IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Joint Stock Company State Savings Bank of Ukraine (a/k/a JSC Oschadbank), Petitioner, v. The Russian Federation, Respondent.	CIVIL ACTION NO. 1:23-cv-00764 (ACR)

EXPERT DECLARATION OF ALEXEI S. AVTONOMOV

PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 44.1

I. INTRODUCTION

(1) My name is Alexei Stanislavovich Avtonomov. I live in Moscow, Russian Federation. I am a Professor of Law and currently the Vice-Rector for Research and International Relations at the Moscow University named after A.S. Griboyedov.

(2) Since 1984, I have specialized in the international law of treaties, international arbitration, and comparative law analysis. My relevant qualifications are detailed in my CV attached hereto as Annex A.

(3) I have been asked by Marks & Sokolov, LLC ("Counsel"), to analyze international and comparative law relevant to determining whether adoption of the 1976 UNCITRAL Arbitration Rules (the "UNCITRAL Rules") incorporated in the Russia-Ukraine Bilateral Investment Treaty (the "BIT") constitutes "clear and unmistakable evidence"[1] that the Parties in this case intended to

[1] I am instructed that this is the standard applied by U.S. courts in determining whether parties have delegated "exclusive authority" to determine issues of "Arbitrability" to an arbitral tribunal, to the exclusion of post-arbitration *de novo* court review, based on *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010).

delegate "exclusive authority" to determine certain questions characterized as "arbitrability issues" within the U.S. legal system ("Arbitrability")[2] to the arbitral tribunal ("Tribunal"). In other words, by adopting the UNCITRAL Rules, did the Parties intend to exclude post-arbitration *de novo* judicial review of Arbitrability?

(4) As I explain below, the applicable law and record reflect no "clear and unmistakable evidence" that the Parties intended to delegate "exclusive authority" to the Tribunal and exclude post-arbitration *de novo* judicial review of Arbitrability. To the contrary, based on the applicable law and record, the Parties' adoption of the UNCITRAL Rules must be understood as endorsing the international legal "principle" or "doctrine" of *Kompetenz-Kompetenz* (or "Competence-Competence"), which merely allows a Tribunal to decide Arbitrability in the first instance, and then allows post-arbitration *de novo* judicial review of Arbitrability.

II. SUMMARY OF OPINION

(5) Based on the international legal context and other factors, I have considered whether there is "clear and unmistakable evidence" that the Parties intended to delegate "exclusive authority" to decide Arbitrability to the Tribunal and thus exclude post-arbitration *de novo* judicial review of Arbitrability, such as in annulment ("set-aside") or recognition and enforcement ("enforcement") proceedings.

(6) I have evaluated the interpretation and application of the UNCITRAL Rules (*see* the 1976 UNCITRAL Arbitration Rules, Ex. 1), which are incorporated by reference into Article 9 of the BIT.

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[2] I have been instructed to use the term "Arbitrability" to refer to 1) "whether the parties are bound by a given arbitration clause," that is, disputes over "formation of the parties' arbitration agreement," and (2) "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy," based on *BG Group, PLC v. Argentine Republic*, 572 U.S. 25, 42 (2014).

(7) The BIT and the UNCITRAL Rules — including Article 21(1) — must be interpreted in accordance with the rules of treaty interpretation codified in the Vienna Convention on the Law of Treaties, 115 U.N.T.S. 331 (May 23, 1969) ("VCLT") (Ex. 2). This understanding is confirmed by the text of the BIT and by widespread practice in arbitration proceedings involving investment-related treaties. Both Parties have consistently invoked the VCLT in the post-arbitration litigation proceedings in France.

(8) The UNCITRAL Rules do not contain any reference to the exclusion of post-arbitration judicial review. Indeed, other than a few provisions concerning payment of the arbitrators' fees and expenses,[3] the UNCITRAL Rules do not address any aspect of post-arbitration procedures at all. By contrast, the UNCITRAL Rules do address the arbitrators' competence to evaluate Arbitrability under Article 21(1), which provides: "The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement."

(9) Article 21(1) does not reflect an agreement to exclude post-arbitration *de novo* judicial review of Arbitrability. I base this conclusion on four sets of reasons, which are summarized here and elaborated below in Part IV ("Discussion").

(10) ***First***, VCLT Article 31(1) requires consideration of an international agreement's "ordinary meaning," interpreted in "good faith" and in accordance with the international agreement's "context" and "object and purpose." In relation to the "ordinary meaning" of the UNCITRAL Rules Article 21(1), there is no textual indication that the Tribunal's "power to rule on objections" should be interpreted as exclusive. As for the "context" and "object and purpose" of the

[3] *See* UNCITRAL Rules (Ex. 1), Art. 41(5) ("the arbitral tribunal shall render an accounting to the parties" in relation to costs described in Article 38, including "fees," "expenses," and "costs ... of other assistance required by arbitral tribunal").

UNCITRAL Rules, I confirm the detailed, systemic analysis of this issue by Professor George Bermann, a leading American law professor and arbitration scholar. In a 2015 expert opinion,[4] Professor Bermann explained that the UNCITRAL Rules Article 21(1) should be interpreted in harmony with — not as contradicting or abrogating — the provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517 (June 10, 1958) (the "1958 New York Convention") and the UNCITRAL Model Law on International Commercial Arbitration (1985) (the "1985 UNCITRAL Model Law") (Ex. 4) providing for post-arbitration judicial review of Arbitrability. *See* Bermann (Ex. 3), ¶48.

(11) ***Second***, VCLT Article 31(3)(c) provides that the BIT and UNCITRAL Rules should be interpreted in accordance with the "relevant rules of international law applicable in the relations between the parties." In this case, this category of "relevant rules" includes the *Kompetenz-Kompetenz* principle, which is codified in the European Convention on International Commercial Arbitration, 484 U.N.T.S. 349 (Apr. 21, 1961) (the "1961 Geneva Convention") (Ex. 5). That treaty is also binding and applicable to both the Russian Federation and Ukraine, which are both signatories. *See* U.N.T.S. List of Parties to 1961 Geneva Convention (Ex. 6).

(12) The 1961 Geneva Convention adopts the *Kompetenz-Kompetenz* principle in Article V(3), which provides: "the arbitrator whose jurisdiction is called in question shall be entitled . . . to rule on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement or of the contract of which the agreement forms part." At the same time, Article IX(1) of the 1961 Geneva Convention demonstrates that post-arbitration *de novo* judicial review of Arbitrability is not excluded as "[t]he setting aside … of an arbitral award … shall only constitute a ground for

[4] Supplemental Expert Opinion of Professor George A. Bermann, December 10, 2015, in support of the Russian Federation's motion to dismiss in *Hulley Enters. Ltd. et al. v. The Russian Federation*, D.D.C. Case No. 1:14-cv-01996-BAH ("Bermann") (Ex. 3 attached hereto without the exhibits).

the refusal of recognition or enforcement [of the award] … where such setting aside took place … for one of the following reasons" including, *inter alia*, several issues that pertain to Arbitrability such as if "the [arbitration] agreement is not valid . . . ." or if the award "deals with a difference not contemplated or not falling within the terms of the submission to arbitration". Thus, the 1961 Geneva Convention makes clear that the *Kompetenz-Kompetenz* principle — adopted into the BIT under the UNCITRAL Rules Article 21(1) — does not preclude post-arbitration *de novo* judicial review of Arbitrability in the present case.

(13) ***Third***, applying VCLT Article 31(4), the "special meaning" of *Kompetenz-Kompetenz* shared by the BIT signatory States — the Russian Federation and Ukraine — likewise indicates that the Parties did not intend to exclude post-arbitration *de novo* judicial review of Arbitrability by adopting the UNCITRAL Rules. This is confirmed by the consistent understanding of *Kompetenz-Kompetenz* reflected in Russian and Ukrainian law. This is also the law of France, the seat of the arbitration.

(14) ***Fourth***, applying VCLT Article 31(3)(b), the above understanding is further confirmed by the Parties' "subsequent practice" since 1998 when the BIT was executed. Jurisdictions such as Canada, the Netherlands, Switzerland, and the United Kingdom, where Ukraine and the Russian Federation have consented to arbitrate in other cases, all recognize that "competence-competence" merely provides for tribunals to initially decide Arbitrability, with courts later reviewing the issues *de novo* in set-aside and enforcement proceedings.

(15) ***In sum***, when the Parties' adoption of the UNCITRAL Rules is analyzed in accordance with the VCLT and Geneva Convention, including "special meaning" and "subsequent practice", there is no "clear and unmistakable evidence" the parties sought to delegate "exclusive authority" to decide Arbitrability to the Tribunal, diverging from the ordinary understanding of *Kompetenz-*

Kompetenz which permits post-arbitration *de novo* judicial review of Arbitrability. To the contrary, the evidence indicates the Parties intended to preserve "recourse" to post-arbitration *de novo* judicial review of Arbitrability in set-aside and enforcement proceedings.

III. DOCUMENTS REVIEWED

(16) In preparation of this expert opinion, I reviewed the materials provided to me by Counsel. The full list of materials reviewed is attached hereto as Annex B, exclusive of the statutes, cases, and commentaries cited in my opinion and attached as exhibits.

IV. DISCUSSION

(17) It is well recognized that an international treaty, such as the BIT, is to be interpreted in accordance with the rules of international law including those set forth under the VCLT. This understanding is confirmed by numerous decisions of domestic courts and international tribunals and authoritative commentary.[5] Accordingly, the Parties repeatedly invoked the VCLT in support of their interpretations of the BIT in post-arbitration litigation in France.[6]

A. VCLT Article 31(1): The "Ordinary Meaning" and "Object and Purpose" of the UNCITRAL Rules

(18) The starting point for applying the VCLT is Article 31(1), which provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." Although the UNCITRAL

[5] *See, e.g.*, *United States v. Ali*, 718 F.3d 929, 938 (D.C. Cir. 2013) (citing VCLT as authority on "[b]asic principles of treaty interpretation"); *NJSC Naftogaz of Ukraine v. The Russian Federation*, PCA Case No. 2017-16 (February 22, 2019) (Ex. 8) ¶137 ("the Tribunal must satisfy itself, on the basis of the provisions of the Treaty and general principles of international law, that all of the other conditions under the BIT respecting jurisdiction are fulfilled.")

[6] *See, e.g.*, the Russian Federation's Fourth Submission to the Paris COA (February 4, 2021), ECF 35-2, ¶¶101, 147-170, 257, 278-284; Oschadbank's Fourth Submission to the Paris COA (February 6, 2021) (Ex. 7), ¶¶174-176, 236, 238.

Rules are not themselves a "treaty," they should be interpreted in accordance with Article 31(1) and other VCLT rules of interpretation because they have been incorporated by reference into the BIT under Article 9(2)(c).

(19) ***First,*** with respect to the "ordinary meaning" of the UNCITRAL Rules Article 21(1), the most significant point is that the arbitrators' "power to rule on objections" is not characterized as exclusive. Neither the word, "exclusive," nor any synonym appears in this provision. In many legal contexts and in many legal systems, a first-instance court or tribunal may have the "power to rule" on a legal or factual question, subject to review in a second-instance proceeding by a separate court or tribunal. Accordingly, the ordinary meaning of UNCITRAL Rules Article 21(1) does not reflect the exclusion of post-arbitration *de novo* judicial review.

(20) ***Second,*** with respect to the "context" and "object and purpose" of the UNCITRAL Rule Article 21(1), which provides "[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement," I agree with the detailed views set forth in the 2015 expert opinion of Professor Bermann. In particular, Professor Bermann observes that the UNCITRAL Rules must be interpreted as comprising one element of the "unified legal framework" that includes the 1958 New York Convention and the 1985 UNCITRAL Model Law. *See* Bermann (Ex. 3), ¶48. The establishment of such "unified legal framework" was declared by the U.N. General Assembly in a 1985 resolution recommending adoption of the UNCITRAL Model Law to all States. *See* U.N. G.A. Res. 40/72 (Dec. 11, 1985) (Ex. 36) ("the Model Law, together with the [NY] Convention … and the [UNCITRAL] Arbitration Rules …, significantly contributes to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations").

(21) Both the 1958 New York Convention and the 1985 UNCITRAL Model Law provide for post-arbitration *de novo* judicial review of Arbitrability issues. The NY Convention, Art. V(1) provides, "Recognition and enforcement of the award may be refused [if] … the said [arbitration] agreement is not valid … or … the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration." Similarly, the 1985 UNCITRAL Model Law, Art. 36(1) provides, "Recognition or enforcement of an arbitral award ... may be refused [if] … the said [arbitration] agreement is not valid … or … the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration." Finally, the 1985 UNCITRAL Model Law, Art. 34(2) provides, "An arbitral award may be set aside by the court [if] … … the said [arbitration] agreement is not valid … or … the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration." Thus, the UNCITRAL Rules should not be interpreted as precluding such *de novo* judicial review. Bermann (Ex. 3), ¶48. Professor Bermann's conclusion is supported by many other commentators.[7]

[7] *See, e.g.,* Pieter Sanders, *Commentary on Uncitral Arbitration Rules, in* 2 Y.B. COMM. ARB. 172, 197 (Pieter Sanders ed., 1977) (Ex. 31) ("[N]otwithstanding the impression [UNCITRAL Rule 21(1)] might give, the final word on the competence of arbitrators still remains with the Court. [This] can only be decided by the Courts themselves and cannot entirely be left to private persons appointed as arbitrators."). Professor Sanders was a member of the Netherlands delegation to the 1958 conference in New York that drafted the NY Convention and also served as UNCITRAL's expert consultant and supervised the process of drafting the 1976 UNCITRAL Rules. *See also* Richard W. Hulbert, *Institutional Rules and Arbitral Jurisdiction: When Party Intent is not "Clear and Unmistakable,"* 17 AM. REV. INT'L ARB. 545, 564, 570 (2006) (Ex. 38) ("Modern international arbitration is conducted under the umbrella of the New York Convention of 1958 [and] is widely influenced by the more recent UNCITRAL Arbitration Rules of 1976 and the UNCITRAL Model Law… Both contain explicit provisions noting the arbitral tribunal's authority

(22) Accordingly, as required by VCLT Article 31(1), an analysis of the "ordinary meaning" and "object and purpose" of the UNCITRAL Rules Article 21(1) demonstrates that the Parties did not intend to delegate exclusive authority to decide Arbitrability to the Tribunal and exclude post-arbitration *de novo* judicial review.

B. VCLT Article 31(3)(c): The International Legal Principle of *Kompetenz-Kompetenz* Under the 1961 Geneva Convention

(23) The above analysis is confirmed by application of VCLT Article 31(3)(c) which requires that an international agreement is to be interpreted in accordance with "any relevant rules of international law applicable in the relations between the parties." This category of legal rules has been frequently relied upon by international courts and tribunals in matters relating to international treaty interpretation, including the Tribunal in the present case.[8] As concerns the present inquiry, VCLT Article 31(3)(c) requires due regard for the international legal "principle" or "doctrine" of *Kompetenz-Kompetenz*.

(24) In international arbitration, *Kompetenz-Kompetenz*, or competence-competence, is a legal doctrine that provides that an arbitral tribunal has "competence" to rule on its own jurisdiction. *Kompetenz-Kompetenz* provides that while a tribunal can rule on its jurisdiction, such rulings are subject to independent judicial review under the *de novo* standard.

(25) In this case, the *Kompetenz-Kompetenz* principle qualifies for consideration under VCLT Article 31(3)(c) because it has been codified under Article V(3) of the 1961 Geneva Convention,

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to rule on issues of jurisdiction. In the Rules, this appears as Article 21(1). In the drafting of that provision, … the sole substantive concern was that it would mislead the parties, because questions as to the competence and jurisdiction of arbitrators were ultimately a matter for the courts to settle… As Professor Sanders has summarized the matter, 'Obviously the court has the last word on the jurisdiction of the arbitral tribunal....'") (quoting Pieter Sanders, THE WORK OF UNCITRAL ON ARBITRATION AND CONCILIATION 96 (2d ed. 2004)).

[8] *See* Arbitral Award dated November 26, 2018, ECF 1-2, ¶¶100, 104-121, 157, 185, 203-218.

which states that "the arbitrator whose jurisdiction is called in question shall be entitled . . . to rule on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement or of the contract of which the agreement forms part." The parties to the 1961 Geneva Convention include the Russian Federation and Ukraine. *See* U.N.T.S. List of Parties to 1961 Geneva Convention (Ex. 6). Therefore, by operation of Article V(3) of the 1961 Geneva Convention, the *Kompetenz-Kompetenz* principle directly applies "in relations between" these national jurisdictions, and thus must be considered under VCLT Article 31(3)(c) in the present case.

(26) As previously stated, *Kompetenz-Kompetenz* does not preclude post-arbitration *de novo* judicial review of Arbitrability. To the contrary, the *Kompetenz-Kompetenz* principle empowers tribunals to commence arbitration and rule on objections to Arbitrability without waiting for a judicial determination before arbitration can proceed. In support of this understanding, Professor Bermann collected numerous judicial decisions and legal commentaries, including decisions of the highest courts of the UK, France, and the Netherlands. *See* Bermann (Ex. 3), ¶¶ 22-27.[9]

(27) ***First,*** as Professor Bermann further observed, the provisions of the 1985 UNCITRAL Model Law incorporate both *Kompetenz-Kompetenz* under Article 16(1) ("The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.") and post-arbitration *de novo* judicial review of Arbitrability under Article 34 and Article 36 (*see supra*, ¶21). *Id*. ¶ 48.

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[9] Citing and quoting, *inter alia, Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46 (UK Supreme Court), ¶¶25-26, 84-86; *Southern Pacific Properties, Ltd. v. The Arab Republic of Egypt*, Cour de Cassation (France), January 6, 1987, 26 I.L.M. 1004, 1006; *Republic of Ecuador v. Chevron Corp*., HR 26 Sep. 2014, First Chamber No. 13/04679 EV/LZ (The Netherlands Supreme Court); *Altain Khuder LLC v. IMC Mining Inc, et al. and IMC Aviation Solutions Pty Ltd v. Altain Khuder LLC*, Supreme Court of Victoria, Court of Appeal (Australia), 22 August 2011 *in* 36 Y.B. COMM. ARB. 242 ¶¶405, 406 (Albert Jan van den Berg ed., 2011); *Fung Sang Trading Ltd. v. Kai Sun Sea Products & Food Co Ltd*., [1991] 2 HKC 526, 541-42 (Hong Kong High Court).

(28) Interpreting the *Kompetenz-Kompetenz* principle as abrogating judicial review, therefore, would cause the 1985 UNCITRAL Model Law to become internally inconsistent. "The drafters could not possibly have understood the Competence-Competence principle as depriving courts of their authority and responsibility to rule on these matters on a post-award basis, if they included in the Model Law *both* express mention of the Competence-Competence principle *and* express mention of post-award judicial review of substantive arbitrability." *Id*.

(29) ***Second***, the same analysis applies in the present case under VCLT Article 31(3)(c) because the same structure is also reflected in the 1961 Geneva Convention. Like the 1985 UNCITRAL Model Law, the 1961 Geneva Convention also provides for *Kompetenz-Kompetenz* at the outset of arbitration under Article V(3) and, subsequently, refers to the possibility of post-arbitration *de novo* judicial review of Arbitrability under Article IX.

(30) Article V(3) of the 1961 Geneva Convention provides that "arbitrator whose jurisdiction is called in question shall be entitled . . . to rule on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement or of the contract of which the agreement forms part." (Ex. 5). This is a standard formulation of the *Kompetenz-Kompetenz* principle, which closely approximates both the UNCITRAL Rules Article 21(1) (Ex. 1) and the 1985 UNCITRAL Model Law Article 16(1) (Ex. 4).

(31) Article IX of the 1961 Geneva Convention then demonstrates that post-arbitration *de novo* judicial review of Arbitrability is not excluded. Specifically, Article IX(1) refers to the possibility of both "setting aside" and "refusal of recognition or enforcement" on the same grounds as set forth in the 1985 UNCITRAL Model Law Articles 34 and 36 and the 1958 New York Convention, Art. V(1)(a).

(32) The enumerated list of such grounds under Article IX(1) includes several issues that pertain

to Arbitrability, as defined (according to my instructions) under U.S. law. Under Article IX(1)(a), arbitration award is subject to annulment or refusal of recognition if "the [arbitration] agreement is not valid . . . ." (Ex. 5). Under Article IX(1)(c), an arbitration award is also subject to annulment or refusal of recognition if the award "deals with a difference not contemplated or not falling within the terms of the submission to arbitration." (*Id*.)

(33) Accordingly, the structural relationship between Articles V(3) and IX of the 1961 Geneva Convention demonstrates that when signing the BIT, both the Russian Federation and Ukraine understood the *Kompetenz-Kompetenz* principle as fully compatible with post-arbitration *de novo* judicial review. When interpreted in harmony with this understanding, the BIT's incorporation of the UNCITRAL Rules must likewise be understood as permitting post-arbitration *de novo* judicial review of Arbitrability.

C. VCLT Article 31(4): The "Special Meaning" of *Kompetenz-Kompetenz* Reflected in the Law of the Seat and the Parties' Home Jurisdictions

(34) The above conclusions are further confirmed by application of VCLT Article 31(4). This provision requires consideration of any "special meaning" that "the parties ... intended" should be given to any term of an international agreement. Arbitral tribunals routinely rely upon this concept to guide the interpretation of international treaties.[10]

(35) In the present case, the relevant "special meaning" attributable to the terms of UNCITRAL Rules Article 21(1) may be derived from the treatment of the *Kompetenz-Kompetenz* principle under the law of the Parties' home jurisdictions (the Russian Federation and Ukraine), as well as the seat of arbitration (France). One should conclude that the Parties understood UNCITRAL

[10] *See, e.g.*, *Komaksavia Airport Invest Ltd. v. The Republic of Moldova*, SCC Case 2020/074 (August 3, 2022) (Ex. 9), ¶143 ("If it is established that the Contracting Parties intended a term to have a 'special meaning,' then that intent should be given effect.").

Rules Article 21(1) as reflecting the same interpretation of the *Kompetenz-Kompetenz* principle that is reflected in the similarly worded provisions of national law found in the Russian Federation and Ukraine, as well as in France. As explained below, all three jurisdictions apply the same understanding of *Kompetenz-Kompetenz* that is set forth in the 1961 Geneva Convention.

(36) ***Russian Federation***. Based on my own specialized expertise in Russian law, I confirm that this understanding of *Kompetenz-Kompetenz* is reflected in the law of the Russian Federation. Russian law sets forth rules for post-arbitration *de novo* judicial review of international arbitral awards that takes place: i) in set-aside proceedings where Russian courts have jurisdiction to set aside an international award by a tribunal having a legal seat in Russia; and ii) in enforcement proceedings where Russian courts have jurisdiction to deny recognition and enforcement in Russia of international awards by tribunals seated in foreign jurisdictions.

(37) The Russian legal framework pertaining to international arbitration mainly consists of the 1958 New York Convention, to which Russia is a party as legal successor of the USSR since its ratification by the latter on August 24, 1960; the 1961 Geneva Convention, to which Russia is a party as a legal successor of the USSR since its ratification by the latter on June 27, 1962; the RF Statute "On International Commercial Arbitration" ("RF ICA Statute"), adopted on July 7, 1993 (as amended) (Ex. 10), which is based on the 1985 UNCITRAL Model Law; and procedural rules contained in the RF Arbitrazh Procedure Code ("APC"),[11] July 24, 2002 (as amended) (Ex. 11), Chapters 30 and 31 (articles 230-246).[12]

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[11] Russian Arbitrazh courts (Russian: "*арбитражный суд*") are state courts competent to review commercial disputes and bankruptcy cases and shall not be confused with arbitral tribunals referred to in Russian as "arbitral courts" ("*третейский суд*").

[12] Post-arbitration *de novo* judicial review in Russia falls within the jurisdiction of either state Arbitrazh (commercial) courts handling commercial disputes or state courts of general jurisdiction. Procedural rules pertaining to post-arbitration judicial review by the courts of general jurisdiction

(38) The Russian legal system follows the *Kompetenz-Kompetenz* principle in Article 16 of the RF ICA Statute which allows a tribunal to "rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement." RF ICA Statute (Ex. 10).

(39) Embodying the principle of "chronological priority" where the arbitrators are "not the only, but the first persons to rule on the jurisdiction of the arbitral tribunal over the dispute between the parties,"[13] the *Kompetenz-Kompetenz* principle does not deprive Russian courts of jurisdiction to review arbitral awards *after* an arbitral tribunal establishes its jurisdiction over a dispute and renders its award, either in set-aside or in enforcement proceedings.

(40) For post-arbitration *de novo* judicial review, the RF ICA Statute and the APC set forth certain grounds for setting aside and denial of enforcement of arbitral awards including, *inter alia*, whether "the [arbitration] agreement is not valid," and whether "the award was made regarding a dispute not contemplated by or not falling within the terms of the arbitration agreement, or it contains decisions on matters beyond the scope of the arbitration agreement." RF ICA Statute (Ex. 10), Arts. 34(2)(1), 36(1)(1). *See also* APC (Ex. 11), Arts. 232(5) (set-aside), 244(3) (denial of enforcement).

(41) The standard of post-arbitration judicial review by Russian courts is *de novo*, as it must follow the general procedure applicable at trials by the courts of the first instance (trial courts). *See* APC (Ex. 11), Arts. 232(1), (6) (set-aside) and 243(1), (4) (enforcement). The standard of judicial review under said general procedure requires "comprehensive, full, unbiased and direct examination of evidence." *Id*., Art. 71(1).

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are provided in the RF Civil Procedure Code dated November 14, 2002, No. 138-FZ, as amended ("CPC"), and are very similar to those of APC. This dispute falls clearly under the jurisdiction of the Russian Arbitrazh (commercial) courts, governed by the APC.

[13] S.A. Kurochkin, *Arbitration and international commercial arbitration* ch. 8, § 2 ("Statut" 2017), [Consultant Plus] (Ex. 12).

(42) The *de novo* standard of review applied by Russian courts in judicial review of arbitral awards can be illustrated by Russian case law. For example, in *Nevskaya Concession Company, LLC,* Russian courts denied enforcement of an arbitral award rendered by an international tribunal appointed by the ICC (Paris) under the UNCITRAL Rules, holding that "the arbitration clause ... is null and void as contradicting a [Russian Federal Statute]" which pursuant to "Article 36 of the [ICA Statute], constitutes a ground to deny issuance of a writ of execution for enforcement of the [award]." Decision of the Arbitrazh Court of the North-Western Circuit in case No. A56-9227/2015 (February 17, 2016) (Ex. 13), *aff'd* Resolution of the RF Supreme Court No. 307-ЭС16-3267 in case No. A56-9227/2015 (May 4, 2016) (Ex. 14).

(43) In *Thoroughbred Technologies (Pty) Ltd.,* Russian courts denied enforcement of a foreign award rendered by the Association of Arbitrators of Southern Africa[14] upon examination of evidence pursuant to APC Article 71 (*i.e.*, "comprehensive, full, unbiased and direct examination"), finding that there was no arbitration agreement between the parties. *See* Decision of the Arbitrazh Court of Moscow Circuit in case No. A40-76498/2020 (December 24, 2020) (Ex. 15), *aff'd* Resolution of the RF Supreme Court No. 305-ЭС21-1308 in case No A40-76498/2020 (April 23, 2021) (Ex. 16).

(44) ***Ukraine.*** The same understanding of *Kompetenz-Kompetenz* is reflected in the law of Ukraine which sets forth rules for post-arbitration *de novo* judicial review of international arbitral

[14] The RF ICA Statute applies equally to arbitral awards rendered in accordance with any rules of international arbitration, not exclusively UNCITRAL. In that case, the rules of the Association, as applicable at the time of the award, were closely based on the UNCITRAL Arbitration Rules and, in particular, contained the provisions based on the competence-competence doctrine allowing the tribunal to rule on its own jurisdiction: "The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement." Article 23.1 of the Association of Arbitrators (Southern Africa) NPC Rules for the Conduct of Arbitrations: 2018 Edition (January 1, 2018).

awards that takes place: i) in set-aside proceedings where Ukrainian courts have jurisdiction to set aside international awards by tribunals having their legal seat in Ukraine; and ii) in enforcement proceedings where Ukrainian courts have jurisdiction to deny recognition and enforcement in Ukraine of international awards by tribunals seated in foreign jurisdictions.

(45) The Ukrainian legal framework pertaining to international arbitration mainly consists of the 1958 New York Convention, to which Ukraine is a party since its ratification by the latter on October 10, 1960; the 1961 Geneva Convention, to which Ukraine is a party since its ratification by the latter on March 18, 1963; the Ukrainian Statute "On International Commercial Arbitration" ("Ukraine ICA Statute") (Ex. 17), adopted on February 24, 1994 (as amended), which is based on the 1985 UNCITRAL Model Law; and procedural rules in the Ukraine Civil Procedure Code ("UCPC") (Ex. 18), enacted on March 18, 2004 (as amended), Section VIII (articles 454-461) dealing with set-aside proceedings and Section IX (articles 474-482) dealing with enforcement of foreign arbitral awards.

(46) Ukrainian law follows the *Kompetenz-Kompetenz* principle allowing a tribunal to "rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement," (Ukraine ICA Statute, Article 16(1), Ex. 17) while at the same time allowing *de novo* judicial review of such ruling on tribunal's jurisdiction.

(47) For post-arbitration *de novo* judicial review, the Ukraine ICA Statute sets forth identical grounds both for setting aside and for denial of enforcement of arbitral awards including, *inter alia*, if "the [arbitration] agreement is not valid," or if "the award was made regarding a dispute not contemplated by or not falling within the terms of the arbitration agreement, or it contains decisions on matters beyond the scope of the arbitration agreement." Ukraine ICA Statute (Ex. 17), Arts. 34(2)(1) (set-aside), 36(1)(1) (denial of enforcement). Similarly, UCPC provides for

materially the same grounds for setting aside and denial of enforcement of arbitral awards including, *inter alia*, where "the [arbitration] agreement is null and void" and if "the award was made regarding a dispute not contemplated by or not falling within the terms of the arbitration agreement, or contains rulings on issues beyond the scope of the arbitration agreement". UCPC (Ex. 18), Arts. 459(2)(1) (set-aside), 478(1)(1) (denial of enforcement).

(48) The standard of judicial review by Ukrainian courts is *de novo.* The set-aside proceedings follow the general procedure applicable to courts of the first instance (trial courts), UCPC (Ex. 18), Art. 457(5), which requires "comprehensive, complete, objective and direct examination of the case evidence," *id*. Art. 89(1); the reviewing court "shall not be limited to the arguments of the application on the revocation of the arbitral award" and may independently establish grounds for revocation of the award. *Id.* Art. 457(4). In enforcement proceedings, "[a]t the petition of one of the parties, the court shall request for evidence" and consider such new evidence. *Id.* Art. 477(2).

(49) The *de novo* standard of review applied in set aside proceedings can be illustrated by the decision of the Shevchenkivskyi District Court of Kyiv in a case brought by a Canadian company LZ Group, Inc., seeking to set aside an award issued by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine (ICAC) in favor of a Swiss company Cargill International S.A. *See* Decision of Shevchenkivskyi District Court of Kyiv in case No. 2K-14/09 (May 12, 2009) (Ex. 19). The parties entered into a debt repayment agreement that contained an arbitration clause providing for arbitration of disputes under that agreement at the ICAC. In the set-aside proceeding, Cargill argued that the ICAC award was invalid under the Ukraine ICA Statute Article 34 because it was issued on matters not covered by the debt repayment agreement arbitration clause. The court conducted a *de novo* review and set aside the award, finding that the dispute concerned matters outside the scope of the debt repayment agreement arbitration clause,

and therefore the ICAC lacked jurisdiction.

(50) An example of the *de novo* standard of review applied in the context of enforcement of foreign awards is a recent decision of the Supreme Court of Ukraine on appeal from the Kyiv Appellate Court's denial of enforcement of an award issued by the International Center for Dispute Resolution (ICDR) seated in Placerville, California, in favor of a French company New Alternative Oak, LLC, against a Ukrainian company Galicia Distillery. *See* Decision of the Supreme Court of Ukraine in case No. 824/181/19 (May 21, 2020) (Ex. 20). In that case, the arbitration clause was contained in a contract. In the enforcement proceeding, New Alternative Oak argued that the question of whether the arbitration clause extended to the contract's addendum was in the exclusive jurisdiction of the arbitral tribunal. The Kyiv Appellate Court denied enforcement, and the Supreme Court of Ukraine affirmed, finding that the dispute related to matters outside the scope of the arbitration clause and the award was invalid.

(51) The rule that the *Kompetenz-Kompetenz* principle allows *de novo* judicial review of an arbitral tribunal's ruling on its own jurisdiction, either in set-aside or in enforcement proceedings, is confirmed by Ukrainian scholars and practitioners. For example, Mykola Selivon, Member of the Ukrainian National Academy of Legal Sciences and the President of the ICAC, explains that "Ukrainian legislation on international arbitration accepted the 'competence-competence' doctrine, the essence of which is the right of the tribunal to decide on its own the issue of its jurisdiction... This right of the tribunal is provided for in Art. 16 of the [Ukraine ICA Statute]. Meanwhile the tribunal's decision on the issue of jurisdiction is not final, it is subject to review by the state court within the proceedings to set-aside or recognize and enforce the arbitral award." M. Selivon, *Interaction between the judicial power and international commercial arbitration*, Yearly Journal by the National Academy of Legal Sciences of Ukraine 274, 278 (No. 4/2012) (Ex. 21).

(52) ***France.*** France is also a party to the 1961 Geneva Convention. *See* U.N.T.S. List of Parties to 1961 Geneva Convention (Ex. 6). While it has not adopted the UNCITRAL Model Law, France recognizes both the *Kompetenz-Kompetenz* principle and the authority of French courts to review Arbitrability *de novo* in the French Code of Civil Procedure ("FCCP") (Ex. 22), which provides *inter alia* that an award may be set aside where "arbitral tribunal wrongly upheld or denied jurisdiction," FCCP Article 1520(1), and a foreign award may be denied enforcement "on the grounds listed in Article 1520," FCCP Article 1525.

(53) The Paris Court of Appeal held forty years ago that under French law the judicial review of Arbitrability in post-arbitration proceedings is conducted *de novo. See The Arab Republic of Egypt v. Southern Pacific Properties Ltd.*, Paris CA, July 12, 1984, in 10 Y.B. COMM. ARB. 113 (Pieter Sanders ed., 1985) (Ex. 23). "[T]he arbitrators, whose jurisdiction is challenged, have the power to rule on the existence or validity of the arbitration agreement, [but] it is no less certain that their ruling is subject to review by the Judge competent to set aside the award ..., such remedy being available 'if there is no valid arbitration agreement or the arbitrator ruled on the basis of a void or expired agreement.'" *Id.* ¶10.[15] The same principles apply in French law today.

(54) In its decision on the RF's application for annulment of the award in this case, the Paris Court of Appeal stated: "According to Article 1520(1) of the Code of Civil Procedure, an action for annulment is possible if the tribunal has wrongly declared itself as having or not having jurisdiction. It is up to the annulment court to review the arbitration tribunal's decision on its

[15] This ruling was upheld by the Court of Cassation (France's highest court). *See Southern Pacific Properties, Ltd. v. The Arab Republic of Egypt*, Court of Cassation, January 6, 1987, 26 I.L.M. 1004, 1006 ("[T]here is no restriction upon the power of the court to examine, as a matter of law and in consideration of the circumstances of the case, elements pertinent to the grounds in question; and that in particular, it is for the court to construe the contract in order to determine itself whether the arbitrator ruled in the absence of an arbitration clause ...") (Ex. 24).

jurisdiction, whether it has declared itself as having jurisdiction or not, by looking at all the legal and factual elements that make it possible to assess the scope of the arbitration agreement." *Russian Federation v. JSC Oschadbank*, RG No. 19/04161, Paris CA, Section 5, Div. 16, 30 March 2021, ECF 1-4.[16] As further explained in the Declaration of Andrea Pinna filed with this Court, describing the proceedings in France, based on the quoted language, the Paris Court of Appeal reviewed the jurisdiction of the arbitral tribunal *de novo*. Pinna Declaration, ECF 35, ¶7.

(55) Oschadbank itself has admitted that the review of the award by French courts in this case, including the issues of Arbitrability, is conducted *de novo*. *See* Petitioner's Opposition to Respondent's Motion to Stay, ECF 44, at 13; *see also* Claimant's Rejoinder to the Respondent's Revision Application (November 25, 2019) (Ex. 25), ¶11 ("the Paris Court of Appeal will review *de novo* the issue of the Tribunal's jurisdiction").

(56) French legal scholars and practitioners confirm that the *Kompetenz-Kompetenz* principle allows *de novo* judicial review of an arbitral tribunal's ruling on its own jurisdiction. French legal scholar and arbitration specialist, Emmanuel Gaillard, confirms that "the notion of competence-competence, one of the founding principles of international arbitration law ... empowers an arbitral tribunal to rule on its own jurisdiction," while "domestic courts [do not] relinquish their power to review the existence and validity of an arbitration agreement ... and recover their power of full scrutiny at the end of the arbitral process."[17]

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[16] *See also Republique Bolivarienne du Venezuela v. Monsieur Serafin Garcia Armas, Madame Karina Garcia Gruber*, RG No. 19/03588, Paris CA, Div. 5, Chamber 16, 3 June 2020, ¶45 ("[T]he annulment judge reviews the arbitral tribunal's decision on its jurisdiction, whether it has declared itself competent or incompetent, by looking at all the legal and factual elements that enable the scope of the arbitration agreement to be assessed. This is no different when, as in the present case, the arbitrators are seized on the basis of the provisions of a bilateral investment treaty."). (Ex. 26)

[17] Emmanuel Gaillard & Yas Banifatemi, *Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND

(57) ***Accordingly***, the "special meaning" of *Kompetenz-Kompetenz*, as consistently reflected in the law of the Parties' home jurisdictions (Ukraine and the Russian Federation), as well as that of the seat of arbitration (France), confirms that the Parties did not understand the UNCITRAL Rules as excluding post-arbitration *de novo* judicial review of Arbitrability.

D. VCLT Article 31(3)(b): The Understanding of *Kompetenz-Kompetenz* Principle Reflected in the Parties' "Subsequent Practice"

(58) Finally, the above conclusions are confirmed by the application of VCLT Article 31(3)(b) concerning the parties' "subsequent practice", which courts and tribunals also routinely rely upon when interpreting treaties.[18] Here, the "subsequent practice" regarding "competence-competence" is reflected in the choices of seats of arbitration by the BIT signatory States — Ukraine and the Russian Federation — in other arbitrations since 1998.

(59) In this case, the Parties initially considered the Netherlands but later agreed to France as a seat of arbitration, both of which recognize and apply *Kompetenz-Kompetenz*. In other investment arbitrations, both Ukraine and the Russian Federation have consistently consented to arbitrate in other countries that also recognize that *Kompetenz-Kompetenz* allows tribunals to initially decide Arbitrability, while domestic courts retain full power to review the issues of Arbitrability *de novo* in subsequent set-aside and recognition proceedings, including, *e.g.*: Canada, the Netherlands, Switzerland, and the United Kingdom.[19]

INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 257, 258, 259, 261 (E. Gaillard & D. Di Pietro eds., 2008) (Ex. 27).

[18] *See, e.g.*, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5 (June 3, 2021) (Ex. 28) ¶337 ("Article 31(3) of the VCLT further provides that the interpreter must take into account . . . 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation . . .'").

[19] **Canada:** *Luxtona Ltd. v. The Russian Federation*, PCA Case No. 2014-09; **Netherlands:** *Hulley Enterprises Ltd. v. Russian Federation*, PCA Case No. 2005-03/AA226; *NJSC Naftogaz of Ukraine, et al. v. The Russian Federation*, PCA Case No. 2017-16; *Veteran Petroleum Limited v.*

(60) ***Canada***. In 1986, Canada became the first country in the world to adopt the UNCITRAL Model Law, which has been implemented across the country at the provincial level. For instance, in the Ontario Province, it is enacted as Schedule 2 to the International Commercial Arbitration Act, 2017, S.O. 2017, c. 2, Sch. 5. In a recent decision, the Ontario Court of Appeal examined the principle of *Kompetenz-Kompetenz* as codified in Article 16(1) of the Model Law and confirmed that, under this principle, the standard of judicial review of arbitral tribunals' decisions on their own jurisdiction is *de novo*. *See The Russian Federation v. Luxtona Limited*, 2023 ONCA 393 (June 2, 2023) (Ex. 29).

(61) The specific issues considered by the Ontario Court of Appeal in *Luxtona* were whether new evidence may be introduced as of right in the context of judicial set-aside proceedings and whether there was an international consensus on this matter. *Id*. ¶27. The court concluded that the answer was "yes" to both questions.

(62) The Court first observed that the "competence-competence" principle, codified in Article 16(1) of the Model Law, provides that "an arbitral tribunal may rule on its own jurisdiction" and is a principle "fundamental to international commercial arbitration." *Id*. ¶30. At the same time, "[t]hat is as far as the competence-competence principle goes. It does not require any special deference be paid to an arbitral tribunal's determination of its own jurisdiction." *Id*. ¶34. The Court concluded "[t]he weight of international authority shows that the competence-competence principle does not limit the fact-finding power of a court assessing an arbitral tribunal's jurisdiction." *Id*. ¶35.

The Russian Federation, PCA Case No. 2005-05/AA228; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. 2005-04/AA227; **Switzerland**: *PJSC Gazprom v. Ukraine*, PCA Case No. 2019-10; *Yukos Capital SARL v. The Russian Federation*, PCA Case No. 2013-31; **United Kingdom**: *Igor Boyko v. Ukraine*, PCA Case No. 2017-23; *JKX Oil & Gas plc, Poltava Gas B.V. and Poltava Petroleum Company v. Ukraine (II)*, PCA Case No. 2015-11; *Olympic Entertainment Group AS v. Ukraine*, PCA Case No. 2019-18.

(63) Furthermore, the Court concluded that there is an international consensus on this issue. The Court identified *Dallah Real Estate and Tourism Holding Co. v. Pakistan*, [2010] UKSC 46, a unanimous decision of the U.K. Supreme Court, as "the leading case in this area." *Id*. ¶¶36, 44. The Court quoted *Dallah* that an arbitral "tribunal's own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to the government at all," and the "starting point ... must be an independent investigation by the court" of the questions of Arbitrability. *Id*. ¶¶45, 47. The Court also identified multiple cases from other jurisdictions where courts "explicitly endorsed Dallah and followed its reasoning." *Id*. ¶48.

(64) The Court concluded that the court of the first instance, the Divisional Court, did not err in "determining that there was a 'strong international consensus' in favour of a *de novo* hearing," *id*. ¶49, and "correctly interpreted Article 16(3) [of the Model Law] as providing for a proceeding *de novo*," *id*. ¶52, "unfettered by any principle limiting its fact-finding ability," *id*. ¶38 (quoting a Singapore case, *AQZ v. ARA*, [2015] SGHC 49, ¶57). The Court upheld the ruling of the Divisional Court that "jurisdictional set-aside applications are hearings *de novo* and, therefore, the parties can, as of right, introduce evidence that was not before the tribunal." *Id*. ¶¶8, 53.

(65) ***Netherlands***. The relevant provisions of the Dutch Code of Civil Procedure ("DCCP") (Ex. 30) reflect the same compatibility between the principle of *Kompetenz-Kompetenz* and post-arbitration *de novo* judicial review of Arbitrability. As Professor Sanders, the principal author of the Dutch arbitration statute and also a key advisor to UNCITRAL during the drafting of the 1985 UNCITRAL Model Law, explained, "the final word on the competence of arbitrators still remains with the Court."[20]

[20] Pieter Sanders, *Commentary on UNCITRAL Arbitration Rules*, in 2 Y.B. COMM. ARB. 172, 197 (Pieter Sanders ed., 1977) (Ex. 31).

(66) Specifically, DCCP Article 1052(1) provides that an arbitral tribunal has jurisdiction "to rule on its own jurisdiction." DCCP Article 1065(1) authorizes annulment based on essentially the same grounds that are reflected in Article 34 of the 1985 UNCITRAL Model Law, whereas DCCP Article 1076(1) authorizes refusal of recognition based upon the same grounds that are set forth in Article 36 of the 1985 UNCITRAL Model Law.

(67) The Dutch legislative history further confirms that, notwithstanding the "jurisdiction of arbitrators to decide on their jurisdiction … known as compétence-compétence (*Kompetenz-Kompetenz*) …, the decision of the arbitrators is not final. The last word on the jurisdiction of the arbitrators belongs to the court (see the first ground for the action to set aside the arbitration award in Article 1065)." Dutch Parliamentary Papers 1983/84, 18464: Re-enactment of arbitration rules in the Code of Civil Procedure, Number 3: Explanatory Memorandum, at 21 (Ex. 32).

(68) The Dutch Supreme Court has also confirmed this relationship: "The arbitral tribunal appointed for this purpose is authorized to rule on its jurisdiction (Article 1052(1) DCCP), but the fundamental nature of the right of access to the courts [means] … the question of whether a valid arbitration agreement has been concluded ultimately is referred to the courts …. This fundamental nature also [means] that an application for setting aside an arbitral award based on the ground specified in Article 1065(1)(a) DCCP, will not be assessed by the courts with restraint." *The Rep. of Ecuador v. Chevron Corp*., Case No. 13/04679 EV/LZ (Supreme Court of the Netherlands) (Sept. 26, 2014), ¶4.2 (Ex. 33).

(69) ***Switzerland***. Switzerland provides for *Kompetenz-Kompetenz* and allows *de novo* judicial review of Arbitrability. As explained in the legal expert report of Dr. Homayoon Arfazadeh,[21]

[21] Second Legal Expert Report of Dr. Homayoon Arfazadeh pursuant to Fed. R. Civ. P. 44.1, December 11, 2023, in support of the Russian Federation's motion to set aside default in *Yukos*

Swiss law provides that Swiss Courts exercise a *de novo* review of all issues of law when deciding on an objection as to the existence and validity of an arbitration agreement and/or the jurisdiction of the arbitral tribunal in any action to annul or to enforce an arbitral award, including in investment arbitration. *Id*. ¶¶5, 41. They may also exercise a *de novo* review of issues of fact when deciding on the same jurisdictional objection in an action to enforce. *Id*. "In both cases, the application of UNCITRAL Rules and the exercise of 'competence-competence' powers granted to the arbitral tribunal does not affect the scope of review exercised by Swiss annulment or enforcement courts when deciding on an objection as to the existence of an agreement to arbitrate and/or the jurisdiction of the arbitral tribunal and its scope." *Id.* ¶41.

(70) ***United Kingdom***. As reflected in both statutory law and judicial practice, the relevant English law comports with the 1961 Geneva Convention.

(71) Specifically, Section 30 of the 1996 UK Arbitration Act provides that "the arbitral tribunal may rule on its own substantive jurisdiction," including as to "whether there is a valid arbitration agreement" and "what matters have been submitted to arbitration in accordance with the arbitration agreement." 1996 UK Arbitration Act (Chapter 23) § 30(1) (Ex. 34). In the same statute, Section 67 authorizes English courts to "set aside" arbitral awards based on a lack of Arbitrability, such as where one of the parties submits a petition "challenging any award of the arbitral tribunal as to its substantive jurisdiction." *Id*. §§ 67(1)(a) & (3)(c). Similarly, Section 103 authorizes refusal of recognition based upon the same grounds as in Article V of the 1958 New York Convention, which include lack of Arbitrability (*e.g.*, under Article V(1)(a) and Article V(1)(c)). *Id*. §§ 103(2)(b), (2)(d) & (3).

Capital Ltd. v. The Russian Federation, D.D.C. Case No. 1:22-cv-00798-CJN (Ex. 37 attached hereto without the exhibits).

(72) Interpreting these provisions, the U.K. Supreme Court confirmed the relationship between *Kompetenz-Kompetenz* and post-arbitration *de novo* judicial review of Arbitrability: "'[I]t appears that every country adhering to the competence-competence principle allows some form of judicial review of the arbitrator's jurisdictional decision . . . An arbitral tribunal's decision as to the existence of its own jurisdiction cannot therefore bind a party who has not submitted the question of arbitrability to the tribunal.' . . . [T]here is no doubt that, whether or not a party's challenge to the jurisdiction has been raised, argued and decided before the arbitrator, a party who has not submitted to the arbitrator's jurisdiction is entitled to a full judicial determination on evidence of an issue of jurisdiction . . . " *Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Affairs*, *Government of Pakistan*, [2010] UKSC 46, at 13-14 (Ex. 35).

V. CONCLUSION

(73) As set forth in my Summary of Opinion and the above Discussion, I conclude as follows:

When the Parties' adoption of the UNCITRAL Rules is analyzed in accordance with the VCLT and 1961 Geneva Convention, including "special meaning" and "subsequent practice", there is no "clear and unmistakable evidence" that the parties sought to delegate "exclusive authority" to arbitrators and diverge from the ordinary understanding of *Kompetenz-Kompetenz* which permits post-arbitration *de novo* judicial review of Arbitrability. To the contrary, the evidence indicates that the Parties intended to preserve "recourse" to post-arbitration *de novo* review of Arbitrability in annulment proceedings at the seat of arbitration and in other jurisdictions under the New York Convention.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on August 07, 2024
Moscow, Russia

Alexei Stanislavovich Avtonomov