Recognition and enforcement of foreign arbitral awards in Russia: overview and prospects

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There is no doubt that the rapid development of international trade in the 21st century calls for the unification of legislation and enforcement practices in the spheres associated with international commercial arbitration, especially so in the area of recognition and enforcement of foreign arbitral awards.

Despite Russia being a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, judicial practice of arbitration (state commercial) courts in Russia with respect to enforcement of international arbitral awards lacks uniformity. Moreover, generally its current vector appears to lean toward counter-international arbitration approach.

Minimising the existing uncertainty in order to protect the rights of foreign entities, as well as prevent "asset stripping" under the guise of enforcement of foreign judgments and arbitral awards is the primary goal of the Supreme Court of the Russian Federation, according to its President Vyacheslav Lebedev[1]. To this end, the Resolution of the Plenum of the Supreme Court of the Russian Federation is to be passed, covering, inter alia, the questions of enforcement of international arbitral awards.

Under Article 36 of the Law of the Russian Federation on International Commercial Arbitration, dated 14 August 1993, a state court may refuse to recognise or enforce an arbitral award either at the request of the party against whom it was invoked (e.g. in the event that such party was not given proper notice of the arbitral proceedings), or ex-officio (e.g. if the recognition or enforcement of the award would be contrary to the public policy of the Russian Federation).

It is the latter scenario of refusal that causes headache both to practitioners and judges due to the vague statutory definition of public policy. We believe that the following cases could serve as examples of the situation at hand.

[1] https://www.kommersant.ru/doc/3752831

Protection of creditors in bankruptcy cases as an essential element of public policy

As per the established practice, courts tend to pay close attention to the interests of third parties (creditors) in enforcing an arbitral award against a debtor in bankruptcy proceedings.[2]

Moreover, as creditors in bankruptcy cases lack the necessary means to prove a breach of public policy for reasons of confidentiality of the arbitral proceedings, limited access to the files etc., a low standard of proof is applied. Therefore, it is sufficient for the creditor to present to the court *prima facie* evidence of "substantial doubt as to the existence of the debt" awarded by the tribunal, whereas the burden of refuting these doubts[3] rests with the party applying for enforcement of the award.

While shifting the burden of proof onto the party requesting enforcement, this position was initially aimed at ensuring the balance of rights and obligations of the parties and was successfully used to that end, mostly with respect to domestic arbitration.[4]

However, with regard to international commercial arbitration it has led to a dubious dismissal by the Arbitration Court of Moscow of the application for recognition and enforcement of an ICC award on the basis of, inter alia, infringement of the rights of creditors under a settlement agreement approved by the court in bankruptcy proceedings. Absent any doubt as to the existence of the debt, the application was rejected, as the Arbitration Court of Moscow concluded that the International Court of Arbitration "did not examine the possibility of conducting the arbitral proceedings after an application for the debtor's bankruptcy had been accepted by the court".[5] As a result, the foreign entity lost the opportunity to recover its debt both via a settlement agreement and the enforcement procedure.

The approach outlined above cannot be called arbitration-friendly and is unlikely to have a positive effect on the promotion and development of ADR in Russia.

Abuse of rights as a breach of public policy

The Arbitration Court of Moscow had to deal with quite a "hot" issue in case No. A40-170631/2017, i.e. the party's recourse to arbitration allegedly aimed at transferring assets of a Russian entity to an affiliated person registered abroad through the enforcement procedure, as opposed to actually resolving a dispute.

The court dismissed the application for recognition and enforcement of an award rendered by the International Commercial Arbitration Court at the Ukrainian CCI on the basis of the fact that parties to the dispute had partially identical names and the respondent acknowledged the debt in the course of arbitral proceedings, suggesting lack of actual dispute.[6] Thus, the court concluded that the facts of the case revealed an abuse of rights, constituting a breach of public policy.

The cases outlined above are just a few examples of obstacles in the course of recognition and enforcement of foreign arbitral awards in Russia, evidencing a broad construction of the term "public policy" and, more generally, a tendency towards counter-productive judicial practice in this area.

Given said negative trend, it may be useful for businesses to consider the potential strategy for dispute resolution not only prior to the dispute resolution process, but as early as during the deal structuring, so as to minimize the risk of failure to enforce the arbitral award in Russia.

To conclude, we strongly believe that it is vital for the system of recognition and enforcement of foreign arbitral awards in Russia that the Supreme Court works out a unified judicial approach to the notion of "public policy", which would allow pro-international arbitration practice to develop throughout the judicial system.

[2] Clause 10 of Judicial review No. 1 (2016) of the Supreme Court of the Russian Federation dated 13.04.2016.

[3] Ruling of the Presidium of the Supreme Arbitration Court of the Russian Federation dated 13.05.2014 in case No. A41-36402/2012.

[4] E.g. if the court established that the creditor and the debtor were affiliated through the same controlling person and arbitration was used to create fictitious debt to the benefit of that person on the verge of debtor's bankruptcy (Ruling of the Arbitration Court for the West-Siberian District dated 26.12.2017 in case No. A45-19710/2017).

[5] Ruling of the Arbitration Court of Moscow dated 8.02.2018 in case No. A40-176466/17 (upheld by the Court of Cassation and the Supreme Court of the Russian Federation).

[6] The judgment was upheld by the Court of Cassation.