

IN THE NAME OF THE RUSSIAN FEDERATION

CONSTITUTIONAL COURT
OF THE RUSSIAN FEDERATION

Judgment
of 25 March 2008 No. 6-II

in the case concerning the review of the constitutionality of the provision of Section 3, Article 21 of the Arbitration Procedure Code of the Russian Federation, in connection with complaints of Tovarishchestvo Zastroyschikov CJSC, Nizhnekamskneftekhim OJSC, and TNK-BP Holding OJSC.

Moscow, 25 March 2008

The Constitutional Court of the Russian Federation composed of Presiding Judge M. I. Kleandrov and Judges Yu. M. Danilov, L. M. Zharkova, V. D. Zorkin, S. M. Kazantsev, N. V. Melnikov, N. V. Seleznev, O. S. Khokhryakova,

in the attendance of attorney A. L. Orlov, representative of Tovarishchestvo Zastroyschikov CJSC, attorney V. V. Kuznetsov, representative of TNK-BP Holding OJSC, Permanent Representative of the State Duma in the Constitutional Court of the Russian Federation A. N. Kharitonov, Representative of the Council of the Federation Ye. V. Vinogradova, PhD in Law, Plenipotentiary Representative of the President of the Russian Federation in the Constitutional Court of the Russian Federation M. V. Krotov,

pursuant to Section 4, Article 125 of the Constitution of the Russian Federation, Subsection 3, Section 1, Sections 3 and 4, Article 3, Subsection 3, Section 2, Article 22, Articles 36, 74, 86, 96, 97, and 99 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”,

in an open hearing, examined the constitutionality of the provision of Section 3, Article 21 of the Arbitration Procedure Code of the Russian Federation.

The reason for the consideration of the case is complaints of Tovarishchestvo Zastroyschikov CJSC, Nizhnekamskneftekhim OJSC, and TNK-BP Holding OJSC. The ground for the consideration of the case is the discovered uncertainty of whether the provision challenged by the applicants is in conformity with the Constitution of the Russian Federation.

Insofar as all the complaints concern essentially the same subject matter and pursuant to Article 48 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, the Constitutional Court of the Russian Federation is permitted to consider these applications together.

Having heard the report of Judge-Rapporteur Yu. M. Danilov, statements by the parties' representatives, intervention by Deputy President of the Supreme Arbitration Court of the Russian Federation T. K. Andreeva as the representative of the Supreme Arbitration Court of the Russian Federation invited to the hearing, and having considered written submissions and other materials, the Constitutional Court of the Russian Federation

e s t a b l i s h e d :

1. Article 21 of the Arbitration Procedure Code of the Russian Federation determines, in its Section 1, the grounds precluding participation of an arbitration court judge in the consideration of the case and serving as a basis for recusal (Subsections 1–7), and in Section 3 stipulates that an arbitration lay judge shall be recused on grounds envisaged by Subsections 1–4, Section 1 of this Article. Accordingly, Paragraph 2, Section 4, Article 19 of the Arbitration Procedure Code of the Russian Federation requires that the arbitration court considering a motion for a selected arbitration lay judge to sit in consideration of a case shall verify whether the circumstances specified by Subsections 1–4, Section 1, Article 21 of the Code, precluding participation of this candidate as an arbitration lay judge in a specific case and the grounds for dismissal of the motion are present.

The mentioned provisions of the Arbitration Procedure Code of the Russian Federation providing for recusal of an arbitration lay judge on grounds listed in Subsections 1–4, Section 1, Article 21, do not envisage a possibility of arbitration lay judge recusal on other grounds listed in Section 1 of this Article which are valid for recusal of a judge. These latter grounds are: his personal, direct or indirect, interest in the outcome of the case or other circumstances which may raise doubts as to his impartiality; present or past official or any other dependency on a person participating in the case or his representative; public statements or expressed opinion on the merits of the case under consideration (Subsections 5–7).

On these grounds, the Arbitration Court of Moscow considering the case upon a lawsuit by the Government of Moscow against *Tovarishchestvo Zastroyschikov CJSC* dismissed, by its decision of 1 March 2007, the defendant's motion for recusal of D. D. Petrushkin (Head of the Legal Department of *Spetsialnoye Predpriyatie pri Pravitelstve Moskvy*, a Moscow Unitary Enterprise) as a candidate for an arbitration lay judge selected by the plaintiff. The representative of *Tovarishchestvo Zastroyschikov CJSC* claimed that D. D. Petrushkin had an interest in the outcome of the case as a person dependent on the plaintiff since the Government of Moscow had the right to regulate directly or indirectly (through the director of the enterprise appointed by an order issued by the First Deputy Mayor of Moscow) the payment of salary and bonuses to him and to apply disciplinary sanction (including dismissal). The Arbitration Court of Moscow

referred to Section 3, Article 21 of the Arbitration Procedure Code of the Russian Federation and reasoned that an arbitration lay judge may be recused on grounds envisaged in Subsections 1–4, Section 1 of this Article, and may not therefore be recused on other grounds specified in it.

Similar decisions were made by arbitration courts of the Republic of Tatarstan and the Sakhalin Region, which dismissed motions submitted by Nizhnekamskneftekhim OJSC and TNK-BP Holding OJSC for recusal of the arbitration lay judges selected by the plaintiffs for consideration of the respective cases. The courts did not take into account the defendants' arguments that the selected candidates were dependent on the plaintiffs and that there were circumstances which raised doubts as to their impartiality.

In the opinion of Tovarishchestvo Zastroyschikov CJSC, Nizhnekamskneftekhim OJSC and TNK-BP Holding OJSC, Section 3, Article 21 of the Arbitration Procedure Code of the Russian Federation, applied by the arbitration courts in their cases contradicts the Constitution of the Russian Federation, namely its Articles 17, 46, 55 (Section 3), 120, and 123 (Section 3), since by limiting the list of grounds for recusal of an arbitration lay judge compared to the list of grounds for recusal of a judge it violated the constitutional right to judicial protection and guarantees of fair and impartial administration of justice.

Thus, the subject matter for consideration by the Constitutional Court of the Russian Federation in the present case is Section 3, Article 21 of the Arbitration Procedure Code of the Russian Federation, which envisages a possibility for arbitration lay judge recusal on the grounds for recusal of a judge specified in Subsections 1–4 of its Section 1, as in conjunction with paragraph 2, Section 4, Article 19, and Section 1, Article 21 of this Code, it prevents recusal of an arbitration lay judge on other grounds specified in Article 21.

2. Pursuant to the Constitution of the Russian Federation, namely its Article 46 (Section 1), everyone shall be guaranteed judicial protection of his rights and freedoms; the right to judicial protection is among the fundamental inalienable human rights and freedoms, it shall be recognized and guaranteed in the Russian Federation according to the generally recognized principles and norms of international law and in accordance with the Constitution of the Russian Federation (Article 17, Sections 1 and 2), it shall be directly applicable and determine the meaning, contents and enforcement of laws, actions of legislative and executive bodies, local self-government, and shall be ensured by administration of justice (Article 18).

It follows from the cited provisions of the Constitution of the Russian Federation, in their conjunction with its Article 19, and corresponding provisions of international treaties of the Russian Federation, which are an integral part of its legal system and override the laws of the Russian Federation (Article 15, Section 4 of the Constitution of the Russian Federation) that the right to judicial protection envisages such specific legal guarantees that permit its full exercise

and ensure effective restoration of rights through administration of justice that complies with the general legal requirements of fairness and equality.

Pursuant to Article 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Similar provisions are found in Article 14 § 1 of the International Covenant on Civil and Political Rights.

Developing these general legal requirements, the Constitution of the Russian Federation establishes that justice in the Russian Federation shall be administered only by courts (Article 118, Section 1); judges shall be independent and be bound only by the Constitution of the Russian Federation and the federal law (Article 120, Section 1); judicial proceedings shall rest upon adversariness and equality of the parties (Article 123, Section 3); in cases prescribed by federal law justice shall be administered in a jury trial (Article 123, Section 4). Within the meaning of Article 32 (Sections 1 and 5) of the Constitution of the Russian Federation, in its conjunction with the mentioned provisions, judicial power may be exercised by a panel of judges consisting of professional judges and lay judges, i.e. people's representatives.

The European Court of Human Rights upon interpretation of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, in a number of judgments (of 26 February 1993, *Padovani v. Italy*, §§ 25 and 27), of 28 February 1993, *Fey v. Austria*, §§ 28 and 30, and of 10 June 1996, *Pullar v. the United Kingdom*, § 30) determined general criteria for an impartial court.

First, the tribunal must be “subjectively impartial”, that is, no member of the tribunal should hold any personal prejudice or bias; personal impartiality is to be presumed unless there is evidence to the contrary. This criterion reflects a judge's personal convictions on a specific case.

Secondly, the tribunal must be “impartial from an objective viewpoint”, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect. According to this criterion, the decision is made whether certain ascertainable facts raise doubts in his impartiality regardless of the judge's behaviour and external characteristics. For the respective decision, the opinion of interested persons is taken into account but is not decisive; what is decisive, however, is whether their concerns can be considered objectively well-founded. Any judge whose impartiality may be put in doubt on legitimate grounds shall withdraw from the tribunal that considers the case.

Thus, within the meaning of Article 46 of the Constitution of the Russian Federation in conjunction with Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the right to an impartial court, which implies the absence of prejudice

and partiality of judges, shall be one of the inalienable characteristics of the right to judicial protection and a prerequisite for a fair trial. The federal legislator has sufficiently broad discretion in the choice of means to guarantee efficiency of the judicial power and the judicial system's ability to ensure everyone's right to a fair trial by a competent, independent and impartial court. However, in exercising the legal regulation under Articles 71 (Subsection "n") and 76 of the Constitution of the Russian Federation it shall consider that the requirement of impartiality is a principled issue and it is equally relevant for all judges, i.e. those who exercise judicial power on a professional basis and those sitting as lay judges.

3. Specifying the provisions of the Constitution of the Russian Federation, Federal Constitutional Law No. 1-ФКЗ of 31 December 1996, "On the Judicial System of the Russian Federation", establishes that judicial power in the Russian Federation shall only be exercised by courts represented by judges and jury, lay judges and arbitration lay judges who participate in administration of justice as prescribed by law; no other authorities or persons shall be entitled to administer justice (Section 1, Article 1). The Arbitration Procedure Code of the Russian Federation envisages case consideration by a single judge or a panel of judges of arbitration courts who consider economic disputes and other cases falling within their competence pursuant to the powers vested in them by the federal constitutional law (Article 127, Article 128, Section 3 of the Constitution of the Russian Federation; Articles 23–25 of the Federal Constitutional Law "On the Judicial System of the Russian Federation"). In Chapter 2, "Composition of Arbitration Court", the Code establishes that a panel considering cases in a first instance arbitration court shall consist of three judges or a judge and two arbitration lay judges (Section 1, Article 17) and that arbitration lay judges shall participate in administration of justice by first instance arbitration courts pursuant to the federal law (Section 1, Article 19).

Defining the status of arbitration lay judges, Federal Law No. 70-ФЗ of 30 May 2001, "On Arbitration Lay Judges in Arbitration Courts of Subjects of the Russian Federation", establishes, in its Article 1, that arbitration lay judges in arbitration courts of the subjects of the Russian Federation shall be citizens of the Russian Federation duly vested with the power to administer justice in consideration of civil law cases by arbitration courts of the subjects of the Russian Federation (Subsection 1); arbitration lay judges shall sit in cases upon a party's motion, which is submitted before the hearing on the merits and resolved in accordance with the procedures established by the Arbitration Procedure Code of the Russian Federation (Subsection 2); the composition of the arbitration court to consider a specific case with participating arbitration lay judges shall be formed in a manner which precludes influence by any persons interested in the outcome of the case and shall consist of one presiding judge and two arbitration lay judges (Subsection 3); arbitration lay judges shall participate in consideration of a

case and delivery of a judgment equally with professional judges; in administration of justice they shall enjoy the rights and bear the responsibilities of a judge; arbitration lay judges who participate in administration of justice shall be independent and be bound only by the Constitution of the Russian Federation and law (Subsection 4). Moreover, pursuant to Article 7 of this Federal Law, in administering justice an arbitration lay judge and his family members shall enjoy guarantees of immunity established for judges and their family members by the Constitution of the Russian Federation and the federal law.

Pursuant to the Arbitration Procedure Code of the Russian Federation, a first instance arbitration court composed of a judge and two arbitration lay judges shall consider economic disputes and other cases that arise from civil and other legal relationships if any of the parties submits a motion for hearing the case with the participation of arbitration lay judges (Section 3, Article 17); in consideration of a case arbitration lay judges shall enjoy the rights and bear the responsibilities of a judge; in consideration of cases and resolution of all issues arising in the consideration and delivery of judicial acts, the judge and arbitration lay judges shall enjoy equal procedural rights (Sections 5 and 6, Article 19); any issues which arise in case consideration by a panel shall be resolved by a majority vote (Section 1, Article 20).

An arbitration lay judge who assumes his obligations for the first time shall take an oath in an open court hearing and swear to be impartial and fair (Subsection 3, Article 2 of the Federal Law “On Arbitration Lay Judges in Arbitration Courts of Subjects of the Russian Federation”). Therefore his activities shall be based on fundamental principles of justice ensuring fair trial of the case by an independent and impartial court. All judges composing the arbitration court, either professional judges or arbitration lay judges administering justice on a non-professional basis, shall act without any bias, prejudice, or partiality. This obligation corresponds with Articles 46 and 118 of the Constitution of the Russian Federation providing for everyone’s right to have his case considered by a legally established court capable of acting without prejudice and trusted by the litigants.

Thus, pursuant to the provisions of the Arbitration Procedure Code of the Russian Federation and the Federal Law “On Arbitration Lay Judges in Arbitration Courts of Subjects of the Russian Federation”, professional judges and non-professional judges (arbitration lay judges) resolving a specific case and delivering a judicial act shall have equal status and powers in an arbitration court, which implies the need for equal requirements ensuring their impartiality in consideration of cases.

4. In the Russian Federation the introduction of such procedural institutions universally accepted in rule of law states as recusal and self-recusal of a judge for all types of court proceedings and for all courts (including arbitration courts) is aimed at implementing the

provisions of the Constitution of the Russian Federation (Section 1, Article 46; Section 1, Article 120; and Section 3, Article 123), the International Covenant on Civil and Political Rights (Article 14 § 1) and the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6 § 1) stipulating the right to fair hearing of a dispute by an independent and impartial court established by law as an inalienable characteristic of the right to judicial protection, which is guaranteed at the national level by the entirety of relevant procedural means and procedures (as was repeatedly articulated by the Constitutional Court of the Russian Federation, in particular in its Judgment No. 2-II of 5 February 2007).

The Arbitration Procedure Code of the Russian Federation states that fair public hearing by an independent and impartial court within the time limit prescribed by law is one of the fundamental tasks of judicial proceedings in arbitration courts (Subsection 3, Article 2). To implement the constitutional principle of impartiality of the court, Article 24 of the Code prescribes that if there are grounds specified in Articles 21 and 22 of the Code the judge and arbitration lay judges shall recuse themselves; recusal may also be requested by persons participating in the case (Section 1).

Pursuant to Section 1, Article 21 of the Arbitration Procedure Code of the Russian Federation, a judge may not participate in consideration of the case and shall be recused if he: participated in the previous consideration of the case as a judge and his repeated participation is impermissible under the requirements of the Code (Subsection 1); participated in the previous consideration of the case as a prosecutor, law clerk, secretary of the judicial proceedings, representative, expert, interpreter, or witness (Subsection 2); participated in the previous consideration of the case as a judge of a foreign court, or an arbitral tribunal (Subsection 3); is a relative of a person participating in the case or his representative (Subsection 4); is personally, directly or indirectly, interested in the outcome of the case or if there are other circumstances which may raise doubts as to his impartiality (Subsection 5); has present or past official or any other dependency on a person participating in the case or his representative (Subsection 6); has made public statements or expressed opinion on the merits of the case under consideration (Subsection 7).

By linking circumstances envisaged in Section 1, Article 21 of the Arbitration Procedure Code of the Russian Federation, with the absence of due guarantees of the judge's impartiality when he participates in considering a specific case, the federal legislator considers any of them an unconditional ground for recusal of a judge. The introduction of these specific grounds for judge recusal is predetermined by the essence of an impartial court; it is aimed at ensuring fair trial, and therefore complies with the requirements of the Constitution of the Russian Federation.

For arbitration lay judges, Article 21 of the Arbitration Procedure Code of the Russian Federation, namely its Section 3, stipulates that an arbitration lay judge shall be disqualified on grounds envisaged by Subsections 1–4, Section 1 of this Article. Paragraph 2, Section 4, Article 19 of the Arbitration Procedure Code of the Russian Federation, vests the arbitration court with an obligation to verify the presence of circumstances (established by Subsections 1–4, Section 1 of Article 21) which are grounds for dismissal of a motion for the selected arbitration lay judge to sit in consideration of a case. Section 1, Article 21 of the Arbitration Procedure Code of the Russian Federation, determines grounds precluding a judge’s participation in consideration of a case and his recusal. These provisions taken together imply that the grounds envisaged by Subsections 5–7 of Section 1, Article 21, are grounds for recusal of professional judges only, not arbitration lay judges.

At the same time, in their essence the grounds for recusal envisaged in Subsections 5–7, Section 1, Article 21 of the Arbitration Procedure Code of the Russian Federation, and in its Subsections 1–4 are of fundamental importance for deciding on whether the court resolving a specific case is impartial; and the circumstances specified in them may raise doubts as to the impartiality of not only of a professional judge, but equally of an arbitration lay judge. Therefore all these grounds must equally apply to the whole composition of the court, including non-professional judges (arbitration lay judges) whose participation in the resolution of the case under such circumstances also contradicts the general criteria of court impartiality. The absence of sufficient guarantees excluding any doubts in the prejudice and partiality of an arbitration lay judge is evident.

If the doubts as to an arbitration lay judge’s impartiality are the same as those which the legislator considers a ground for recusal of a professional judge, an arbitration lay judge may not participate in the consideration either. Moreover, within the meaning of Articles 21, 24, and 25 of the Arbitration Procedure Code of the Russian Federation, in deciding whether there are legitimate grounds in a specific case which raise doubts as to the impartiality of an arbitration lay judge and taking into account the opinion of the persons who request recusal, the arbitration court shall consider that it is not the opinion itself that is decisive but whether the concerns may be considered objectively well-founded.

By failing to include the circumstances specified in Subsections 5–7, Section 1, Article 21 of the Arbitration Procedure Code of the Russian Federation, in the grounds for judge recusal that apply to arbitration lay judges, the federal legislator violated the requirement stemming from the principle of legal equality as applied to the exercise of the right to judicial protection (Sections 1 and 2, Article 19; Section 1, Article 46; Section 3, Article 123 of the Constitution of the Russian Federation), stipulating that the relationships that are homogeneous

in their legal nature shall be regulated in the same way. Moreover, he permitted to establish a court that does not meet the requirements of impartiality. Deprivation of the participants in the proceedings of the possibility to request recusal of an arbitration lay judge if there are circumstances specified in Subsections 5–7, Section 1, Article 21 of the Arbitration Procedure Code of the Russian Federation, inappropriately limits citizens' constitutional right to judicial protection in judicial proceedings administered by an independent and impartial court on principles of adversariness and equality of the parties. It distorts the very essence of justice and therefore results in violation of the guarantees of the right to judicial protection established by the Constitution of the Russian Federation, its Articles 46 (Section 1), 55 (Section 3), and 123 (Section 3).

Concluding from the above and pursuant to Sections 1 and 2, Article 71, Articles 72, 75, 79, and 87 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, the Constitutional Court of the Russian Federation

h e l d :

1. To recognize the provision of Section 3, Article 21 of the Arbitration Procedure Code of the Russian Federation, as non-conforming to the Constitution of the Russian Federation and its Articles 46 (Section 1), 55 (Section 3) and 123 (Section 3). Although this provision envisages the possibility for recusal of an arbitration lay judge on grounds for recusal of a judge listed in Subsections 1–4, Section 1, Article 21, it does not permit – in conjunction with Paragraph 2, Section 4, Article 19, and Section 1, Article 21 of the Code – recusal of an arbitration lay judge on other grounds specified in this Article, namely: if he is personally, directly or indirectly, interested in the outcome of the case or if there are other circumstances which may raise doubts as to his impartiality; if he has past or present official or any other dependency on a person participating in the case or his representative; if he has made public statements or expressed opinions on the merits of the case under consideration.

2. Pursuant to Article 100 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, if the applicants submit relevant motions, the judgments delivered in their cases shall be reconsidered according to the established procedure.

3. This Judgment shall be final and shall not be subject to any appeal, it shall come into force immediately upon its pronouncement, shall be directly applicable, and shall not require confirmation by other authorities and state officials.

4. Pursuant to Article 78 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, this Judgment shall be published immediately in the Collection of

Laws of the Russian Federation and *Rossiyskaya Gazeta*. The Judgment shall also be published in the Bulletin of the Constitutional Court of the Russian Federation.

Constitutional Court
of the Russian Federation

No. 6-II