

# Insight: Dispute Resolution

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## Arbitration clause with unilateral option to litigate held to be invalid by Russian Court

The Russian Supreme Commercial Court has held that an arbitration clause granting one party a unilateral option to litigate is invalid under Russian law. In its recent decision in *CJSC Russian Telephone Company v. Sony Ericsson Mobile Telecommunications Rus LLC*,<sup>1</sup> the Court stated that a clause granting a unilateral option to litigate was invalid because it would unfairly disadvantage one party. The decision means that there is a risk of Russian litigation for the many foreign parties who have been using such clauses in their deals for a number of years and that parties should carefully evaluate the use of such clauses going forward.

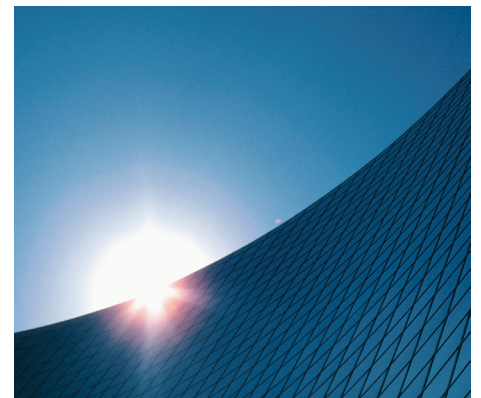
### Background

Arbitration clauses with a unilateral option to litigate have, for a number of years, been commonplace for Russian and CIS deals involving international parties. Judgments of the English courts – and all other EU courts, as well as those of many other jurisdictions – are generally not enforceable in Russia and the CIS. However, parties with a strong bargaining position have tended to want an option to litigate in England or elsewhere for cases where enforcement in Russia and the CIS might not be necessary.

### The Case

The dispute arose out of a distribution agreement between CJSC Russian Telephone Company (“RTC”) and Sony Ericsson Mobile Telecommunications Rus LLC (“Sony Rus”) for the sale of mobile telephone equipment. The agreement contained a dispute resolution clause providing for ICC arbitration in London, governed by English law. In addition, it also provided that Sony Rus could bring a claim relating to the purchase price before any competent state court. RTC did not have any such right.

In 2011, RTC filed a claim with the Moscow Commercial Court seeking replacement of certain allegedly defective equipment delivered by Sony Rus under the agreement. The Moscow Commercial Court refused to hear the claim based on the dispute resolution clause and granted a stay of the proceedings. RTC appealed against this decision on the



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<sup>1</sup> Case no. 1831/12, judgment dated 19 June 2012, reasons for the judgment published on 1 September 2012.

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grounds that the dispute resolution clause was invalid. The decision was upheld by two appellate courts before it reached the Supreme Commercial Court, which referred the matter to its Presidium, a sign that the Court took the case particularly seriously.

In its judgment dated 19 June 2012, the Presidium reversed the order of stay of proceedings and set aside the three lower court decisions, remanding the matter back to the Moscow Commercial Court. In the reasons for its judgment, which have recently been published, the Presidium held that the dispute resolution clause in the agreement was invalid as it violated the fundamental principle of the procedural equality of the parties. It was said that a dispute resolution clause may not provide only one party to the contract with a right to apply to a competent court and deprive the other party of such a right. Any party who is subject to such a dispute resolution clause should also have the option to refer the dispute to the competent court on terms equal to those of the counterparty.

### Practical Implications

The decision of the SCC Presidium is somewhat controversial because it failed to engage with the fact that the dispute provisions were governed by English law, pursuant to which they should be valid and enforceable. Nevertheless, it has rendered one sided optional dispute resolution clauses invalid in the Russian courts. Parties that have used such clauses in past deals are now at risk of having disputes arising under those deals accepted and heard by the Russian courts (instead of being able to compel arbitration or litigation in another competent court). In addition, there must be a risk that an arbitral award rendered pursuant to such a clause will be challenged upon attempts to enforce it in Russia on the basis that the agreement to arbitrate was invalid. It remains to be seen whether this decision will have a ripple effect in countries of the former Soviet Union, which could be influenced by the Supreme Commercial Court's decision.

Therefore, such one-sided clauses (whether they afford a right to arbitrate or a unilateral option to go to a particular court) should no longer be used for Russian transactions unless the parties are willing to see their disputes litigated in the Russian courts. Instead, parties who may want to enforce in Russia should opt for an arbitration only clause, with no option to litigate.

In relation to existing Russian deals where such clauses have been used, the parties involved may wish to consider re-executing the clause and replacing it with a clause requiring both parties to submit to arbitration.