execution for the enforcement of arbitral awards: *"Proceedings in the category of cases under review aim not to consider claims, but to lend enforceability to the respective judicial acts consistent with the law. Such proceedings are marked by compulsory requirements that commercial courts should at all times abide by the applicable special rules no departures from which are permissible: the commercial courts are expected to observe the procedures established for the fulfillment of judicial*

acts delivered not by state courts in the Russian Federation, but by other courts – foreign commercial courts or arbitral tribunals or domestic arbitration courts. Consequently, amicable settlements are inadmissible in cases initiated upon challenges to arbitral awards, requests for writs of execution for the enforcement of arbitral awards, and requests for the recognition and enforcement of foreign judgments and foreign arbitral awards"[11].

All of these conclusions are fallacious. The imperativeness in question may only extend to certain special aspects of procedures for the examination of cases, but not at all to the litigants' right to enter into an amicable settlement or to the possibility of the latter being approved by the court, which is indubitable, as already demonstrated above.

The imperative nature of regulation for procedures for the issue of writs of execution should be significant for the purposes of deciding whether it is allowed to depart from those procedures in accordance with the parties' agreement. Among other things, it follows from the imperative nature of those procedures that the parties may not agree on the court during its examination of the case based on a request for a writ of execution looking at any circumstances other than those which are provided in the CCPC as grounds for refusal for its issue. The parties' conclusion of a settlement agreement and its approval in such case is an entirely different matter. In such agreement, the parties may not come to terms on the criteria and procedures according to which the court is to decide to issue a writ of execution to enforce an arbitral award, but may agree on the manner in which the debtor will meet the award creditor's claims. This is precisely why the arguments about the imperative nature of the procedures concerned are unrelated to the issue concerning approval for an amicable settlement.

It is likewise crystal-clear that the court considering a case based on a request for a writ of execution to enforce an arbitral award should not endorse any amicable settlement indiscriminately. Under Clause 141.6 of the CCPC, *"the commercial court shall not approve an amicable settlement if the latter is contrary to law or injurious to any rights and lawful interests of any other persons"*. It is certainly impossible for the parties to agree by way of an amicable settlement, for example, that the arbitral award concerned is inconsistent or consistent with the public policy of Russia: only the court itself may determine the answer to this question. But the parties may still agree in their amicable settlement in such case, for instance, that the award creditor will retract its application on condition that it will be paid a certain monetary amount by the debtor.

[11] *M. A. Rozhkova,* Amicable Settlements in Commercial Turnover [in Russian], Moscow, Statut publishers, 2005, p. 299. The text remaining unitalicized is the one italicized in the original, while the remainder there is not italicized.

IX. Possibility for an amicable settlement in the case under review to be made in connection with the latter's closure

The imperative aspects of proceedings in the above cases do not prevent them from being closed, as desired by the award creditors, simultaneously with the termination of such aspects themselves. Will the court continue examining a case based on a request for a writ of execution if the award creditor withdraws its application? No, it certainly won't; the court will only close the case in line with Article 150, "Grounds for Termination of Proceedings in a Case". In the meantime, the execution of an amicable settlement is also among the grounds existing for the discontinuance of proceedings in the case (Clause 150.2 of the CCPC). Accordingly, the following question is in order: Should the closure of a case take place upon the withdrawal of an application for a writ of execution pursuant Article 150 of the CCPC, but in no case upon the execution of an amicable settlement in accordance with the selfsame article?

The foregoing is further evidence that the approval of an amicable settlement in the case under review is permissible.

X. Possibility for an amicable settlement in the case under review to be approved in the light of enforcement proceedings

If it is possible for a settlement agreement to settle uncontestable claims during enforcement proceedings, why can't it be used to settle claims that depend on a number of conditions in a case based on a request for a writ of execution to enforce an arbitral award? In a case based on a request for a writ of execution for the enforcement of an arbitral award, the award creditor does objectively have greater reason to doubt being eventually able to receive whatever has been awarded by the arbitration court than in a situation where it has already obtained a writ of execution to such effect. However, if the award creditor is entitled to ask for the approval for an amicable settlement in the course of enforcement proceedings, where it no longer has any doubt as to its rights, why may not the award creditor seek such approval within the framework of a case based on a request for a writ of execution to enforce an arbitral award where it is yet experiencing uncertainty on such score.

D. Courts' refusal to approve amicable settlements in cases based on requests for writs of execution for the enforcement of arbitral awards injures the parties' right to independently settle their differences

The denial that it is possible to approve a settlement agreement in a case based on a writ of execution for the enforcement of an arbitral award clearly prevents an amicable settlement between participants in legal and economic affairs by narrowing down the

available range of ways they can follow to legalize their new-found understanding.

Does this meet the ideals of a civil society? Obviously no. Does this encourage unwarranted government interference in private affairs? Obviously yes.

E. Courts' refusal to approve amicable settlements in cases based on requests for writs of execution for the enforcement of arbitral awards fails to square with prevalent trends in the evolution of procedural legislation

For more than twenty years, Russian legislation has shown a manifest trend whereby procedural regulation comes to include optionality on an ever larger scale and contractual relations assume ever greater significance during the resolution of disputes between their participants. The tendency is particularly visible in the 2002 CCPC.

It cannot be denied, therefore, that the refusal of state commercial courts authorities to approve amicable settlements in cases based on requests for writs of execution for the enforcement of arbitral awards plainly goes against that mainstream.

In other words, commercial courts have become increasingly more conservative than Russian lawmakers, even though the opposite should ideally be the case (from the standpoint of interests of both society and those courts themselves, which have still to realize this to the end).

F. Contradiction between courts' refusal to approve amicable settlements in cases based on requests for writs of execution for the enforcement of arbitral awards and their complaints about the unduly heavy docket

Spokesmen for state commercial courts authorities over recent years have been increasingly vocal in their lamenting about commercial courts being overloaded with cases on their hands.

Commercial courts' refusal to endorse settlement agreements in cases based on requests for writs of execution for the enforcement of arbitral awards appears to testify that those courts, on the contrary, are only too willing to deal with as many disputes upon their merits as possible and that their overburdening with cases is exaggerated.

To put it in a nutshell, such reluctance to okay amicable settlements is not at all conducive to the principle of procedural economy.

G. The issue under review as a demonstration of the contradictory attitude taken by commercial courts to commercial arbitration

It is curious that commercial courts deny approval for amicable settlements in cases based on requests for writs of execution to enforce awards by pleading the inadmissibility of breaching the competence of arbitral tribunals and thus declare and demonstrate their favorable attitude to the private refereeing of private-law disputes, respect for the jurisdiction of arbitral tribunals and, hence, certain care for the latter.

Does, however, the parties' settlement of their dispute through the instrumentality of a settlement agreement in a case based upon a request for a writ of execution for the enforcement of an arbitral award detract from the authority of commercial arbitration courts in any way? No, it is, on the contrary, the blocking of the parties' attempts to attain amicable settlements in such cases that is injurious to the alternative manner of resolving disputes with the help of commercial arbitration and conciliation. We see as inconsistent the position of judges and theorists who speak out in favor of developing private refereeing and conciliation procedures, while also practicing or advocating restrictions on the possibility for the parties to work out amicable settlements in the cases under view.

The declared concern about the competence of arbitral tribunals being breached thus does nothing positive in practice towards the advancement of commercial arbitration in cases based on requests for writs of execution to enforce arbitral awards.

There also is another puzzling matter. It is an open secret that while paying lip service to the promotion of private arbitration, some commercial court judges in fact treat it with suspicion and jealousy, as occasionally shows during their examination of cases having to do with arbitral awards. How does this square with assertions that refusal to endorse settlement agreements in cases based on requests for writs of execution for the enforcement of arbitral awards is due to the determination to prevent interference in the competence of commercial arbitration courts? Such assertions may mean that the above suspicion and jealousy are actually receding, but they may also be nothing more than another manifestation of opportunism in taking sides, which is so characteristic of Russian courts.

Finally, refusal to approve settlement agreements in cases based upon requests for writs of execution to enforce arbitral awards may also be seen as betraying disdain for alternative dispute resolution venues if one ponders the following logic: if the parties were in a position to enter into an amicable settlement previously, during the private arbitration of the case, but did not do so then, they are no longer entitled after taking their dispute to a commercial court to address the judges with requests for approval for a settlement agreement, as they should be seen as having forfeited the right to make such arrangements and should bear the consequences.

H. CONCLUSIONS

The above suggests that commercial courts take a purely formalistic approach to the issue of whether it is possible for them to approve amicable settlements in