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Vladimir Nikolaevich Kostsov

Non-monetary relief in international arbitration

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Academic Supervisor:
Mikhail Lvovich Galperin
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Associate Professor

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5.1.3. Private Law (Civilistic) Sciences

I. GENERAL OVERVIEW OF THE DISSERTATION

Relevance of the research topic. International arbitration has traditionally been one of the most popular forms of cross-border dispute resolution, and its popularity is steadily rising globally. A survey by the School of International Arbitration of the Queen Mary University of London, in partnership with White & Case, shows that international arbitration was the preferred mode of resolving cross-border disputes in 2021 according to 90% of respondents,[1] whereas in 2006 only 73% of corporations gave the same answer.[2] Its field of application has expanded considerably in recent years, and arbitration is more frequently used not only for the resolution of disputes arising out of international sale contracts, as before, but also in complex construction, infrastructure, investment, and other cases.[3] With this in mind, the practical demand for a wider range of legal remedies (apart from a mere award of money as contractual damages) is inevitably on the increase as well.

Non-pecuniary (non-monetary) remedies, including actions to protect rights to property *in rem*, claims for specific performance and contract adaptation occupy a special place among such legal remedies. Non-monetary remedies are becoming increasingly important given the increasing number of situations where a purely monetary compensation does not satisfy the party whose rights have been violated.[4] These remedies in the context of international arbitration are actively debated in

[1] Queen Mary University of London, 2021 International Arbitration Survey: Adapting arbitration to a changing world. P. 2.

[2] Queen Mary University of London, International arbitration: Corporate attitudes and practices 2006. P. 2.

[3] For example, according to statistics from the Hong Kong International Arbitration Centre (HKIAC), in 2022, cases involving the sale of goods were the third most common (14%) after corporate disputes (17.7%) and financial disputes (36.9%). Construction disputes (9.9%) and real estate disputes (1.5%) also had a significant share. See HKIAC, 2022 Statistics, URL: https://www.hkiac.org/about-us/statistics (Date accessed: 17.05.2023).

[4] The increasing number of disputes involving a non-monetary remedy was also discussed at the 2021 Paris Arbitration Week, which included a session dedicated to non-monetary relief in the context of mergers and acquisitions. One type of relief relevant to these disputes is specific performance of the promise to sell or buy shares in a corporate entity. Because this type is performance is unique in nature, damages are usually an inadequate remedy. Knoll-Tudor I. Paris Arbitration Week: Non-Monetary Relief in International Arbitration of M&A Disputes // Kluwer Arbitration Blog. November 2021.

international scholarly writings.[5] Textbooks on international arbitration include chapters dedicated to these remedies, noting the lack of uniform approaches to their understanding in various jurisdictions.[6]

For example, for decades, international scholarly writings have discussed the practical issues associated with the recognition and enforcement of arbitral awards ordering specific performance (for example, the construction of a building according to the design documentation) by national legal orders.[7] These issues call into question the suitability of the existing system of transnational enforcement to address the challenges that extensive use of non-monetary remedies in international arbitration may entail. This is especially so given that arbitration has no enforcement system of its own but relies on domestic enforcement systems and, as a consequence, on the law of the place of enforcement.

Apart from specific performance, legal remedies designed to protect property rights, including actions *in rem*, are important for both theoretical and practical purposes. These claims potentially affect the interests of third parties, which raises the question of their congruence with the procedural form of arbitration.

The problem of adapting legal relations (including contractual ones) through arbitration also remains relevant. There is a well-known expression: *arbiter non*

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[5] See, e.g., *Al Faruque A.*, Possible Role of Arbitration in the Adaptation of Petroleum Contracts by Third Parties // Asia International Arbitration Journal; Kluwer Law International 45. Vol. 2, Issue 2. 2006; *Berger K.,* Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators // Vanderbilt Journal of Transnational Law, Vol. 36. 2003; *Berger K.*, Power of Arbitrators to Fill Gaps and Revise Contracts to Make Sense // *Arbitration International*, Vol. 17, No. 1. 2001; *Bernardini P.*, Communications: Adaptation of contracts // New trends in the Development of International Commercial Arbitration and the Role of Arbitral and Other Institutions / *Sanders P.* (ed), ICCA Congress Series, Vol. 1. 1983; *Bernardini, P.* Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause // Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention / Albert Jan van den Berg (ed.), ICCA Congress Series, Vol. 9. 1999; *Ferrario P.,* Adaptation of Long-Term Gas Sale Agreements by Arbitrators, International Arbitration Law Library, Vol. 41. 2017.

[6] *Born G.*, International Commercial Arbitration, 2nd edition. Kluwer Law International, 2014. pp. 3012 – 3112; Chapter 9. *Nigel B.*, *Partasides C.*, et al., Redfern and Hunter on International Arbitration, 6th edition. Oxford University Press, 2015. pp. 501 – 568.

[7] *Elder T.* Case Against Arbitral Awards of Specific Performance in Transnational Commercial Disputes // 13 Arbitration International, 1997.

substituit – that is, arbitrators do not change contracts[8]. However, continuing legal relations (including those relevant for complex international business) may require adaptation to new circumstances, and the parties to such contracts often agree on special adaptation clauses indicating that their contracts may be revised by arbitrators should certain events take place. This practice raises both the general question of whether arbitrators have the power to adapt contracts and the more specific question of the potential limits to the use of this remedy in international arbitration.

Another non-monetary legal remedy that meets the practical needs of commercial parties is declaratory relief. The insufficient doctrinal discussion of this issue may cast doubt on the ability of commercial parties to use arbitration as a practical tool of establishing certainty in certain aspects of their legal relations without the need to request any specific order from the tribunal. The specific prerequisites for an action for declaratory relief in international arbitration require further discussion, including the questions whether the claimant needs to show a concrete legitimate interest in obtaining a declaratory award, as usually required in domestic litigation, and what particular circumstances can be the basis for a declaratory action.

In Russia, disputes involving non-monetary remedies in arbitration are no longer rare[9]. As a result, legal practice requires systematic and theoretically justified approaches to resolving such disputes by Russian courts and arbitral tribunals, taking into account global experience. The existence of a theoretical framework on this

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[8] *Beisteiner L.,* Chapter I: The Arbitration Agreement and Arbitrability, The (Perceived) Power of the Arbitrator to Revise a Contract – The Austrian Perspective // Austrian Yearbook on International Arbitration / Klausegger C., Klein P. et al. (eds), 2014.

[9] See, for example, Awards of the ICAC at the CCI of Russia dated 09 March 2004 in case No. 91/2003, dated 10 December 2001 in case No. 18/2001 (provided by ConsultantPlus database).

issue may also facilitate a relationship of trust between arbitration and Russian state courts, which was one of the goals of the recent arbitration reform[10].

Thus, the problem of non-monetary remedies in international arbitration is relevant both for domestic and international scholarship as a category lying at the interface of substantive and procedural law.

The level of development of the research topic and the theoretical basis of this thesis. In Russia, legal remedies are traditionally researched as a creature of private law only.[11] As a result, domestic legal literature often overlooks the problems of legal characterization of legal remedies as an issue of substance or procedure, their transboundary application, as well as the relationship between the substantive content of particular legal remedies and the procedural form of their implementation[12].

Gaps in the doctrinal approaches to legal remedies in Russia are even more evident when it comes to commercial arbitration. For instance, Russian scholarship often discusses the availability of specific relief in commercial arbitration based on abstract arguments about whether a remedy has "purely civil law" nature or also affects "public interests",[13] whether arbitral tribunals deliver "justice," or whether a given legal remedy seeks to protect an "absolute" (*erga omnes*) or a personal (*inter partes*) right[14]. However, conclusions about the availability of legal remedies in arbitration and their legal regime cannot be predictably made based on these abstractions but require a comprehensive analysis of their congruence with specific

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[10] *Galperin M.L., Pavlova N.V.* What's ahead for arbitration // Zakon. 2019 No. 8. P. 125 – 139; *see also Komarov A.S.* International arbitration as a factor for Russia's integration into economic globalization // S.N. Lebedev: In Memoriam (eds. V.A. Kabatov, S.N. Lebedev). Moscow, 2017.
[11] See, e.g., *Gribanov V.P..*, Osushestvlenie i zashchita grazhdanskih prav. Moscow, 2001; *Rozhkova M.A.* Sredstva I sposoby pravovoy zashchity storon kommercheskogo spora. Moscow, 2006 (provided by ConsultantPlus database); *Korableva M.S.*, Grazhdansko-pravovye sposoby zashchity prav predprinimateley. M., 2002; *Andryushin A.G.*, Intellektualnaya sobstvennost i grazhdansko-pravovye sposoby ee zashchity. Volgograd, 2006.
[12] *Galperin M.L.* Budushchee ispolnitelnogo proizvodstva: problem vzaimodeystviya materialnogo I protsessualnogo prava // Zakon. 2012. No. 4.
[13] *Rozhkova M.A.* Op. cit.
[14] *Galas E.M.* Zashchita prav subyektov grazhdanskikh pravootnosheniy, osushchestvlyayemaya treteyskim sudom // Sovremennoe parvo. 2018. No. 7-8.

procedural characteristics of arbitration as a form of dispute resolution, taking into account the extensive international experience, considerations of national and international policy, as well as the doctrine of procedural law.

Russian PhD theses in the field of arbitration also focus on the more general issues such as the arbitration agreement,[15] legal framework applicable to arbitration as a whole,[16] theoretical underpinnings of arbitral decision-making,[17] trends in international arbitration[18] or general problems of arbitration in Russia.[19] A number of more concrete questions discussed in this thesis were the subject of the PhD thesis of A.N. Zhiltsov on overriding mandatory rules in international arbitration[20]. Apart from that, broad questions of arbitrability of disputes and the interpretation of the 1958 New York Convention, which are relevant to this research, were the focus of the PhD theses of A.I. Minina[21], B.R. Karabelnikov[22] and V.V. Eremin[23]. Select aspects of legal relief in international investment arbitration (including non-monetary relief) were also discussed in the thesis of K.E. Ksenofontov dedicated to

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[15] See, e.g., *Kazachenok S.Yu.* Soglashenie ob arbitrazhe v mezhdunarodnom chastnom prave Rossii: dis. ... kand. yur. Nauk. Volgograd, 2004; *Mata O.V.* Arbitrazhnoe soglashenie i razreshenie sporov v mezhdunarodnykh kommercheskikh arbitrazhnykh sudakh: dis. … kand. yur. nauk. M., 2002; *Kotelnikov A.G.* Pravovaya priroda arbitrazhnogo soglasheniya i posledstviya ego zaklycheniya: dis. kand. yur. nauk. Yekaterinburg, 2008; *Nikolyukin S.V.* Arbitrazhnye soglashenia i kompetentsiya mezhdunarodnogo kommercheskogo arbitrazha: nekotorye problemy teorii i praktiki: dis. … kand. yur. Nauk. M., 2007.
[16] *Narinyan V.V.* Mezhdunarodnyj kommercheskij arbitrazh: sovremennye tendentsii pravovogo regulirovaniya: dis. … kand. yur. nauk. M., 2004
[17] *Nikiforov V.A.* Mezhdunarodnyj kommercheskij arbitrazh v sisteme tretejskikh sudov: Istoriya i sovremennoe sostoyanie: dis. … kand. yur. nauk. M., 2002.
[18] *Polyakov YU.V.* Osnovnye tendentsii razvitiya mezhdunarodnogo kommercheskogo arbitrazha i opredeleniya primenimogo im prava: dis. … kand. yur. nauk. M., 2010
[19] *Skvortsov O.YU.* Problemy tretejskogo razbiratel'stva predprinimatel'skikh sporov v Rossii: dis. d-ra yur. nauk. Sankt-Peterburg, 2006.
[20] *ZHil'tsov A.N.* Primenimoe pravo v mezhdunarodnom kommercheskom arbitrazhe: imperativ. normy. dis. … kand. yur. nauk. M., 1998.
[21] *Minina A.I.* Ponyatie i vidy arbitrabil'nosti v teorii i praktike mezhdunarodnogo kommercheskogo arbitrazha: dis. … kand. yur. nauk. M., 2013.
[22] *Karabel'nikov B.R.* N'yu-Jorkskaya Konventsiya 1958 goda o priznanii i privedenii v ispolnenie inostrannykh arbitrazhnykh reshenij: Problemy teorii i praktiki primeneniya. M., 2001.
[23] *Eremin V.V.* Arbitrabel'nost' sporov s uchastiem publichnykh sub"ektov Dis. ... kand. yurid. nauk. SPb., 2021.

expropriation of an investor's property in international investment law[24]. However, there have been no dedicated studies in Russia on the issue of legal relief in international arbitration in light of the specific challenges associated with non-monetary remedies.

The topic of this thesis is also insufficiently developed in international scholarship. For instance, J. Waincymer notes as follows: "given that arbitration is essentially about seeking practical and timely solutions to complex international commercial problems, it is perhaps surprising that so little has been written about the nature of relief."[25] A recent research project under the auspices of the Swiss Arbitration Association also concluded that non-monetary remedies in arbitration have drawn little attention in scholarly literature[26].

The goal of this thesis is to develop a complex transnational theoretical framework on the availability and procedural specifics of non-monetary relief in international arbitration, which would be suitable to both Russian and other domestic legal systems, as well as compatible with international law.[27] The thesis covers both general doctrinal issues (applicable to legal relief as such) and specific matters relevant for particular debatable non-monetary remedies (such as actions *in rem*, specific performance and contract adaptation).

The specific objectives of this thesis are based on the above goal:

- development of a transnational approach to the notion of non-monetary remedies suitable for international arbitration, taking into account its differences from domestic arbitration and state court litigation;
- evaluation of particular procedural issues caused by the use of non-monetary remedies in international arbitration;

[24] *Ksenofontov K.E.* Ekspropriatsiya sobstvennosti inostrannogo investora v mezhdunarodnom investitsionnom prave: dis. … kand. yur. nauk. M., 2015.
[25] *Waincymer J.*, Procedure and Evidence in International Arbitration, Kluwer Law International, 2012. p. 1098.
[26] Performance as a remedy: non-monetary relief in international arbitration: ASA special series no. 30 / *Schneider M., Knoll J.* (eds), New York, 2011. p. vii.
[27] Sports arbitration is deliberately left outside the scope of this thesis due to the particular features of that type of arbitration.

- assessment of possible limits to the availability of non-monetary remedies in international arbitration in light of the procedural features of international arbitration;
- evaluation of the legal regime for the transboundary enforcement of non-monetary arbitral awards and development of solutions for potential conflicts between domestic enforcement systems and foreign arbitral awards ordering a non-monetary remedy;
- analysis of potential peculiarities of the application of non-monetary remedies in arbitration proceedings seated in the Russian Federation.

The object of this thesis is the legal relations associated with claims for non-monetary relief in the procedural form of international arbitration.

The specific subject matter of this research is the concept of legal relief in international arbitration at all stages of legal protection, including the arbitral proceedings themselves, the rendering of an arbitral award and cross-border enforcement of arbitral awards.

The research methods include both general methods and methods peculiar to legal scholarship. Among general scholarly methods, the author employed the method of analysis, in particular when studying arbitration and litigation cases. Apart from that, the thesis relies on the methods of synthesis when proposing a transnational approach to the legal characterization of legal relief. The research also uses logical methods. In particular, induction is used to single out non-monetary remedies as a distinct analytical category. Deduction is used to draw conclusions relevant to particular matters pertaining to non-monetary relief from broader legal concepts such as arbitrability.

Functional reasoning is used in this thesis to highlight deficiencies in the predominant approach to the legal nature of legal relief in domestic legal systems and when developing potential solutions to problems related to transboundary enforcement of non-monetary arbitral awards. The systemic method was used to develop a comprehensive legal framework for non-monetary relief that encompasses various procedural stages of dispute resolution via international arbitration.

Reasoning by analogy was used to determine whether it is feasible for international arbitration to adopt certain domestic solutions used in state court litigation when it comes to non-monetary remedies.

As for methods peculiar to legal scholarship, an important feature of this thesis is the broad use of comparative legal methodology. The thesis analyzes international treaties and model laws (as interpreted by various legal systems), international scholarly literature, as well as examples from case law and legislation from leading jurisdictions in the field of international dispute resolution. Within the broader ambit of comparative law, the paper employs both the traditional functional method (for instance, when arguing that the requirements of "real interest' and the existence of a "dispute" to bring declaratory actions are functionally equivalent), and the cultural method (for instance, when discussing the cultural origins of the divergent approaches to the procedural or substantive nature of legal relief in civil and in common law jurisdictions).

Another feature of this thesis is its use of critical methodology to evaluate approaches suggested by scholars, legislators and case law and suggest solutions to problems revealed in the thesis. The thesis also relies on the methodology of legal history (when reviewing the conceptual origins of legal relief) and the methodology of legal formalism (when discussing particular doctrinal concepts).

Theoretical basis of this study consists of works of Russian legal scholars in the field of civil procedure, international arbitration, civil law and private international law, including V.O. Abolonin, S.N. Abramov, A.V. Asoskov, M.G. Avdyukov, M.L. Bashkatov, M.I. Braginsky, S.N. Bratus, I.S. Chuprunov, A.A. Dobrovolskiy, D.V. Dozhdev, A.V. Egorov, V.V. Eremin, M.A. Filatova, M.L. Galperin, I.V. Getman-Pavlova, A.V. Grebelskiy, V.P. Gribanov, A.A. Gromov, M.A. Gurvich, O.S. Ioffe, B.R. Karabelnikov, A.G. Karapetov, A.S. Kasatkina, S.N. Khorunzhiy, A.F. Kleiman, A.S. Komarov, A.A. Kostin, E.A. Krasheninnikov, V.A. Krasnokutskiy, K.E. Ksenofontov, A.Y Kurbarov, S.A. Kurochkin, S.N. Lebedev, N.A. Milovidov, A.I. Minina, L.A. Novoselova, E.A. Ostanina, V.V. Polyakov, M.A. Rozhkova, V.A. Ryazanovskiy, M.Z. Shvarts, A.M. Shirvindt,

O.Y. Skvortsov, S.V. Tretyakov, M.K. Treushnikov, S.V. Usoskin, E.V. Vaskovsky, N.G. Vilkova, V.V. Vitryanskiy, T.M. Yablochkov, V.V. Yarkov, A.N. Zhiltsov, R.O. Zykov.

The theoretical basis of this study also includes the works of foreign scholars in the field of international arbitration, international law, foreign civil law and civil procedure, as well as in comparative law, such as P. Ashford, L. Beisteiner, K. Berger, G. Bermann, G. Bernini, G. Born, S. Brekoulakis, A. Briggs, A. Brinz, C. Brunner, O. Bulov, J. Castel, D. Cavers, S. Chappius, H. Collins, W. Cook, G. Degenkolb, T. Elder, P. Ferrario, J. Fawcett, R. Garnett, E. Gaillard, U. Grusic, R. Gordley, B. Hessel, U. Huber, N. Jansen, J. Jenkins, S. Kröll, J. Knoll, A. Kukorek, P. Lalive, J. Lew, S. Limegruber, H.L. McClintock, E. McKendrick, M. McParland, R. Michaels, L. Mistelis, D. Munoz, K. Oliferenko, G. Panagopoulos, J. Paulsson, M. Petsche, M. Pika, R. Plender, F. Savigny, J. Schapp, P. Schlechtriem, P. Schlosser, M. Schneider, K. Schroer, I. Schwenzer, H. Schumacher, S. Shavell, A. Thurman, S. Vogenauer, J. Waincymer, A. Wach, B. Windscheid, R. Zimmerman.

The legal and empirical basis of this research includes the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 1958 New York Convention), the 1958 UNCITRAL Model Law on International Commercial Arbitration with amendments dated 2006 (the UNCITRAL Model Law), arbitration rules of various arbitral institutions, Russian and foreign laws on civil procedure, international arbitration and enforcement proceedings, international soft law instruments, as well as materials of Russian and foreign case law and decisions of international courts.

The novelty of this thesis follows from the fact that this is the first study in Russian legal scholarship that has developed and formulated a comprehensive interdisciplinary theory of non-monetary legal relief in international arbitration that takes into account international experience and case law, and identified specific features of non-monetary legal relief in international arbitration covering all aspects of this concept at all stages of legal proceedings, starting from commencement of an

arbitration to the enforcement of a non-monetary arbitral award. This thesis presents a systematic analysis of legal problems arising in the process of resolution of disputes concerning non-monetary relief and enforcement of non-monetary arbitral awards and formulates reasoned propositions for their resolution and for further development of legal scholarship in this field.

Results of the study presented for public defense:

1. The notion of non-monetary relief includes all remedies that are not concerned with the transfer of money as a means of payment. Non-monetary remedies are subdivided into remedies that require enforcement, such as claims for specific performance and claims to protect an *erga omnes* right (including property rights), and remedies that do not require enforcement, such as declaratory relief and contract adaptation.

International arbitration should use a transnational approach to the nature of legal relief, given that parties from different legal backgrounds may participate in an international arbitration proceeding.

2. Non-monetary remedies are by default available in international arbitration in the same way as they are available in state court litigation. Arguments that are currently used to restrict arbitrators' powers, including the proposition that arbitrators are not part of the state system of justice or the fact that arbitration has limited powers over third parties, does not by itself affect the range of legal remedies available to parties in international arbitration, while risks related to the public interest in the outcome of disputes may be mitigated by procedural means.

In exceptional cases, where the degree of third-party involvement in a dispute is excessive, non-monetary remedies may be unavailable in arbitration based on rules limiting the arbitrability of certain categories of disputes.

3. Specific questions relating to the application of a given non-monetary remedy in international arbitration should be resolved based on a cumulative application of procedural law (to determine whether the arbitrators are in principle empowered to award relief of the kind requested) and substantive law (to determine the grounds to award relief on the facts of the specific case). A legal remedy is

available in an arbitration if this is simultaneously consistent with the applicable substantive law (*lex causae*), law of the seat of arbitration (*lex arbitri*) and the arbitration agreement (in light of the law governing the arbitration agreement).

Domestic legal rules that restrict availability of non-monetary remedies on the ground that their practical enforcement is overly burdensome should be taken into account by arbitrators when rendering non-monetary awards (for instance, as overriding mandatory rules of third states).

4. Parties to an arbitration agreement may, by mutual consent, expand the range of legal remedies available in international arbitration compared to state court litigation at the seat of arbitration. They may also agree to exclude availability of certain legal remedies. An agreement to exclude certain remedies should not be construed as an exception from the substantive scope of the arbitration agreement, and as a result the parties should not be entitled to resort to state court litigation to obtain the excluded type of relief.

Unlike international commercial arbitration and traditional interstate arbitration, in investment arbitration it should be presumed that the respondent state did not consent to the arbitral jurisdiction to award non-monetary relief.

5. The availability of non-monetary relief in international arbitration warrants a new approach to the interpretation of the 1958 New York Convention, which has traditionally been used primarily to enforce pecuniary awards. In particular, enforcing jurisdictions should be entitled to refuse enforcement of a non-monetary award that is not compatible with procedural rules of *lex fori* and to set out a different manner for implementing a specific non-monetary order (for instance, by awarding a monetary compensation to the award creditor which can be used to hire a third party to implement the non-monetary order) to the extent consistent with the nature of the underlying substantive right.

6. From a policy perspective, non-monetary awards should, *de lege ferenda*, first and foremost be enforced at the respondent's domicile. At the same time, enforcement in other jurisdictions should be allowed where enforcement in the primary jurisdiction is impossible or ineffective. However, an award creditor should

normally not be entitled to request enforcement of a non-monetary award in several jurisdictions after obtaining a coercive order against the award debtor in one jurisdiction, on the ground of abuse of rights. However, enforcement in several jurisdictions should be allowed where the award creditor has a legitimate interest in such enforcement.

7. As regards international arbitration seated in the Russian Federation, creditors should be entitled to use arbitration for actions *in rem* (given that arbitral awards on issues of property law operate *inter partes* and do not preclude third parties that were not privy to the proceedings from bringing their own claims with respect to the same subject matter), to obtain an award of specific performance (however, arbitrators are to balance the claimant's interest in this type of relief and the ensuing burden on states' enforcement apparatus), as well as to obtain declaratory relief (subject to a showing of a legitimate interest in resolving the relevant dispute) and to request contract adaptation (where the relevant contract contains an adaptation clause authorizing arbitrators to adapt the contract or the applicable substantive law allows for adaptation in court).

Theoretical significance of the research. The results of this research can be used in teaching law, in further research projects in the field of the international arbitration and civil procedure and in developing legislative proposals. The thesis can also be used to resolve a number of conflicts between national and international legal systems, and to coherently delineate the jurisdiction of state courts and arbitral tribunals.

Practical significance of the research. The results of this research can be used to resolve arbitration disputes as well as disputes on recognition and enforcement of arbitral awards. The thesis also brings legal certainty to the field of non-monetary relief in international arbitration, which has the potential for increasing the demand for and public trust in arbitration in the Russian Federation, and for assisting Russian persons in resolving international disputes, including those adjudicated abroad.

Approbation of the results of the study and the main publications of the author on the topic of research. This thesis was developed at the School of International Law of the Federal State Autonomous Educational Institution of Higher Education National Research University "Higher School of Economics" (HSE University) and was discussed at a joint session of the School of International Law and the School of Legal Regulation of Business of the HSE University (with participation of an invited expert from the School of Private Law of the HSE University).

The main results of this research were presented at the Ph.D. Seminar of the HSE University School of International Law in December 2022, at the conference of the Center for International and Comparative Legal Studies in May 2019, as well as in the preparation of a report on international dispute resolution in the Russian Federation for the conference of the international legal association Mackrell International in 2020.

The main conclusions of this thesis were also used in the author's published scholarly articles and in the author's chapter on international dispute resolution to be included into the international law textbook (prepared for publication by the HSE University School of International Law).

The results of this research were also used by the author while teaching the "International Arbitration" course (in English) for undergraduate students of the HSE University's Faculty of Law, as well as the "Legal Aspects of International Trade" course for master students of the HSE University's Institute of Trade Policy. The results of the research were also used in the course of the author's supervision of the applied project "Preparation for the Willem C. Vis International Commercial Arbitration Moot Court Competition" at the HSE University.

The results of this research were also tested in the course of the author's own legal practice while representing clients before international arbitration tribunals and before state courts on matters concerning the recognition and enforcement of arbitral awards, as well as when giving legal advice to clients.

The scholarly accuracy of this research is confirmed by its detailed analysis of normative and theoretical material, including Russian and international scholarship and publications, litigation and arbitration case law, legislation of various jurisdictions, and is verified by the diversity of methods employed in the research.

The organization of this thesis is based on its goal and objectives. The thesis includes an introduction, four chapters which are each divided into paragraphs, a conclusion and bibliography.

II. OUTLINE OF THE THESIS

The **introduction** describes the relevance of the research topic, its level of scholarly development, the goal and objectives of the thesis, its object and particular subject matter, the methodological, theoretical and legal bases of this research, its novelty and main results presented for public defense, as well as summarizes the data on approbation of the results of this study and outlines the organization of the thesis.

The first chapter "The concept and legal nature of non-monetary legal remedies" includes four paragraphs. This chapter is dedicated to general theory of legal relief.

The first paragraph "The need for a universal understanding of legal relief" describes the traditional approaches to the nature of legal relief and offers criticism of these approaches, inter alia, by reference to the fact that they are not compatible with the goals of international arbitration. The paragraph notes that Russian law, like civil law systems generally, tends to treat legal relief as an aspect of the substantive legal right and often does not pay sufficient attention to the procedural side of this concept. Conversely, common law traditionally treats the notion of remedy as a creature of procedure only.

The author discusses specific examples of cases where each of these approaches leads to difficulties in the context of international dispute resolution. In particular, the procedural understanding of legal relief causes risks of "forum

shopping" and may defeat the purpose of applying foreign substantive law to the dispute. On the other hand, if legal relief is classified as a matter of substance and not procedure, this is also unsatisfactory because as a result the court may have to order relief that is not compatible with domestic procedural law including its enforcement apparatus. The substantive classification of relief is also unable to explain a number of legal phenomena, such as the practice of replacing a non-monetary order with a pecuniary compensation as a means of enforcing non-monetary judgments in a number of legal systems (see, e.g., Article 887 of the German Code of Civil Procedure). In light of this, the author concludes that a transnational approach to legal relief is desirable especially in international arbitration, because the powers of arbitrators in an international arbitration are based, inter alia, on the consent of disputing parties, which may represent divergent legal traditions.

The second paragraph "Forming a transnational approach to legal relief" analyzes the origins of the traditional domestic approaches to legal relief in a comparative and historical perspective.

The thesis draws attention to the fact that Roman law treated legal relief as a syncretic notion that is both substantive and procedural. The author considers the evolution of scholarly attitudes to the legal nature of relief in civil law and common law jurisprudence and finds that both the substantive and the procedural approaches to legal relief emerged in an entirely domestic context that did not account for disputes with an international element. However, when faced with international disputes, legal scholars in various jurisdictions in fact acknowledged the interdisciplinary nature of legal relief. As a result, a transnational approach to legal relief should treat this concept as a complex interdisciplinary phenomenon. Instead of seeking to categorize the entire concept of legal remedies as either substantive or procedural, one should construe each specific legal rule in this field to determine its proper doctrinal classification.

The third paragraph "Actions for declaratory relief and actions for change of a legal relationship" discusses the taxonomy of legal claims (which is

traditional for Russian scholarship) that divides all legal claims into three broad categories: actions to condemn the respondent to certain conduct, actions for declaratory relief, and actions for a court-ordered change of a legal relationship. The author criticizes the commonly held view that actions for declaratory relief and actions for a court-ordered change of a legal relationship, due to their peculiar features, are solely procedural notions that do not have a substantive law dimension. The author argues in favor of a uniform approach to these types of claims because, like actions requesting an order that the respondent engage in a specific conduct, they also involve interference with the respondent's legal sphere in connection with an alleged breach of the claimant's rights or legal interests. As a result, these remedies should also be seen as complex substantive and procedural notions, which is consistent with the theory of a court claim in Russia, under which a court claim always includes a procedural aspect (claim addressed to the court) and a substantive aspect (claim addressed to the respondent).

The fourth paragraph "Notion and peculiar features of non-monetary legal remedies" begins by observing that scholars in the field of civil law traditionally discuss the category of "pecuniary obligations" which is traditionally opposed to non-pecuniary obligations that provide for certain conduct other than provision of money. The author argues that this dichotomy can also be fruitfully used in scholarship in the field of arbitral procedure when it comes to legal remedies that do not involve the transfer of monetary funds as a means of payment. These types of legal remedies can be divided into two categories: remedies that may require enforcement (including actions for specific performance) and those that do not require enforcement (actions for declaratory relief and actions to change a legal relationship). The paragraph describes peculiar features of each of these categories and argues that these features require holistic treatment in legal scholarship based both on their substantive and procedural dimensions.

The paragraph also argues that the Russian language term "non-monetary" remedies should be preferred to the term "non-pecuniary" remedies to avoid confusion caused by debates among Russian scholars of substantive civil law on

what exactly should be understood by a “pecuniary” obligation (such as whether the promise to pay in advance is a “pecuniary” promise or not). As these debates are rooted in issues of substantive law, they have no bearing on the topic of this research. The author also criticizes the approach of Russian law that does not always distinguish between an “obligation” (“right”) and “remedy”, as follows for instance from the wrong conclusion in Russia that the limited availability of a court action to enforce the duty to pay in advance is an effect of mutuality (reciprocity) of contractual promises, rather than a limitation on the availability of specific performance as a matter of economic policy.

The second chapter “The use of non-monetary remedies in international disputes” includes four paragraphs. This chapter elaborates on the conclusion that legal remedies should be treated as a complex interdisciplinary phenomenon. It proposes a practical algorithm to distinguish between substantive and procedural rules when resolving particular questions relating to remedies in a specific dispute.

The first paragraph “Basic approaches to procedural classification” argues that neither the fact that legal rule was codified in a “substantive” or a “procedural” statute nor or its wording are proper criteria of legal classification. It is also not satisfactory to classify legal rules based on whether they objectively impact the outcome of the case. These approaches are untenable because they are not based on the policy reasons because of which legal systems distinguish between substance and procedure in the first place. They should be replaced with a more flexible purposive approach, under which a rule is procedural if it is principally aimed at a procedural policy, including procedural economy and proper organization of court machinery. If there is no evidence that a rule has an immediate procedural purpose, it should be presumed to be a rule of substantive law because a procedural classification comes with increased risks of being inconsistent with the parties’ expectations and may cause incongruence in the legal regime created by the otherwise applicable foreign substantive law.

The second paragraph “Legal classification of rules dealing with legal relief” applies the purposive approach of legal classification to specific legal rules

that deal with legal remedies. The author argues that rules on the types of remedies that are in principle available in a given forum are to be classified as procedural. Apart from that, procedural rules may include limitations on the availability of specific performance in a jurisdiction, to the extent that the purpose of these rules is to protect the legal system from the disproportionate burden of enforcing certain non-monetary judgments or awards. Other rules are normally rules of substantive law, including rules dealing with the grounds to award relief on the facts of the case, rules requiring that a remedy be only awarded through a court action, rules dealing with concurrence of remedies, rules dealing with burden of proof.

The third paragraph "Conflict between substantive and procedural law when it comes to legal remedies" is devoted to cases where a given legal remedy is available under the applicable substantive law but is not recognized or has limited availability from the viewpoint of procedure in a given forum. The author proposes solutions to this conflict. Where the conflict is based on a mere omission of the procedural law of the forum (which does not expressly provide for the exact remedy sought), the forum may award the requested relief as a matter of implied or inherent powers, by reasoning by analogy or based on the general principles of the law of the forum. However, where the conflict is not caused by a mere omission (e.g., the procedural law restricts the relevant remedy based on concrete procedural policies), the forum lacks jurisdiction to award relief sought despite its availability under the law governing the substance of the dispute.

The fourth paragraph "Conflict between substantive and procedural law in transboundary enforcement" elaborates on the same conflict between substance and procedure in the context of transboundary enforcement of foreign awards. The author argues that as a general rule a foreign award that orders a legal remedy that is not known to the procedural law of the forum should be enforced by adapting its dispositive part to the most compatible type of relief available in the relevant jurisdiction. However, where an award is fundamentally inconsistent with the procedural policies of the enforcing jurisdiction, the court may refuse enforcement of the foreign award.

The paragraph also discusses the question whether a non-monetary remedy can be replaced during enforcement proceedings (for instance, by providing a monetary compensation to the award creditor in lieu of the non-monetary performance). The author argues that from a policy perspective this should be permitted either where the award to be enforced expressly refers to this possibility, or where the award would otherwise not be enforced because of its incompatibility with the law of the enforcing jurisdiction. In light of this, the author calls for a revision of the existing approach of Russian law, under which Russian courts may revise the non-monetary relief awarded in the foreign award on a broad list of grounds.

The paragraph concludes by analyzing the problem of judicial penalty (*l'astreinte*) as a means of maximizing compliance with non-monetary arbitral awards. The author argues that judicial penalties should be treated as an auxiliary remedy, meaning that this concept also has both a substantive and procedural dimension. This has practical consequences – a judicial penalty that is part of the foreign award should be enforceable internationally under the 1958 New York Convention, provided that this is compatible with the law of each enforcing jurisdiction. However, even if a judicial penalty was not ordered when the award was issued, the enforcing court may still order a judicial penalty on the grounds listed in forum law as a means of enforcing the foreign award within the relevant jurisdiction – even if judicial penalty is not recognized by the applicable substantive law.

The third chapter "Special issues of non-monetary remedies in international arbitration" includes four paragraphs. This chapter is devoted to the impact of the distinguishing features of international arbitration on the issues of non-monetary legal remedies.

The first paragraph "Choice of law applicable to legal relief in international arbitration" discusses special issues that arise in the context of choice of law in international arbitration. Given that procedural law in international arbitration is essentially hybrid in nature (procedure is governed by both the law of

the seat of arbitration – *lex arbitri* – and the arbitration agreement in light of the law applicable to the law governing the arbitration agreement), in international arbitration issues pertaining to legal relief should be resolved based on a cumulative application of three bodies of law: *lex causae* (the scope is analogous to state court litigation), *lex arbitri* (to determine the procedural power to award relief of the kind sought), and the law applicable to the arbitration agreement (to determine the parties' intentions).

This paragraph also discusses special issues that arise in applying each of these bodies of law. The author notes that whenever the *lex arbitri* is silent on procedural powers of arbitrators, analysis should be based on the doctrine of synchronized competence (according to which arbitrators' powers to award relief are presumed to be the same as the powers available to state courts at the seat of arbitration). However, given that party autonomy is an important pillar of international arbitration, the parties may agree to expand the arbitrators' powers or to limit availability of relief without prejudice to the exclusionary effect of the arbitration agreement when it comes to state courts' jurisdiction. This agreement may be both explicit and implicit in circumstances of the case, and should be given effect to the extent that it is valid under the law applicable to the arbitration agreement and is not inconsistent with the mandatory rules of *lex arbitri*.

The second paragraph "Impact of procedural features of arbitration on the availability of legal remedies in arbitration" considers potential derogations from the doctrine of synchronized competence based on the procedural features of arbitration compared to state courts. The author argues that the potential derogations should be based on the rules of arbitrability of disputes. Other arguments that are traditional for Russian discourse (such as the limited powers of arbitrators to join third parties, public interest in the dispute and the private status of arbitrators) should not by themselves have any bearing on availability of relief in international arbitration. This is because arbitral awards are normally not procedurally opposable to third parties (*inter partes* effect), while the compatibility of the arbitral award with the public interest is subject to *ex post* judicial review based on the public policy

exception. However, disputes involving specific types of remedies may be deemed non-arbitrable in cases where the arbitral decision directly extends its *res judicata* effect to third parties or causes immediate *erga omnes* consequences as a matter of substantive law.

This approach also challenges the general theory of arbitration in Russian literature. The paragraph argues that arbitration should be viewed as a full-fledged alternative to state court litigation. As a result, its legal regime should normally be the same as that applicable to state court decision-making, except where differential treatment follows from specific procedural features of arbitration as a form of dispute resolution. The tendency of Russian jurisprudence to view arbitration as a mere private law agreement between disputing parties is not consistent with modern approaches to the nature of arbitration and the policy reasons why legal systems recognize international arbitration as a binding method for dispute resolution.

The third paragraph "Arbitrators' duty to render an enforceable award and non-monetary relief" criticizes the view that procedural enforceability of an arbitral award is a risk of the parties and should not be taken into account during the arbitral decision-making. The author argues that since the arbitrators' powers are based not only on the intention of the parties but also on their recognition by national legal orders, the arbitrators should weigh the claimant's interest in non-monetary relief and the potential burden on society to implement a non-monetary decision. Doctrinally, this balancing test follows from the fact that domestic legal rules that restrict availability of non-monetary relief for reasons of procedural policy are to be characterized as overriding mandatory rules of third states, which may be applied in arbitration regardless of the governing substantive law. Alternatively, arbitrators can rely on Article 7.2.2 of the UNIDROIT Principles (which contains a balanced legal test restricting availability of specific performance) as a codification of a transnational principle that should be applied in international arbitration.

Apart from procedural enforceability, the author also discusses whether arbitrators should take into account the risk that their award may be annulled or refused enforcement in a given jurisdiction because of its negative attitude towards

certain types of legal remedies, such as a judicial penalty in an order for specific performance, for reasons other than the enforcement burden. The author argues that these risks should not by themselves have any bearing on arbitral decision-making except where the law of the relevant jurisdiction is found to be applicable in a given arbitration, for instance as overriding mandatory rules of third states.

The fourth paragraph “Applicability of non-monetary relief in international investment and interstate arbitration” begins by demonstrating that the methodology of resolving questions on legal relief is fundamentally similar in commercial, investment and interstate arbitration. However, in arbitrations that do not have a seat of arbitration (this refers to arbitrations under the 1965 ICSID Convention and normally interstate arbitrations), the international law of procedure (which normally consists of the treaty based on which the arbitration tribunal was constituted and general principles of international procedure) should be used as the reference point instead of *lex arbitri*. As substantive public international law (PIL) provides that restitution in kind is the primary remedy for a breach of international law, PIL tribunals should be presumed to be empowered to award non-monetary relief also as a matter of international procedural law.

Exceptions from availability of non-monetary relief should be based on the interpretation of states’ intentions when entering into a particular international instrument. In particular, there are solid grounds to presume that states do not intend to empower arbitrators to award non-monetary remedies (such as to reverse certain expropriatory measures) when it comes to investor-state arbitration. This presumption follows both from the case law of investment tribunals and from the *in dubio mitius* principle. Orders for non-monetary relief may not only call into question the legitimacy of investment arbitration due to their substantial interference with a state’s internal affairs, but could also cause a burden on states that is not proportionate to the claimant’s interest in a non-monetary order.

The fourth chapter “Particular types of non-monetary remedies in international arbitration” includes four paragraphs that are each dedicated to a

debatable type of legal remedies using an international arbitration seated in Russia as an example.

The first chapter "Actions in rem" argues that arbitrators may hear actions for remedies that protect an *in rem* property right, including those that necessitate changes to public registers. This is because third parties are not bound by arbitrators' findings and may file their own lawsuit to state courts. However, where the object of the proceedings is possessed by a third party not privy to the arbitration agreement that serves as the basis for arbitral jurisdiction, the arbitrators may lack personal jurisdiction to proceed. Apart from that, enforcement proceedings based on an arbitral award should normally be discontinued where the object of the dispute is no longer possessed by the respondent.

The second paragraph "Specific performance" argues that international arbitration is compatible with orders for specific performance which should also be enforced abroad pursuant to the 1958 New York Convention. From a policy perspective, orders of this kind should normally be enforced at the respondent's domicile, but enforcement elsewhere may be permitted where enforcement in the primary jurisdiction is impossible or ineffective. However, where the award creditor has obtained a coercive order in one jurisdiction to compel the non-monetary performance by the award debtor, the award creditor should normally not be allowed to request another coercive order in a different enforcement jurisdiction, to avoid an undue cumulation of coercive measures. However, simultaneous enforcement should be allowed where the award creditor has demonstrated a legitimate interest in doing so.

This paragraph also discusses procedural steps available to arbitrators in order to maximize chances for successful enforcement of a non-monetary order. The author argues that arbitrators should consider using a judicial penalty to motivate voluntary compliance, provided that this is compatible with *lex causae* and assuming that they have the procedural power to do so under the *lex arbitri* and the parties' arbitration agreement. Apart from that, in cases where this is permitted by the applicable substantive law, arbitrators should be entitled to render an award under

which the respondent is, by virtue of the award, deemed to have made a declaration of intent requested by the claimant as a matter of legal fiction, instead of ordering specific performance. Enforcement prospects of a non-monetary award may also be maximized by arbitrators' reserving their jurisdiction to supervise the practical implementation of an award after its issuance (in deviation from the *functus officio* doctrine). The arbitrators may also wish to use a series of partial awards to gradually set out a party's obligations in the course of their implementation, and to issue an alternative award for damages if the primary non-monetary remedy fails. Furthermore, it is reasonable to consider post-award disputes to be arbitrable and within the scope of a standard arbitration agreement. Therefore, these disputes should be referred to arbitration (with the same tribunal as the main dispute or a different tribunal) at the request of either party, which can also alleviate the burden of enforcing non-monetary order for domestic legal systems.

The third paragraph "Contract adaptation" is dedicated to a debated scenario where an arbitral decision directly changes the content of a party's contract for the future. The author notes that several jurisdictions do not consider contract adaptation to be a legal dispute but rather an instance of negotiations with the use of an *amiable compositeur*. The author concludes that this narrow view should not be supported. Actions for contract adaptation should be allowed, at least, where adaptation is envisaged as a remedy by the applicable substantive law (e.g., Article 451 of the Russian Civil Code) or where the contract has an adaptation clause that explicitly refers to contract adaptation by arbitrators where parties cannot agree. The paragraph also discusses the so-called "open" contract adaptation where arbitrators have broad powers to "draft" contract terms on behalf of the parties and are not bound by the parties' proposed language. The author also reviews the distinction between contract adaptation and related concepts such as supplying an omitted term in the process of contract interpretation.

The fourth paragraph "Actions for declaratory relief" reviews problems peculiar to declaratory awards. Actions for declaratory relief are widespread in international arbitration but are treated with suspicion in a number of domestic legal

systems, including Russia. The author argues that actions for declaratory relief should be permitted in international arbitration even where the arbitration is seated in a jurisdiction which restricts availability of declaratory relief for state court litigation. This conclusion is based on implied intentions of the parties which follows from the commonality of declaratory awards in international arbitration, and is consistent with the conclusion that arbitrators' powers to award relief may be broader than those of state courts at the seat of arbitration by agreement of the parties.

However, the author criticizes the view that any type of action for declaratory relief should be entertained in arbitration – without the claimant being required to show a legitimate interest in obtaining the declaration (this argument tends to be made on the basis that the costs of an arbitration are fully borne by the parties and are not subsidized by society). The author argues that this view is inconsistent with fundamental principles of arbitral decision-making and may lead to issuance of advisory opinions or abstract interpretative guidance rather than arbitral awards. For that reason, an action for declaratory relief should be admissible subject to the existence of a real "dispute" between the parties, which should be ripe for adjudication rather than merely hypothetical in nature and whose resolution should have tangible consequences for the claimant (rather than being moot).

The **conclusion** summarizes the main findings of the thesis.

III. Publications on the research topic

Publications in journals recommended by HSE University (lists B, D):

1. *Kostsov V.N.* Substance and Procedure in Arbitrability of Disputes and Powers of Arbitrators // The Herald of Economic Justice. 2023. No. 6. P. 86–113;

2. *Kostsov V.N.* Nature of Legal Relief through the Lens of International Civil Procedure // The Herald of Civil Procedure. 2021. Vol. 11. No. 4. P. 179–228;

3. *Kostsov V.N., Sirota A.N.* Enforcement of the Duty to Pay in Advance: A Critical Appraisal of the Emerging Approach // The Herald of Economic Justice. 2021. No. 11. P. 96–155.

Publications in other journals:

4. *Avdulova A.E., Kostsov V.N.* Duty to Render an Enforceable Award in International Arbitration: Critical Analysis // Zhurnal VSHÉ po mezhdunarodnomu pravu (HSE University Journal of International Law). 2023. No. 2(1). P. 4–29.