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The "concentration of public elements" theory and the arbitrability of disputes in Russia

O. Yu. Skvortsov

St. Petersburg State University,
7–9, Universitetskaya nab., St. Petersburg, 199034, Russian Federation

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This article is devoted to the analysis of the theory of concentration of public elements. The author explains the causes of this theory and its influence on the arbitrability of disputes in Russia. The causes of this jurisdictional theory are illustrated in the development of substantive law. The work emphasizes that the two sectors of civil turnover regulation, which have developed in Russia, largely affect the formation of dispute resolution mechanisms. This also applies to the issue of determining the range of disputes that the arbitral tribunal is entitled to accept for its consideration. The author stresses that there are no norms in the legislation on which the theory of concentration of public elements is based. It is generated exclusively by judicial decisions, which are not always consistent. This is evidenced by the fact that, despite the precedent nature of one of the decisions of the Supreme Court of the Russian Federation on the arbitrability of procurement disputes for the needs of certain types of legal entities, lower cassation courts refuse to recognize the arbitrability of this category of disputes. At the same time, they refer to the violation of public order when considering procurement disputes by arbitration courts. This is seen as some manipulation in which a conservative approach to the activities of arbitration courts is provided by the arbitrary involvement of various doctrines that have no basis in the law. The author predicts the negative consequences of the development of this doctrine, which will take place in the form of limiting the arbitrability of disputes considered by commercial arbitrations and in relation to other categories of cases in which a public element will be manifested to a greater or lesser extent.

Keywords: arbitration, commercial arbitration, concentration of public elements, arbitrability, court practice, internal arbitration, reform of arbitration.

1. Introduction

Over the past quarter of a century of the market economy in Russia, arbitration (arbitraz)[1] has undergone three reforms. The first reform is the establishment of arbitration in the state jurisdictional system (1993). The second stage is connected with the adoption in 2002 of the Federal law "On Arbitral Tribunals in the Russian Federation"

[1] Russian lawyers traditionally explain to their western colleagues that the term "arbitration" in Russian practice has two main meanings: 1) state courts resolving economic disputes with the participation of entrepreneurs (an analogue of commercial courts); 2) non-state jurisdictional bodies considering civil disputes. This situation is due to a number of historical reasons related to the evolution of the Russian jurisdictional system in the years of the USSR and post-Soviet Russia. In this article, the term "arbitration" is used in the second meaning, unless otherwise specified or expressly implied by the context.

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(“Law on Arbitral Tribunals”)[2]. And the third stage is the reform of the system of arbitration conducted in 2015–2017 on the basis of the Federal Law “On Arbitration in the Russian Federation” (“Law on Arbitration”).

The first two stages can be characterized as the existence in Russia of a liberal model of arbitration supported by the state in general and state courts in particular.

However, the liberal and, in practice, irresponsible attitude of the state towards arbitration has led to enormous abuses in this area. One of the most visible negative manifestations was the phenomenon of so-called “puppet”[3] arbitral tribunals, which were often used to implement illegal schemes. These factors have led to the creation of a negative perception of arbitral tribunals. Opposition to abuses by arbitral tribunals became the mission of the Supreme Arbitration Court of the Russian Federation (hereinafter — “SAC”)[4], which in the absence of adequate legal regulation has formed a system of precedents on arbitration issues. It should be noted that the attitude of Russian state courts to arbitration, starting from the second half of the 2000s, had an anti-arbitration nature, which drew criticism from practicing lawyers and representatives of the academic environment[5].

Ultimately, the Ministry of Justice of the Russian Federation reformed the system of commercial arbitration, initiating the adoption of the Law on Arbitration[6], which revised the model of regulation of arbitration on the basis of extremely conservative principles, providing the state with total control over the activities of arbitral tribunals[7]. The result of the reform was the abolition of several thousand arbitral tribunals (the exact number of arbitral tribunals that existed in Russian before the reform is incalculable and the estimate of their number is based on expert assessments made in mass media[8]).

Therefore, to date, there are only four permanent arbitration institutions in Russia, which have the right to consider private legal disputes referred to them.

One of the activities of state courts in the context of the complex processes of rethinking the role of arbitral tribunals and their place in the Russian jurisdictional system was squeezing them out from the sphere of dispute resolution where one of the parties to such is a subject, to one extent or other, associated with the state. This squeezing out was based on the doctrine formulated inside the Presidium of the SAC. State courts relied on

[2] Hereinafter all Russian laws, statutory instruments, and court rulings are given in connection with the inquiry system “Consultant Plus”. Accessed December 12, 2020. http://www.consultant.ru.

[3] A “puppet” arbitration court is a buzzword of Russian lawyers meaning institutional arbitral tribunals established by commercial organisations to resolve disputes involving their founders. As a result of the reform, the Law on Arbitration prohibited commercial organisations from establishing arbitral tribunals. This right is now reserved only to non-profit organisations, which should not, however, have ties to those who seek assistance in resolving disputes.

[4] Until 2014, the Supreme Arbitration Court of the Russian Federation (before the reform of the state judicial system) was the supreme body of the state judicial power and stood at the top of the pyramid of arbitration courts (see footnote 1 of this article).

[5] At the same time, sometimes in the literature there was also a justification for the anti-arbitration practice conducted by the SAC, which did not agree with the policy of absolute deregulation and libertarianism in the arbitration sphere, introduced by the Law on Arbitral Tribunals 2002 (Muranov 2018).

[6] In addition to that law, the Russian Federation has a Law “On International Commercial Arbitration”, which, as its name implies, regulates the activities of international commercial arbitration. Thus, the Russian laws on arbitral tribunals are based on dualistic principles and distinguish legal regimes of international court from those of domestic arbitral tribunals.

[7] For more information on arbitration reform in Russia, see (Skvortsov, Kropotov 2018).

[8] See for example (Muranov 2018).

this doctrine and it, apparently, will continue developing in Russia, despite the body that prepared it being abolished.

In 2014, the Presidium of the SAC adopted a resolution[9], which can be seen as the beginning of the formation of the judicial theory of the concentration of public elements. Based on this theory, state courts have consistently found a significant number of disputes non-arbitrable in the absence of legislative regulation[10].

Thus, the theory of concentration of public elements analyzed in this article is of great practical importance.

2. Basic research

2.1. General conditions of the arbitrability of disputes in Russia

The term "arbitrability" is not used by the Russian legislator[11]. However, it is rooted both in doctrine and court practice.

Prior to the reform of arbitral tribunals, the state courts relied on the theory of arbitrability while formulating conservative approaches to the competence of commercial arbitration. In the course of arbitration reform, the concept of arbitrability was used as a legal and technical tool for narrowing the legal possibilities of arbitration for civil disputes, which reflected the general ideology of reform. Whereas the previous law provided for the right of arbitral tribunals to consider all categories of civil disputes, the current laws have limited this possibility.

At the same time, it should be noted that with the adoption of the Law on Arbitration, the general principles of arbitrability of disputes have been streamlined. In particular, the following approach to the regulation of arbitrability was established:

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[9] The decree of the Presidium of the SAC dated January 28, 2014 No. 11535/2013 (hereinafter — "Decree No. 11535")

[10] Somewhat of a forerunner of the "concentration of public elements" theory was one of the requests of the SAC, sent to the Constitutional Court of the Russian Federation, in order to verify the constitutionality of legal rules, on the basis of which arbitral tribunals considered disputes on the rights to real estate. In particular, in that request the SAC pointed out that the right to appeal to alternative methods of dispute resolution is based on the basic principles of freedom of contract and autonomy of the will of the parties realised under the framework of private law. The presence of a public element in the legal relationship limits the applicability of these principles — restricts the freedom of contract and the exercise of autonomy of the will of the parties in order to ensure public interest and private interest of third parties, in other words, restricts the right to refer to the arbitral tribunal a dispute where the parties do not have full freedom of discretion to verify the constitutionality of the provisions of Law of the Russian Federation dated 7 July 1993 No. 5338-1 "On International Commercial Arbitration" and the rules of Federal Law of the Russian Federation dated 24 July 2002 No. 102-FZ "On Arbitral Tribunals in the Russian Federation", as well as article 28 of Federal Law dated 21 July 1999 No. 122 "On State Registration of Rights to Real Estate and Transactions Therewith" (Letter of the SAC dated 30 December 2010 No. VAS-C01/UMPS-2681 "Addition to the Request of the Supreme Arbitration Court of the Russian Federation about Verification of Constitutionality of Paragraph 1 of Article 11 of the Civil Code of the Russian Federation, Paragraph 1 of Article 33 of Federal Law dated July 16, 1998 No. 102-FZ 'On Mortgage (Pledge over Real Estate)'". For a detailed analysis of this letter, see (Karabelnikov 2018b).

[11] Until now, even the use of words has not been established. Therefore, most experts use the term "арбитрабИльность", while some legal experts use the term "арбитрабЕльность". At the same time, even the SAC and the Constitutional Court of the Russian Federation use different spellings of the term.

1) the general criterion of arbitrability is the civil nature of the disputed legal relations[12]; all disputes of this category are recognised as arbitrable, except for those disputes that are specified in the Federal Law as non-arbitrable;
2) a list of non-arbitrable disputes is defined by law[13];
3) there is a conditionally non-arbitrable category, which refers to disputes arising out of the relations regulated by the laws of the Russian Federation on the contract system in the sphere of the procurement of goods, work and services for state and municipal needs, as well as corporate disputes of Russian legal entities and disputes equated to them;
4) cases of arbitrability of public legal disputes and those categories of private legal disputes that are not of a civil nature are defined by law[14].

Therefore, the arbitration reform carried out in 2015–2017, among other things, had to minimise the negative consequences in this area, the reason for which was the lack of proper regulation of the issues of arbitrability of disputes. However, this did not happen. Furthermore, the prospects for the further practice of state courts on the range of disputes that arbitral tribunals are entitled to consider are not clear. But even now it can be assumed that in the case of an anti-arbitration approach to the arbitrability of disputes, the state courts will rely on the theory of concentration of public elements, which was formulated by the now abolished SAC.

2.2. Prerequisites for the development of the judicial theory of "concentration of public elements"

The "concentration of public elements" theory[15] began to develop in Russian judicial practice as a result of the dissatisfaction of judges with the level of regulation that existed in Russian laws on commercial arbitration. In particular, there have been difficulties in interpreting the notion of a "civil law dispute"[16] in relation to the legally secured possibility of the arbitral tribunal to take over the case.

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12 Part 3 of Article 1 of the Law on Arbitration, part 6 of Article 4, part 1 of Article 33 of the Arbitration Procedural Code of the Russian Federation (hereinafter — "APC").

13 Items 1–5, 7, 8 of part 2 of Article 33 of the APC; Article 22.1 of the Civil Procedure Code of the Russian Federation (hereinafter — "CPC").

14 Currently, the law specifies two categories of arbitrable investment disputes: disputes arising out of the agreements of the Russian Federation on the protection of foreign investments and disputes arising out of production sharing agreements. In addition, individual labour disputes in professional sports and high-performance sports are recognised as arbitrable (see, for example, Article 362 "Permanent Arbitration Institution Administering Arbitration (Commercial Arbitration) of Disputes in Professional Sports and High-Performance Sports, Including Individual Labour Disputes" of Federal Law of 4 December 2007. No. 329-FZ "On Physical Culture and Sports in the Russian Federation"), which although not being civil law disputes and rather having a private law nature, by virtue of the law are also referred to as arbitrable disputes.

15 In the literature, this theory is also called the concept of "concentration of *socially significant* public elements" (Kalinin 2018).

16 It should be noted that in Russia the term "civil law dispute" means a much narrower range of contentious relations than, for example, in the European Court of Human Rights (hereinafter — "ECHR"). If the ECHR civil law disputes include disputes about property, labour, migration, social, political, etc, rights, in the Russian Federation, the characteristic of the disputed civil law relations is based on item 1 of Article 2 of the Civil Code of the Russian Federation stating that civil laws regulate relations connected with the participation in corporate organisations or with their management (*corporate* relations), contractual and other obligations, and also other property and personal non-property relations based on equality, autonomy of will and property of participants.

This problem is predetermined by two factors: 1) a significant part of civil law relations is closely, and sometimes inextricably, linked with public law relations; 2) civil law relations involve entities who are created by the public owner (primarily state-owned companies and corporations).

Civil circulation in Russia is regulated in such a way that a significant part of transactions concluded by state organisations is subject to one legal regime, while transactions made by private entities are subject to other rules. To a large extent, the relevant rules equally regulate the commercial relations of these parties, but nevertheless, the differences in the legal regimes of circulation, depending on the status of the subjects, are still very noticeable.

Therefore, the civil law governing civil and commercial circulation has a two-sector nature, including: 1) the law that supports the circulation of public enterprises and 2) the law that supports circulation involving individuals.

The current economic order has a historical prototype. The theory of two-sector law was developed approximately 100 years ago by the famous Soviet lawyer, Pyotr Stuchka (Stuchka 1964, 554), and was aimed at substantiating the need for a "special" approach to the regulation of circulation with the participation of Soviet socialist organisations[17]. Gradually, in the Soviet Union, individuals were squeezed out of commercial circulation and the conditions for their return to circulation were formulated after the collapse of the USSR. Ideologists of the theory of two-sector law, which later found its development in the doctrine of economic law, argued that the property relations developing in the socialist economy between state organisations, in regard to their main content, are significantly different from property relations between citizens or with the participation of citizens. Therefore, they should be switched from civil law to economic law (Ioffe 2000).

In the post-Soviet period in the 1990s, the winner was ideology based on the rejection of a separate approach to the regulation of circulation, depending on whether the enterprise is public or private. The monistic approach to economic circulation became the basis for the creation of a single civil code.

However, the practice of regulating civil circulation in Russia at the beginning of the 21st century testifies to a sort of revival of "two-sector law"[18]. This area of legal regulation was supported by judicial practice. One of the indicators of the solidarity of the legislator and courts in the revival of the theory of two-sector law was the "concentration of public elements" theory.

2.3. The "concentration of public elements" theory

The abovementioned decision of the SAC No. 11535 summarises various arguments previously used in relation to the arbitrability of disputes containing public elements and assesses the possibility of commercial arbitration proceedings in respect of disputes from contracts concluded on the basis of laws on state and municipal procurement.

[17] The legal doctrine of "two-sector law" was based on the idea expressed by the leader of the world proletariat, V.I.Lenin: in the sphere of economy "everything… is public, not private" (Lenin 1967, 400).

[18] This issue is actively discussed by lawyers, including in relation to how it affects the possibility of commercial arbitration proceedings in respect to disputes involving companies with state capital. See, e. g. (Ivanov 2018; Muranov 2018).

The background of the controversial case, on which resolution No. 11535 was issued, is as follows. The contractor entered into a contract with a public health institution and the contract was concluded at an open auction in accordance with the Federal Law "On Placing Orders for the Supply of Goods and Services for State and Municipal Needs"[19]. The contract provided for an arbitration clause, which the parties resorted to when a dispute arose. After the arbitral tribunal rendered its decision, the losing party filed a motion with the state court seeking to challenge the arbitral award. The case went through all the judicial instances and was eventually considered by the Presidium of the SAC on its merits. In deciding on the non-arbitrability of this category of disputes, the Presidium of the SAC justified this by the fact that such agreements:

— have a public basis;
— pursue a public interest;
— are aimed at achieving the result necessary for public purposes to meet public needs, achieved through spending budgetary funds.

In addition, in this case, as well as in other cases that followed, additional arguments were formulated that affected the non-arbitrable nature of disputes with public elements:

— as the arbitral tribunal considers the dispute privately, it not possible to exercise due control over the performance of contracts; in turn, due control over the performance of such a contract on the basis of transparency is necessary in order to prevent corruption in state and municipal procurement;
— the regulation of procurement for state and municipal needs has a mandatory nature;
— the impossibility for arbitral tribunal to recognise the invalidity of the placement of a state and municipal order;
— the less formal nature of evidence under commercial arbitration;
— Russian laws do not contain rules that would allow this category of disputes to be referred to arbitral tribunals;
— the size of the arbitration fee, as well as the expenses associated with contributions payable to arbitrators, sometimes significantly exceed the state fee, which does not meet the goal of budget savings, which is also an element of public order[20].

According to the Presidium of the SAC, the presence of such a concentration of socially significant public elements[21] in a single legal relationship does not allow disputes arising out of them to be recognised as exclusively private disputes between individuals that can be considered in private by arbitral tribunals. The Presidium of the SAC made

[19] The law is now no longer in force. However, this fact is insignificant in the context of the problem under consideration, since the regulation of such relations and the approach to their assessment in law enforcement practice are based on the same principles.

[20] Ruling of the Supreme Court of the Russian Federation dated 28 July 2017 in regard to case No. 305-ЭС15-20073; ruling of the Supreme Court of the Russian Federation dated 27 December 2017 in regard to case No. 310-ЭС17-12469.

[21] It should be noted that the disputed relations in themselves are not qualified by the highest court as public law relations. It is about their "essential public specificity". Interpreting the position of the SAC of the Russian Federation, let us ask a question, to which, unfortunately, we do not find an answer: are we talking about private law relations "having a significant public law specificity"? Or, in other words, is the subject matter of our attention a kind of "legal mutant" (this term belongs to A. I. Muranov) — public-private relations?

three conclusions: 1) the arbitration agreement is invalid; 2) disputes arising out of such an arbitration agreement are not arbitrable; and 3) the consideration of such a dispute violates the public order of the Russian Federation.

Decision No. 11535 was a precedent in which the doctrine of "concentration of public elements" was logically established. Based thereon, lower cassation courts[22] began to apply this theory on a massive scale "in order to recognise non-arbitrable disputes arising out of relations between parties to transactions aggravated by a particular public element"[23].

In this sense, the "concentration of public elements" theory has the considerable potential to extend its application to a significant number of disputes "with public elements". In addition, it should be noted that the "concentration of public elements" theory, being subordinate to the ideology of limiting the arbitrability of disputes considered by arbitral tribunals, *is a type of jurisdictional projection of the doctrine of "two-sector law"*, on the basis of which material civil circulation is regulated.

2.4. The influence of the "concentration of public elements" theory on the definition of the range of disputes that can be considered by arbitral tribunal

Despite the SAC, which formulated the "concentration of public elements" theory, no longer being in existence, its practice is to some extent supported by the Supreme Court of the Russian Federation.

However, 2018 would have been deemed an inflection point in court practice on this matter.

The Supreme Court of the Russian Federation considered the case on the dispute of JSC "Mosteplosetstroy" against JSC "Mosinzhproekt", whose shares belong to the Government of Moscow. Initially, the dispute was considered by the Arbitral Tribunal of Construction Organisations of Moscow at the "Centre for Legal Support of Construction Organisations of the City" Autonomous Non-Profit Organisation. The claim was satisfied, but the defendant did not comply with the arbitral tribunal award. The case came to the court of cassation, which confirmed the decision of the court of first instance to issue a writ of execution for the enforcement of the decision of the arbitral tribunal. JSC "Mosinzhproekt" appealed against these court acts to the Supreme Court of the Russian Federation.

Considering this case, the Supreme Court of the Russian Federation suspended the proceedings and approached the Constitutional Court of the Russian Federation with a request, where it formulated an argument on the legal uncertainty of the arbitrability of

[22] In Russia, district cassation arbitration courts are courts of third instance considering appeals to decisions and judgments of courts of first instance and courts of appeal. There are 10 such courts. Decisions of cassation courts may be reviewed under a cassation or a supervision procedure by the Supreme Court of the Russian Federation)

[23] See, for example: The decision of the Arbitration Court of Moscow District dated 4 December 2014 on case No. A40-104344/2014, the Decision of the Arbitration Court of the North Western District dated 1 October 2014 on case No. A21-2236/2014, the Decision of the Arbitration Court of the Ural District dated 17 June 2014 on case No. A50P-36/2014. At the same time, for the sake of fairness, it should be noted that in the practice of courts there are decisions that are based on the opposite approach and proceed from the arbitrability of this category of disputes (the decision of the Arbitration Court of the Moscow Region dated 13 December 2016 on case No. A40-165680/2016).

disputes on procurement for state and municipal needs. However, the Constitutional Court of the Russian Federation found no grounds for taking up this request, pointing out that the arbitrability of disputes can only be limited by the direct indication of a legislator[24].

Ultimately, after the case was retuned by the Constitutional Court of the Russian Federation, the Supreme Court reviewed the dispute on its merits, which arose out of the procurement contract and adopted the ruling dated 11 July 2018 No. 305-ЭС17-7240 ("Decision of 11 July 2018"). This Decision of 11 July 2018 radically changed the approach of the Supreme Court of the Russian Federation towards the arbitrability of disputes involving procurement for state and municipal needs. This category of disputes was recognised as arbitrable. Furthermore, at the end of 2018, amendments[25] were made to laws that legitimised the arbitrability of procurement disputes already at the level of regulatory norms.

However, the irony here is that after the adoption of this judicial act by the Supreme Court of the Russian Federation, the lower cassation courts began to refuse to enforce decisions of arbitral tribunals when considering similar disputes. The courts declared their commitment to the legal position formulated in the Decision of 11 July 2018, with reference to the fact that despite the arbitrability of these disputes, they are contrary to public order[26]. Research conducted by the students of the master's degree programme of the Faculty of Law of St. Petersburg State University, under the guidance of the author of this article, revealed that court practice on this problem is split. Courts rejected the exequatur of arbitral awards in 70 % of cases, with reference to the violation of the public order (Malitskaya, Ushkalov, Klimenkov 2018).

At the same time, the ideology of the "concentration of public elements" theory tends to expand, encompassing various areas of civil circulation where a "public element" is available in a sense.

Therefore, Russian state courts recognised the following disputes as non-arbitrable: investment disputes[27], disputes arising out of the laws on special economic zones[28], disputes arising out of the lease of forest plots[29], disputes related to the application of laws on local self-government in relation to municipal property[30].

2.5. Criticism of the "concentration of public elements" theory as a basis for limiting the arbitrability of disputes

The ruling of the Supreme Court of the Russian Federation dated 11 July 2018 has triggered a mixed reaction from both scientists and legal theorists, and practising lawyers

[24] Ruling of the Constitutional Court of the Russian Federation dated 12 April 2018 No. 865-O.

[25] Federal law No. 531-FZ dated 27 December 2018 "On Amendments to the Federal Law 'On Arbitration in the Russian Federation' and the Federal Law 'On Advertising'".

[26] The decision of the Arbitration Court of the Moscow District dated 6 September 2018 on case No. A40-75603/17, the decision of the Arbitration Court of the Moscow District dated 5 October 2018 on case No. A40-202817/2017; the Decision of the Arbitration Court of the Moscow District dated 18 July 2018 on case No. A40-202682/2017; the Decision of the Arbitration Court of the Moscow District dated 5 September 2018 on case No. A40-251851/2017. — For a more detailed review of the relevant judicial acts, see (Malitskaya, Ushkalov, Klimenkov 2018).

[27] Decree of the Presidium of the SAC dated 3 April 2012 No. 17043/2011.

[28] Ruling of the Supreme Court of the Russian Federation dated 28 July 2017 on case of No. 305-ЭС15-20073.

[29] Decree of the Presidium of the SAC dated 11 February 2014 No. 11059/2013.

[30] Ruling of the Supreme Court of the Russian Federation dated 27 December 2017 on case No. 310-ES17-12469.

(Karabelnikov 2018a; Usoskin 2018). On the one hand, lawyers recognise that the local problem of the arbitrability of disputes arising out of relations associated with procurement for state and municipal needs by certain types of legal entities is being resolved; on the other hand, the theoretical background of this problem, namely the "concentration of public elements" theory is not being eliminated.

Meanwhile, criticism of this theory is evident using the following arguments. The justification of the competence of a public subject in civil circulation is based on the conceptual division of its functions. Therefore, the subsequent provisions are a matter of common knowledge: if *acta iure imperii* powers provide for the implementation of authorities, *acta iure gestionis* powers provide for the participation of a public subject in civil circulation[31]. This is reflected in current Russian laws. In particular, Chapter 5 of the Civil Code of the Russian Federation, which deals with the participation of the Russian Federation, subjects of the Russian Federation and municipalities in relations regulated by civil laws. Therefore, all specified parties to the relations regulated by civil laws act on a par with other participants of these relations — citizens and legal entities[32]. Such equality, among other things, ensures healthy competition in economic circulation.

At the same time, the "concentration of public elements" theory formed in judicial practice raises the problem caused by a differentiated approach to the regulation of relations arising in circulation depending on the sphere of economic activity and the presence of public entities involved in the circulation (the problem of the two-sector regulation of the economy, which was described above).

It should be recognised that disputes "with a public element", based on the current policy regarding arbitration, can be recognised as both arbitrable and non-arbitrable. However, the legislator, while making an appropriate decision, should act from the perspective of the balance of private and public interests.

Such an approach is also found in the practice of the Constitutional Court of the Russian Federation: one of its acts indicates that, while exercising legal regulation, the legislator must proceed from the need to maintain a balance of the values constitutionally important for the sphere of market relations — economic security, freedom of entrepreneurship — by providing participants of civil circulation with effective protection. This includes judicial protection, of violated rights and freedoms, thereby ensuring the certainty and stability of the legal regulation introduced by them and contributing to the development of the economy. In turn, law enforcement agencies, especially courts, are obliged to apply the provisions of the laws not only on the basis of their consistent connection with the basic provisions of civil law, but also in the context of the general legal principles of equality and justice, while also taking into account the requirements of proportionality arising out of these principles and the balance of competing rights and legitimate interests — private and public[33].

The arguments formulated in the context of the "theory of concentration of public elements" are incompatible with the idea of the inadmissibility of unequal treatment of

[31] On the basis of such differentiation, the procedural regime of disputes with the participation of a foreign state is regulated differently in the Russian Federation (Article 7 of Federal Law dated 3 November 2015 No. 297-FZ "On Jurisdictional Immunities of a Foreign State and Property of a Foreign State in the Russian Federation").

[32] Item 1 of Article 124 of the Civil Code of the Russian Federation.

[33] Resolution of the Constitutional Court of the Russian Federation dated 18 February 2018 No. 8-P.

subjects of civil circulation, depending on whether the state participates in the capital of such a legal entity or not. This unequal treatment has a negative impact on competition. In such circumstances, there is a contradiction between the spirit and the letter of the civil law and the judicial concept of “concentration of public elements”, which justifies the “special right” of the state in civil circulation. This “special right” is also projected onto the jurisdictional sphere, since disputes and the public element are removed from arbitration jurisdiction on the grounds that in terms of circulation some subjects (companies with state participation) are not equal to other subjects (companies with private capital).

In this regard, it should be noted that restrictions on arbitrability, which are imposed not by the legislator, but by courts, constitute a violation of the principle of the separation of powers provided for in Article 10 of the Constitution of the Russian Federation, since the judicial power appropriates the powers of the legislative power, which is being particularly criticised in the current situation (Karabelnikov 2018a, 152).

3. Conclusions

The Russian theory of the “concentration of public elements” is to some extent consonant with the doctrine formulated by American courts in 1968 and named after one of the parties as the “American Safety” dispute[34]. This theory was used by American courts until the mid-1980s. Not recognising the arbitrability of disputes on the recovery of losses caused by a violation of antitrust law, the courts pointed to the high importance of competition law for the state economy, which excludes the possibility of referring the dispute to arbitration.

Russian courts are following the trail created by American courts at the time. However, it should be borne in mind that in the United States the doctrine of “American Safety” failed the test of time. The US Supreme Court in 1985 reviewed the decision of the court of appeal and, without rejecting the arguments on the importance of competition law, formulated a number of arguments in favour of the arbitrability of private disputes related to antitrust regulation: 1) the need for a pro-arbitration approach to disputes arising out of international commercial relations[35]; otherwise, American business will not be successful outside the state; 2) the absence of legislative prohibitions on arbitration of this category of disputes; 3) the possibility of judicial control from the standpoint of public order over the decision of arbitration in its enforcement[36].

It is evident that Russian law is taking the same path once taken by American jurisprudence. The lack of clear criteria for the arbitrability of disputes has forced courts to form, taking a paternalistic approach, a theory based on the public importance of a particular category of disputes. The importance of the public element proved decisive for the recognition of these disputes as non-arbitrable.

American courts have managed to abandon paternalism in assessing the arbitrability of such categories of disputes. It is to be hoped that the Russian jurisdictional system

[34] See case American Safety Equipment Corp. v. J. P. Maguire & Co., Inc. 1968. Accessed December 12, 2020. Review of this approach see (Braun 1989; Lee 1987; Fuglsang 1997, 797).

[35] In fairness, we note that the US Supreme Court noted that in relation to the arbitrability of domestic disputes related to the application of antitrust law a different approach is permissible.

[36] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 1985. Accessed December 12, 2020. Comments see: (Fuglsang 1997, 797).

will also overcome the hazards of establishing arbitration as a private legal mechanism for resolving disputes that it has to face while considering disputes with a concentration of "publicly significant elements".

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Author's information:

Oleg Yu. Skvortsov — Dr. Sci. in Law; oleg.skvortsov@dlapiper.com