

Supreme Court of Russia clarifies arbitrability of procurement disputes

by *Maxim Kulkov (Managing Partner), Kristina Aleksa (Associate), KK&P*

Legal update: case report | [Published on 13-Feb-2019](#) | Russian Federation

In *Case Nos A12-39725/2017, #40-212856/2017, #40-158635/2017, #40-185774/2017 and #40-48734/2018*, the Supreme Court of the Russian Federation rendered decisions confirming that the non-arbitrability of public procurement contracts does not affect regular procurements made by legal entities. These five decisions follow a judgment handed down in July 2018.

On 21 and 22 January 2019, the Supreme Court of the Russian Federation handed down two judgments clarifying its views on the arbitrability of procurement disputes. This is an addition to three other judgments handed down on this issue since July 2018.

In July 2018, the Supreme Court held that the non-arbitrability of public procurement contracts does not affect regular procurements made by legal entities (even state-owned ones). The Supreme Court has now examined the limits of arbitrability in relation to the public element in several cases.

In case *No. A12-39725/2017*, the Supreme Court confirmed the arbitrability of a dispute arising out of subcontract concluded pursuant to the general public contract of the Ministry of Sports on the construction of a stadium. The court held that mere reference to the general public procurement contract in the preamble of the subcontract did not extend non-arbitrability to the subcontract. The court further confirmed its view in case *No. A40-212856/2017*. In case *No. A40-158635/2017*, an interested state-affiliated party had authorised the contract within the relevant state programme. The lower courts considered such authorisation as evidence of a public interest and held the dispute non-arbitrable. This decision was later revoked by the cassational court with a reference to the Supreme Court's July 2018 judgment. However, the courts denied recognition of the arbitral award due to a public policy violation.

In cases *No. A40-185774/2017* and *A40-48734/2018*, the Supreme Court reversed two lower court decisions. The lower courts had found that the procurement subcontracts were non-arbitrable as they fell within the scope of a state programme. Again, the court held that the state programme itself, even if controlled by the Russian Government, did not render the contracts within this programme non-arbitrable. In case *No. A40-185774/2017*, the court referred to observing the "legal and economic nature" of the programme in issue, for example, establishing whether the programme is financed from state budgetary funds.

Accordingly, recent case law shows the Supreme Court following its original approach to limit non-arbitrability according to the express intention of the legislator. Hence Russian state courts are restricted in their findings of non-arbitrability of a dispute, using a broad concept of a public interest.

Cases: *Rulings of the Supreme Court of Russian Federation in:*

- *A40-158635/2017, 305-KI18-19492, 3 December 2018.*
- *A12-39725/2017, 306-ЭC18-8105, 10 December 2018.*
- *A40-212856/2017, 305-ЭC18-21184, 25 December 2018.*

- *A40-185774/2017, 305-ЭС18-16908, 21 January 2019.*
- *A40-48734/2018, 305-ЭС18-24266, 22 January 2019.*

END OF DOCUMENT