

case number 200.100.508/01

8 September 2012

COPY

## COURT OF APPEAL IN AMSTERDAM

THIRD THREE-JUDGE CIVIL DIVISION

DECISION

in the case of:

**Nikolai Viktorovich MAXIMOV**,  
residing in Moskow, Russian Federation,  
**APPELLANT**,  
lawyer: *mr* J.Ph. de Korte in Amsterdam,

versus

the company under the laws of the Russian Federation  
**OJSC NOVOLIPETSKY METALLURGICHESKY KOMBINAT**,  
with registered office in Lipetsk, Russian Federation,  
**RESPONDENT**,  
lawyer: *mr* M.A. Leijten in Amsterdam.

The parties will hereinafter be referred to as **Maximov** and **NLMK**.

## 1. The proceedings on appeal

- 1.1 By notice of appeal received on 16 January 2012, Maximov appealed against the decision of the Amsterdam District Court of 17 November 2011, given in this case under case number/application number 491569 / KG RK 11-1722, between him as applicant and NLMK as defendant. Maximov raised nine grounds of appeal against the decision (with ground of appeal 6 consisting of nine sub-grounds), offered to furnish evidence, submitted exhibits in the proceedings and claimed, briefly stated, that the Court of Appeal should reverse the decision and still award his request, by judgment enforceable regardless of any appeal, and order NLMK to pay the costs of the proceedings in both instances and the costs of the attachment to be specified.
- 1.2 By statement of defence, NLMK contested the grounds of appeal, submitted exhibits in the proceedings and claimed, as the Court of Appeal understands it, that the Court of Appeal should confirm the decision and order Maximov to pay the costs of the appeal.
- 1.3 The parties have sent further exhibits to the Court of Appeal, with covering letters. The (consecutively numbered) exhibits of Maximov run up to exhibit 105 and those of NLMK run up to exhibit 47. On behalf of Maximov, a case document was sent, entitled "explanatory document".
- 1.4 On 12 June 2012, the case was heard. The parties had their case pleaded by their lawyers on the basis of plea notes, which they have submitted.
- 1.5 Finally, a decision was announced.

## 2. Assessment

- 2.1 The District Court has established a number of facts in legal grounds 2.1 up to and including 2.9 of the contested decision. These facts are not in dispute, so that the Court of Appeal will also start from those facts. The Court of Appeal will establish a number of additional facts, as asserted by one party and not contested or contested with insufficient substantiation by the other

party, also having regard to the exhibits submitted in the proceedings.

2.2 The following facts have been established between the parties.

2.2.1 NLMK is a legal entity, with registered office in Russia, incorporated under Russian law, which is the largest employer in the Russian region of Lipetsk and is internationally active as a steel producer. A part of the shares in the capital of NLMK is traded on the stock exchange in London.

The other shares, the majority, are held by V.S. Lisin. Lisin is also the owner of transshipment ports in Sint Petersburg and Tuapse. He also holds a high position in the Russian state-owned United Shipbuilding Corporation (shipbuilding) and holds an indirect interest in the Russian state-owned company Freight One (transport by railway).

2.2.2 Maximov has the Russian nationality and resides in Russia. He is an internationally active businessman.

2.2.3 Both Lisin and Maximov are included in a list of billionaires compiled by the American magazine Forbes.

2.2.4 On 22 November 2007, Maximov and NLMK entered into a written agreement with each other (hereinafter: the purchase agreement). Under this agreement, Maximov sold 50% plus one of his shares in the capital of the Russian steel company he incorporated, OJSC Maxi-Group (hereinafter: Maxi-Group), to NLMK for a purchase price to be determined according to a formula contained in the purchase agreement.

Article 5 of the agreement provides, *inter alia* (in the English translation):

*"N.V. Maximov and OJSC Maxi-Group herein confirm to OJSC NLMK that all guarantees and representations specified in Annex 3 are valid as per the date of the Agreement, unless otherwise stated."*

Attached to the agreement is Annex 3, entitled "Representations and guarantees".

2.2.5 On 4 December 2007, the shares referred to in the purchase agreement were transferred to NLMK.

2.2.6 On 10 January 2008, NLMK paid Maximov an advance on the purchase price of approximately 7.3 billion rubles.

2.2.7 On 22 December 2009, Maximov instituted arbitration proceedings against NLMK before the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (hereinafter: the arbitration court), such pursuant to the arbitration clause contained in the purchase agreement. In these proceedings, Maximov claimed that NLMK should be ordered to pay approximately 14.7 billion rubles, according to him the remainder of the purchase price. NLMK has put up a defence against this claim. In response, NLMK claimed that Maximov should be ordered to repay approximately 5.9 billion rubles, being the amount by which the advance paid exceeded the purchase price, according to NLMK. Maximov has put up a defence against this claim. In the arbitration proceedings, the representatives of Maximov have taken the position that Maximov is not bound by Annex 3 of the agreement, because he never signed that annex.

2.2.8 Since March 2011, Maximov has been prosecuted in Russia under criminal law on suspicion of fraud. On 28 March 2011, criminal proceedings were instituted against Maximov in Russia on suspicion of fraud in the context of the share transaction with NLMK, and by document of 17 June 2011 criminal proceedings were instituted against him in Russia on suspicion of misleading the arbitration court in the arbitration proceedings against NLMK.

Maximov has lodged criminal complaints against Lisin and persons involved in Maxi-Group. These complaints have not led to any prosecution under criminal law.

2.2.9 By judgment of 31 March 2011 (hereinafter: the arbitration award), the arbitration court ordered NLMK to pay to Maximov a principal of approximately 8.9 billion rubles, dismissing all other or further claims brought by the parties. In support of its award, the arbitration court considered - by way of majority opinion of arbitrators I.S. Zykin and V.S. Belykh and contrary to the minority

opinion of arbitrator K.I. Devyatkin, freely translated from English and in summary - the following:

According to the calculation by Maximov, the purchase price of the shares in Maxi-Group is approximately 22.1 billion rubles. Maximov based his calculation on information he requested from the Maxi-Group, referred to as Basic Data 1. According to the calculation by NLMK, the purchase price is approximately 1.4 billion rubles. NLMK based its calculation on data derived from the financial statements of a number of group companies, including Maxi-Group. Both parties have made insufficient efforts to finalize their calculations within the agreed period. The parties have thus taken risks, the consequences of which shall be borne by them in equal parts. The purchase price must therefore be calculated as half of the sum of the purchase price calculated on the basis of Basic Data 1 and the purchase price calculated on the basis of Basic Data 2. Having regard to the advance payment, this means that NLMK shall pay approximately 8.9 billion rubles to Maximov.

2.2.10 The arbitration award is not subject to appeal.

2.2.11 By case document of 7 April 2011, NLMK brought a claim for reversal of the arbitration award before the Arbitrazh Court of the city of Moscow (hereinafter: the Arbitrazh Court). In the case document of 7 April 2011, NLMK put forward the following - freely translated from English and in summary:

- a. Maximov has deliberately misled NLMK about the value of the shares;
- b. The arbitration court has refused to investigate the relevance of the "warranties and representations" given by Maximov in the purchase agreement and the validity of Annex 3 to the purchase agreement. It ruled that NLMK's argument in this respect was irrelevant to the assessment of the claim;
- c. Based on the above, "fraud" has occurred, which constitutes a breach of public order and therefore a ground for reversal.

Maximov has submitted a statement of defence.

2.2.12 On 27 April 2011, Maximov, pursuant to leave granted by the preliminary relief judge of the Amsterdam District Court, had

prejudgment attachment levied of the shares in the capital of NLMK International B.V. held by NLMK, at the expense of NLMK.

2.2.13 On 17 June 2011, NLMK submitted an additional document in the Russian reversal proceedings. The submitted English text consists of 29 pages, excluding annexes. In this case document, NLMK put forward additional grounds for reversal.

2.2.14 In response to this additional case document, Maximov has repeatedly requested the Arbitrazh Court to postpone the hearing by a few days. This postponement was denied. The hearing took place on 21 June 2011 and lasted approximately five hours. At the end of the hearing, the Arbitrazh Court reversed the arbitration award by oral judgment.

The Arbitrazh Court has not had access to the arbitration file, because NLMK had not consented to providing that file to the Arbitrazh Court.

2.2.15 On 28 June 2011, the Arbitrazh Court issued a written substantiation of its oral judgment of 21 June 2011. In summary and freely translated from English, the substantiation is as follows:

a. The experts V.A. Bublik, S.S. Alekseev and S.A. Stepanov, who assisted Maximov in the arbitration proceedings, are employed by the Ural State Law Academy, which institution also employs arbitrator V.S. Belykh.

Expert Bublik is rector of that institution and thus holds a higher position than arbitrator Belykh. Expert Yu.L. Shulzhenko is employed by the State and Law of the Russian Academy of Sciences, which institution also employs arbitrator I.S. Zykin. Expert Shulzhenko holds a higher position at the institution than arbitrator Zykin. The arbitrators have not informed the parties of these relations between the party experts and the arbitrators. The composition of the arbitration court is therefore not in line with what the parties had agreed. This constitutes the first ground for reversal of the arbitration award.

b. The subject of the dispute is related to the validity of a share transfer. According to Russian law, the dispute can therefore

not be submitted to arbitration. This constitutes the second ground for reversal.

- c. The method by which the arbitration court has determined the purchase price (half of the sum of the purchase price calculated on the basis of Basic Data 1 and the purchase price calculated on the basis of Basic Data 2), is contrary to mandatory Russian law regarding purchases. This constitutes the third ground for reversal.

2.2.16 The case was heard by the Arbitrazh Court and decided by N.V. Shumilina, judge of that Court. The same judge reversed the arbitration awards that were at issue in the Yukos/Rosneft case (Amsterdam Court of Appeal, 28 April 2009, case no. 200.005.269/01, LJN BI2451, JOR 2009/208, TvA 2010/5 and SC 25 June 2010, case no. 09/02566, LJN BM1679, NJ 2012/55).

2.2.17 By decision of 1 September 2011 of the Arbitrazh Court, the Maxi-Group was declared bankrupt at the request of NLMK.

2.2.18 Both Maximov and NLMK have appealed against the judgment of the Arbitrazh Court to the Federal Arbitrazh Court of the Moscow District (hereinafter: the Federal Court). On 26 September 2011, the Federal Court confirmed the contested judgment.

2.2.19 On 10 October 2011, the Federal Court issued a written substantiation of its judgment of 26 September 2011. This substantiation shows that the Federal Court agrees to the judgment of the Arbitrazh Court with respect to all three grounds for reversal.

2.2.20 On 10 November 2011, Maximov appealed against the decision of the Federal Court to the Supreme Arbitrazh Court of the Russian Federation in Moscow (hereinafter: the Supreme Court). By decision of 30 January 2012, the Supreme Court dismissed this appeal. In summary and freely translated from English, the substantiation of this decision is as follows:

- a. The circumstances established by the Arbitrazh Court and the Federal Court indicate that the arbitration court has failed to disclose information about the relations between arbitrators and

persons who signed documents submitted on behalf of Maximov. This constitutes a ground for reversal.

- b. In addition, both the Arbitrazh Court and the Federal Court have arrived at the correct conclusion that the arbitration court has failed to investigate the nature of the transaction on which the claim was based. Based thereon, the arbitration court has drawn an incorrect conclusion regarding its jurisdiction.
- c. The complaints of Maximov are based on circumstances that have not been established by the Arbitrazh Court or the Federal Court. They are aimed at a new establishment of facts. This is beyond the scope of the duties of the Supreme Court.

2.2.21 Maximov has requested the Constitutional Court of the Russian Federation to investigate the constitutionality of Russian statutory provisions that were applied in the reversal proceedings. By decision of 21 December 2011, the Constitutional Court refused to hear Maximov on this request and ruled that its decision on this request was "final".

2.3 In these proceedings, Maximov has requested the preliminary relief judge, briefly stated, to recognise the arbitration award and grant leave for enforcement thereof, primarily unconditionally and alternatively, if NLMK should not furnish the bank guarantee specified in the request, to order NLMK to pay the costs of the proceedings and the costs of the attachment levied on 27 April 2011, everything enforceable regardless of any appeal. The District Court has dismissed the claims. The appeal is directed against this decision. The grounds of appeal submit the dispute in its entirety to the judgment of the Court of Appeal and can be discussed jointly.

2.4 Maximov has based his request on Article 1075 of the Dutch Code of Civil Procedure. That statutory provision reads as follows:

"An arbitration award given in a foreign state that is subject to a recognition and enforcement convention can be recognized and enforced in the Netherlands. Articles 985 up to and including 991 apply by analogy to the extent that the convention does not contain deviating provisions and provided that the preliminary relief judge of the court takes the place of the court and the term for appeal and appeal in cassation is two months."



2.5 The parties agree with the Court of Appeal that the present case is subject to the New York Convention of 1958 (Treaty Series 1958, 145). NLMK has invoked, *inter alia*, Article V, first paragraph, preamble and sub e, of that convention. In Dutch translation, that convention reads (Treaty Series 1959, 58):

"Article V

1. De erkenning en tenuitvoerlegging van de uitspraak zullen slechts dan op verzoek van de partij tegen wie een beroep op de uitspraak wordt gedaan, geweigerd worden, indien de partij tegen wie een beroep op de uitspraak wordt gedaan, het bewijs levert:

*(The recognition and enforcement of the award will only be denied at the request of the party against which the award is directed, if the party against which the award is directed furnishes proof that:)*

(a) (...)

(b) (...)

(c) (...)

(d) (...)

(e) the award has not yet become binding on the parties or has been reversed or that its enforcement has been suspended by a competent authority of the country in which or pursuant to laws of which the award has been given.

2. (...)"

2.6 The Arbitrazh Court may be regarded as a competent authority within the meaning of Article V, first paragraph, preamble and sub e, New York Convention 1958. For NLMK's invocation of that provision to succeed, it is not necessary that the Court of Appeal in these proceedings has jurisdiction to order enforcement of the judgment of the Arbitrazh Court. Nor is it necessary that NLMK has requested or will request recognition and/or enforcement of that judgment to a Dutch court, within or outside the framework of the present proceedings. To the extent that the grounds of appeal are based on a different interpretation of the law, they fail.

2.7 It is also not necessary for NLMK's invocation of that provision to succeed that the judgment of 21 June 2011 of the Arbitrazh Court has acquired the force of *res judicata*. After all, the New York Convention 1958 does not set such a requirement (also not in Article VI), nor is there any other rule of law stipulating such a

requirement. If the judgment has not acquired the force of *res judicata*, that is also not a reason to defer this case.

2.8 As the Arbitrazh Court has reversed the arbitration award, it applies in principle that Maximov's request must be dismissed pursuant to Article V, first paragraph, preamble and sub e, New York Convention 1958. Subject to assessment here is whether an exception must be assumed in this case.

2.9 An exception must be assumed if there are sufficiently strong indications that there have been such essential shortcomings in the reversal proceedings before the foreign state court in the case under consideration that it can not be maintained that the case has been fairly heard. There is also an exception to this exception - in which case Article V, paragraph, preamble and sub e, New York Convention 1958 applies anyway -, namely if it is sufficiently plausible that even if the case had been heard fairly, the proceedings would have resulted in reversal of the arbitration award.

The Court of Appeal derives the jurisdiction and obligation to review all this from general Dutch international private law, which protects the Dutch public order, as well as from Article 6 ECHR (compare: ECHR 20 July 2001, no. 30882/96, (Pellegrini/Italy)).

2.10 Starting point is that a judge must be presumed to be impartial by virtue of his appointment, unless there are exceptional circumstances that constitute a serious indication for the view that a judge is biased against a party.

In principle, this also applies to foreign judges. It is important that a judge of one state exercises restraint when assessing the question of whether the judge of another state is partial and/or allows himself to be influenced by a relationship of dependence with the executive of that other state.

2.11 In the Rosneft/Yukos case, the Court of Appeal cited sources in legal grounds 3.8 up to and including 3.8.10 that partially relate to the degree of independence and impartiality of the Russian state court in general. Maximov has *inter alia* referred to those sources in this case. The picture emerging from these sources is very

worrying, especially where it concerns disputes involving substantial interests that the Russian state regards as its own. In cases in which the Russian state court is involved and interests as referred to above are at issue, this prejudices the starting point described in legal ground 2.10 above. Nevertheless, assuming an exception as referred to in legal ground 2.9 above is only appropriate if the indications giving rise thereto sufficiently specifically relate to the case under consideration.

2.12 The facts established in legal grounds 2.2.1 up to and including 2.2.3 above regarding the persons of Lisin and Maximov are insufficient - even if considered in conjunction with the facts established in legal ground 2.2.8 regarding criminal proceedings and the facts established in legal ground 2.2.16 regarding the person of the judge - to justify the conclusion that the Russian state or interests of the Russian state has or have affected the fairness of the present reversal proceedings in such a manner that it can no longer be maintained that the case has been fairly heard. Solely on the basis of those facts and circumstances, it can therefore not be assumed that there is an exception as referred to in legal ground 2.9. Also otherwise, the Court of Appeal currently has insufficient data from an objective source with regard to the persons of Lisin and Maximov, the actions of the Russian state in criminal cases and/or the person of the judge who pronounced the reversal, to justify the above-described conclusion.

2.13 The Court of Appeal must now investigate whether the manner in which the Russian reversal proceedings were conducted indicates that the exception referred to in legal ground 2.9 must be assumed. The Court of Appeal deems it necessary that one or more independent expert(s) provide information to the Court of Appeal, in particular about the contents of Russian law. The Court of Appeal therefore intends to order an expert opinion. The case will be referred to the cause list in order to give the parties an opportunity to express their views on the number and identity of the person/persons to be appointed as expert(s), the questions to be asked and the advance. First, Maximov will be given the opportunity to submit a statement, thereafter NLMK.

2.14 The parties are requested to seek unanimity with regard to the identity of the person/persons to be appointed as expert(s). The parties are also requested to express their views on the possibility of involving the International Law Institute at R.J. Schimmelpennincklaan 20-22 in The Hague.

2.15 The Court of Appeal proposes to ask the expert(s) the following questions:

- a. Were the arbitrators obliged under Russian law to inform the parties that they were employed by the same institutions as the persons involved in the arbitration proceedings as experts? If so, what is the legal effect under Russian law of a breach of this obligation? Does the circumstance that the arbitrators failed to report the relations have the legal effect under Russian law that the composition of the arbitration court was not in line with what had been agreed? If so, does that constitute a ground for reversal under Russian law?
- b. (if the expert is also an expert in this field): To what extent does academic freedom or a similar independence exist between persons employed by the Ural State Law Academy? Is this institution similar to a university? The same questions apply with regard to the State and Law of the Russian Academy of Sciences.
- c. Should a dispute about the amount of the purchase price of shares under Russian law be regarded as a dispute about the validity of a share transfer? Can a dispute about the amount of the purchase price of shares, in a case in which the share transfer may not be valid, be submitted to arbitration?
- d. Is the method of determining the purchase price applied by the arbitration court contrary to mandatory Russian law regarding purchases? Can the method of determining the purchase price applied by the arbitration court be regarded as determining the agreed purchase price or as determining a reasonable purchase price? Does a violation of such mandatory law constitute a ground for reversal?
- e. Are the denials by the Arbitrazh Court of the requests for postponement from Maximov in response to the additional case document of NLMK of 17 June 2011 contrary to Russian law? What is the relevance of the circumstance that Maximov was still

given the opportunity to discuss the additional case document on appeal and the Arbitrazh Court's ruling thereon?

- f. Is it in compliance with Russian law that the state court has not taken note of the arbitration file on the ground that one of the parties refused to consent thereto? Should the state court have attached consequences under Russian law to the refusal to consent?
- g. Is it in compliance with Russian law that the Arbitrazh Court gave an oral judgment immediately after a five-hour hearing?
- h. Do you have any further comments that may be relevant to the decision of the Court of Appeal?

The parties are requested to comment on these draft questions.

### 3. Decision

The Court of Appeal:

refers the case to the cause list of 16 October 2012 in order to give Maximov the opportunity to express his views on the subjects referred to in legal grounds 2.13 up to and including 2.15 above;

defers any further decision.

This decision was given by *mr. G.C.C. Lewin*, *mr. R.H. de Bock* and *mr. M.A.J.G. Janssen* and pronounced in public by *mr. G.C.C. Lewin*, cause list judge, on 18 September 2012.

Certified as a true copy

The registrar of the Court of Appeal in Amsterdam