Recognition and enforcement of foreign arbitral awards in Russia – remarkable cases of 2019–2020

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Despite a large number of disputes involving Russian entities that are complicated by the presence of a foreign party, the practice of recognizing and enforcing international commercial arbitration decisions in Russia is not always consistent. This is especially true for cases where the other party (against whom a decision is rendered) alleges that the enforcement of the decision is in contradiction to public policy. This argument is the most common defence strategy, although the least predictable in terms of the court's findings.

Readers are offered an overview of a number of interesting court cases for 2019–2020, which contain conclusions that are significant for practice formation.

1. Case No. A40-117326/2018[1]

Factual background: The London Court of International Arbitration (LCIA) ruled on a claim filed by an English company (the claimant) against a Russian joint-stock company (the debtor, Russia) for recovery of a debt due to improper performance by the debtor of its obligations under the share purchase and sale agreement.

Following non-fulfilment of the award on a voluntary basis, the claimant turned to a Russian arbitration court for recognition and enforcement.

History of proceedings: During the first consideration of the claim, the court of first instance granted the award, pointing out at the same time that the subject matter of the dispute was not the ownership of the shares, but rather the recovery of funds due to a violated payment procedure for the shares transferred to the ownership of the interested person. The debtor's arguments that the award contradicts public policy because the debtor is a member of a state corporation group of companies were dismissed.

The court of cassation opened the case for new consideration, being instructed to take into account that the debtor's ultimate beneficiary is the Russian Federation and that the state corporation, of which the shareholder is the debtor, is included in a list of strategic enterprises.

Having reconsidered the case, the court of first instance refused to recognize and enforce the LCIA decision. The court concluded that enforcement of the award, under which the execution upon the property of the person whose ultimate beneficiary is the Russian Federation is levied, may cause damage to the state budget as a result of withdrawal of funds to the accounts of foreign companies, for which reason the general principles of law (principles of good faith and prohibition on abuse of right) may be violated.

Subsequent instances have supported these conclusions.

Comment: The approach considered shows a general trend towards absolute protection of budget funds from claims by foreign companies, even in situations when the prospect of levying execution upon them seems rather remote.

It can be said that even a minimum public element in a dispute still poses a significant risk to recognition and enforcement of an award in Russia, and this is often criticized by the arbitration community.

2. Case No. A40-61107/19-143-521

Factual background: The London Court of International Arbitration (LCIA) considered a dispute between the owner of a vessel (the claimant, UK) registered in a foreign country, Saint Kitts and Nevis, and a shipping company (the debtor, Russia). The dispute is related to termination of a bareboat charter agreement governed by English law and to return of the vessel.

[1] A similar position was also expressed by the courts in case No. A40-117331/18 between the same entities.

During consideration of the dispute, the arbitration tribunal delivered three significant decisions on various sets of disputed issues.

The debtor's non-fulfilment of the third award, which recognized in particular the lawful termination of the bareboat charter and the seizure of the vessel from the debtor as well as the necessity to compensate the claimant's expenses, has become a basis for appeal to the arbitration court for recognition and enforcement of an award.

History of proceedings: When considering a claim, the Russian arbitration courts have focused on the following:

- The possibility of recognizing a partial foreign award in the Russian Federation;
- Compliance with public policy as a result of registration of the vessel, related to a real estate asset, in the Russian International Register of Vessels as bareboat chartered.

The court of first instance stated on the first issue that partial decisions relating to various issues of the proceedings are provided for by the applicable rules of the London Maritime Arbitrators Association. Such decisions are binding and final, and are no different from ordinary awards.

At the same time, contrary to the debtor's arguments, such partial final decisions cannot be qualified as a "provisional" decision, for which the impossibility of recognition and enforcement in Russia has frequently been the subject matter of judicial scrutiny. The court has reached these conclusions based on the barrister's opinion submitted by the claimant, explaining the nature of the "partial final decisions" at various arbitration stages.

The court pointed out on the second issue that the registration of the vessel in the register was necessary to obtain the right to sail under the flag of the Russian Federation, but this does not mean the registration of rights in rem to the vessel and the resulting exclusive competence of Russian arbitration courts[2]. Satisfaction of the claimant's requests has not entailed the need to make changes to the Russian state real estate registers.

The arbitration court of cassation and the Supreme Court of the Russian Federation (hereinafter "the Russian Supreme Court") supported the conclusions of the court of first instance, dismissed the claimant's arguments regarding the violation of public policy, and once again pointed out that the dispute relates to the violation of rights in personam, not in rem.

Comment: A number of arbitration rules (in particular, those of the SCC and LCIA) provide the possibility to render awards in parts. Moreover, due to broad discretion, the parties may themselves agree upon such a dispute resolution procedure.

This case has a positive real-life impact, since the courts' findings go against the previous conservative position, including that of the Russian Supreme Court that it is impossible to recognize and enforce partial final decisions (see cases No. A56-63115/2009 and No. A40-223894/2018). Parties to a foreign arbitration proceeding may therefore feel more protected from the risks of impossibility to enforce an award within Russia.

3. Case No. A40-337611/2019

Factual background: In 2018, an English specialized consulting agency (the claimant, UK) and a well-known football club (the debtor, Russia) concluded a paid services agreement containing the following terms and conditions:

[2] Clause 2 of Part 1 of Article 248 of the Arbitration Procedure Code, Clause 5 of Resolution of the Plenum of the Russian Supreme Arbitration Court No. 23 dated 27 June 2017 On Consideration by Arbitration Courts of Cases on Economic Disputes Arising out of Relations Complicated by a Foreign Element.

- All disputes under the agreement shall be resolved by negotiations;
- If it is impossible to resolve the disputed issues by negotiations, they shall be referred to the Arbitration Court of Moscow for consideration;
- When referring a case to the Court of Arbitration for Sport (CAS), the dispute will be considered in English by a sole arbitrator.

In 2019, the CAS decided to recover funds from the debtor, after which the claimant filed a claim with an arbitration court for recognition and enforcement of this decision.

History of proceedings: The main subject matter of judicial scrutiny was the existence of an arbitration agreement. The claimant submitted an opinion by a commission of linguistic experts that, in accordance with the provisions of the agreement, the claimant holds the right to choose jurisdiction, while the debtor did not challenge the competence of the CAS in a timely manner.

When objecting to the competence of the CAS, the debtor argued that the agreement does not contain the general consensus of the parties to refer the dispute to arbitration, meet the enforceability criterion, or contain the essential terms and conditions of the arbitration agreement.

Refusing to recognize and enforce the decision of the CAS, the court of first instance stated that the arbitration clause was vague and unclearly worded. The initially expressed desire of the parties to consider the dispute in an alternative manner is not confirmed by the case files. At the same time, no correspondence between the parties or exchange of documents confirming the conclusion of the agreement for referring all disputes arising out of this agreement to the CAS was submitted.

The court also pointed out that the place of signature of the agreement was Moscow, that the governing law is established to be the law of the Russian Federation, and that the text of the agreement was drawn up in Russian only and was not duplicated in English. Accordingly, the parties did not expressly conclude an arbitration agreement, and the dispute was resolved by unqualified international commercial arbitration.

The arbitration court of cassation and the Russian Supreme Court supported the conclusions of the court of first instance. The courts pointed out that the arbitration clause should be clearly worded and should mitigate the risk of conflicting linguistic interpretations.

Comment: Despite the fact that the arbitration centres now publish[3] the recommended model arbitration clauses on their websites, the issue of inaccurate wording is still relevant. This covers disputes over competence or jurisdiction and the resulting issues of recognition and enforcement of awards.

When facing the problem of vague and unclear arbitration clauses, courts establish the true intentions of the parties with regard to the dispute resolution mechanism and pay attention to the negotiations and correspondence, the conduct of the parties, and the governing law chosen. These indications usually prevail over the opinions of linguists.

[3] Recommended clause of the Russian Arbitration Centre at the Autonomous Non-profit Organisation Russian Institute of Modern Arbitration https://centerarbitr.ru/about/arbitration-clause/, ICAC clause at the CCI of Russia http://mkas.tpprf.ru/ru/arbitrazhnye-soglasheniya/, ICC https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/, SCC https://sccinstitute.com/our-services/model-clauses/.

4. Case No. A45-33999/2019

Factual background: A foreign company (the claimant, USA) filed a claim against a Russian company (the debtor, Russia) with an international commercial arbitration tribunal (ad hoc) in Sofia, Republic of Bulgaria. The claim was aimed at the recovery of damages due to the non-performance of the debtor's obligations arising from a foreign award on recovery of a debt under a loan agreement, previously made in favour of the claimant.

The arbitration tribunal partially satisfied the claims and also froze the debtor's non-residential premises pledged to another Russian company. Subsequently, the claimant filed a claim with a Russian arbitration court for recognition and enforcement of the foreign award within the Russian Federation.

History of proceedings: The court of first instance refused to recognize and enforce the award, as it considered that the award contradicts public policy.

Firstly, the court pointed out that the arbitration tribunal had resolved the issue of the rights and obligations of the Russian company as the pledgee that had not participated in the arbitration proceedings. In this instance, the method of award enforcement (attachment of the debtor's property) will impede the levy of execution upon the pledged property, which was initiated by the pledgee based on the legally effective judicial decision. The disputed decision was in fact a decision on grant of an interlocutory injunction against the real estate.

Second, the damages recovered from the debtor resulted from the non-fulfilment of another foreign award that has not been recognized and enforced in the Russian Federation in accordance with established procedure. The court pointed out that, in such a case, recognition and enforcement of the disputed award would indirectly mean recognition and enforcement of another award in circumvention of the procedure established by Chapter 31 of the Arbitration Procedure Code of Russia.

The arbitration courtof cassation supported the conclusions of the court of first instance.

Comment: The case under consideration contains a noteworthy conclusion regarding "indirect" confirmation by the court of legal force for a foreign award that has not undergone the full recognition and enforcement procedure. In general, such an approach should be taken positively, as it prevents artificial formation of a chain of interconnected arbitration proceedings.

5. Case No. A40-217058/2018

Factual background: A construction equipment manufacturer (the claimant, China) and a Russian company (the debtor, Russia) concluded a number of supply agreements. Due to the improper performance of payment obligations by the Russian company, the claimant turned to the China International Economic and Trade Arbitration Commission (CIETAC) for dispute resolution.

Since the CIETAC decision on recovery of the debt was not fulfilled on a voluntary basis, the claimant turned to a Russian arbitration court for its recognition and enforcement.

History of proceedings: The main issue considered by the courts was compliance with the procedures for notifying the debtor of arbitration proceedings. Therefore, the court of first instance refused to recognize and enforce the CIETAC decision, referring to the improper notification of the debtor: the notice of proceedings had been sent to the address specified in the agreement, which did not correspond to the legal address in the Russian Unified State Register of Legal Entities.

The court of cassation supported the conclusions of the court of first instance and dismissed the claimant's cassation appeal.

However, the Russian Supreme Court overturned the decisions of the previous courts and granted the claim for recognition and enforcement of the foreign award. The Supreme Court took the view that a party who fails to notify the other party of a change in essential information should bear the risks of non-receipt or untimely receipt of a notice after initiating the arbitration proceedings. The notice sent to the address specified in the arbitration agreement was deemed appropriate, taking into account the specific features of foreign economic relations.

Comment: The issue of proper notices has always been important in a situation where a party does not participate in the proceedings. The position of the Russian Supreme Court has a positive real-life impact, since the court has shifted away from an overly formal approach. Almost at the same time as the proceedings, this approach was fixed in Clause 48 of Resolution of the Plenum of the Russian Supreme Court No. 53 dated 10 December 2019 On Performance by the Courts of the Russian Federation of Their Functions of Assistance and Control with Regard to Arbitration Proceedings and International Commercial Arbitration.

6. Case No. A50-2962/2019

Factual background: An equipment manufacturer (the claimant, Germany) and a Russian company (the debtor, Russia) concluded a contract for manufacturing and supply of sawmill equipment. The governing law was agreed to be the law of the Russian Federation.

The contract established that the seller's (the claimant's) duty to supply the goods arises only after the buyer (the debtor) has made three advance payments. Due to the fact that the buyer failed make the third advance payment in a timely manner, the seller filed a claim with the Court of Arbitration of the Hamburg Chamber of Commerce for recovery of a portion of the advance payment and interest. The court satisfied the manufacturer's claims in full.

Due to the debtor's refusal to fulfil the foreign award, the claimant filed a claim with a Russian arbitration court for its recognition and enforcement.

History of proceedings: The buyer objected to satisfying the claim, stating that recognition and enforcement of this award would grossly violate the fundamental principles of Russian legislation, which does not contain any principles allowing the seller to demand payment for goods manufactured but not handed over to the buyer.

The seller, in its turn, stated that the possibility to recover an advance payment for unsupplied goods is provided for by the provisions of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter the "Vienna Convention") and Russian legislation may be applied only on a subsidiary basis.

The court of first instance satisfied the claim for recognition of the award and its enforcement, as it considered that the debtor's arguments reduce themselves to checking whether the award is correct on its merits, which is unacceptable within the meaning of Part 4 of Article 243 of the Arbitration Procedure Code of Russia. The court stated that when checking the award for compliance with public policy, the fulfilment of the award, rather than the award itself, should be checked. The court's competence does not include examination of the evidence in the case or the correctness of application of the rules of substantive law, including compliance with industry-specific legislation.

The court of cassation overturned the ruling of the arbitration court and refused to recognize and enforce the award, having considered that it violates the principle of legality, which is an element of public policy. The principle of legality, in the court's opinion, includes broadly construed finality of a judicial decision and legal certainty in

the relations between the parties on the disputed issue. The decision of the Court of Arbitration of the Hamburg Chamber of Commerce does not comply with this principle, since it does not actually resolve the conflict between the parties.

For example, the seller originally claimed recovery of a portion of the advance payment only. If this had been claimed by the buyer, there would be a situation where the seller still had no counter duty to supply the goods, and the parties would still be in a state of uncertainty. However, the performance of obligations under the supply contract cannot be endlessly suspended, since the purpose of the contract is lost, and the buyer loses its interest in the contract. Therefore, in the court's opinion, the award violates the principle of legality and cannot be enforced in Russia.

The Russian Supreme Court supported the conclusions of the previous court instances and refused to refer the cassation appeal for consideration in a court session of the Judicial Chamber for Economic Disputes.

Comment: It is known that as a general rule even if the arbitration court makes an error when evaluating evidence or applying rules of law, this itself does not entail a violation of public policy and does not serve as a basis for refusal to enforce the award. This example of a broad interpretation of the principle of legality appears to border on actual revision of the award on its merits.

7. Case No. A41-90912/2018

Factual background: A foreign state-owned enterprise manufacturing metal products (the claimant, Ukraine) and a space enterprise (the debtor, Russia) concluded an agreement providing for supply of products, which included a set of design documentation by the debtor to the claimant and performance of work ensuring such a supply. The products were a component of rocket and space equipment designed for military applications and required a licence for their export.

Due to the debtor's non-performance of its obligations, the claimant turned to the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine for recovery of the advance payment and, subsequently, to a Russian arbitration court for recognition and enforcement of the award.

History of proceedings: In court, the debtor objected to the claim, stating that it had taken all measures under its control to obtain the licence; however, the licence had not been issued.

The courts of all instances refused to recognize and enforce the award in the Russian Federation, drawing attention to two facts. Firstly, the courts stated that the arbitrators had not examined the special supply procedure, the special terms and conditions of the agreement, and the fact that the performance of the debtor's obligations was dependant on permits from the Russian Federation. Secondly, the courts separately outlined the special type of military products and the licensable procedure for their export.

Therefore, it is worth assuming that the courts took issue with the fact that there is a public element in the dispute under consideration and in whether there are actual grounds for the arbitration award. At the same time, it is not obvious from the judicial decisions how fulfilment of the award contradicted public policy.

Comment: An issue of principle regarding contradiction of the fulfilment of the award with public policy, the previous criticism, and a lack of consistency in Russian practice impose increased requirements on the courts when applying this basis: each refusal must be accompanied by strong and detailed reasoning of the judicial decision, which excludes possible ambiguous interpretation and development in future judicial practice.

It can be assumed that the court could see a contradiction of the fulfilment of the award with the public policy in the structure of corporate governance of the parties: the ultimate beneficiary of the debtor was the Russian Federation represented by the Federal Agency for State Property Management (Rosimushchestvo) (30%) and of the claimant – Ukraine represented by the State Space Agency of Ukraine. Therefore, the fulfilment of the award had an indirect impact on budget funds. However, this approach is certainly not indisputable.

8. Case No. A40-309754/2019

Factual background: : The International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine satisfied the claims of a foreign-invested enterprise (the claimant, Ukraine) for recovery from a Russian company (the debtor, Russia) of funds for supplied goods and the expenses incurred for arbitration costs.

Due to the fact that the Russian company did not repay the debt on a voluntary basis, the claimant turned to a Russian arbitration court for recognition and enforcement of the award.

History of proceedings: The discussions in the arbitration court focused on the following issues:

- Compliance with the procedure for proper notices to a party of arbitration proceedings;
- Possible resolution of the dispute under the norms of the Vienna Convention in a situation where the parties agreed on the law of Ukraine as the governing law;
- The need to involve the Federal Financial Monitoring Service and the Federal Tax Service in the case and the resulting contradiction with public policy.

The court of first instance dismissed the debtor's arguments regarding the contradiction with public policy, but refused to recognize and enforce the court decision on another basis – due to non-compliance with the proper procedure for sending notices to the debtor of the arbitration proceedings.

The court of cassation opened the case for new consideration, having stated that it was necessary to check the claimant's argument that the parties had established the notice procedure in accordance with the Rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine. At the same time, the debtor did not deny being aware of the arbitration proceedings, submitted its objections, and stated the case to have been considered in its absence.

During reconsideration of the case, the court of first instance refused to recognize and enforce the award due to the violation of public policy, having stated that:

- When resolving the dispute, the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine applied the provisions of the Vienna Convention, having ignored the law of Ukraine agreed upon by the parties, and did not take into account all relations established between the parties;
- The procedure for appointing arbitrators was violated (in particular, the dispute was considered by a sole arbitrator instead of the required three);
- There were violations of the rules of procedure, as a result of which the guarantees of independence and impartiality of arbitrators were not ensured.

The court of cassation disagreed with these conclusions. Firstly, the court of cassation pointed out that, as the parties had not determined the number of arbitrators, a sole arbitrator was appointed by the President of the Chamber of Commerce and Industry of Ukraine. The parties did not object to the arbitrator, and no challenge was filed.

Secondly, the court's findings on incorrect determination of the governing law and insufficient study by the arbitrator of the actual relations between the parties were qualified as revising the decision on its merits (Part 4 of Article 243 of the Arbitration Procedure Code of Russia).

Therefore, the claim for recognition and enforcement of the decision of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine was granted.

Comment: The history of proceedings of this case is a good example of just how many difficulties creditors may face before obtaining enforcement of a foreign award.

The approach that the parties bear the risk of incorrect application of the rules of substantive law by arbitrators has long been established in international practice. However, as seen from the case in question along with a number of other cases in this overview, this rule is still not always observed in Russia. The position of the court of cassation, which completed the dispute consideration, may be considered as a good contribution to the formation of proper law enforcement practices.

9. Case No. A40-76498/2020

Factual background: In 2014, a foreign company (the claimant, South Africa) and a Russian company (the debtor, Russia) negotiated equipment supply by correspondence via e-mail.

Later on, an arbitrator of the Association of Arbitrators (South Africa) granted the claims of the foreign company for recovery of a debt, interest, and arbitration costs from the Russian company. When recognizing the competence to consider the dispute, the arbitrator referred to the Standard Terms and Conditions of Supply, which were accepted by the debtor through acceptance of the commercial offer and the purchase order, which referred to those Standard Terms and Conditions.

Due to the non-fulfilment of the award, the claimant filed a claim for recognition and enforcement in the Russian Federation.

History of proceedings: It follows from the facts of the case that actual qualification of the debtor's actions during the negotiations as acceptance of the commercial offer and the purchase order is disputable. Accordingly, as a result, the expression of the debtor's desire to conclude the arbitration agreement contained in the documents relating to the terms and conditions of the transaction is also disputable.

Refusing to recognize and enforce the foreign award, the court of first instance stated the following:

- The arbitration agreement need not be in the form of a separate document — such an agreement may be contained in separate provisions of the agreement;
- The agreement concluded between the claimant and the debtor was not submitted to the files of the case, and an arbitration agreement was not concluded between the parties in the form of a separate document;
- The correspondence and the debtor's consent to supply of the goods in accordance with the Standard Terms and Conditions of Supply, submitted by the claimant, which provide for a disputable arbitration agreement, do not confirm conclusion of the agreement, since the correspondence relates to clarifying the supply terms, technical characteristics for equipment, commissioning work, and operation.

Therefore, the court of first instance concluded that there was no arbitration agreement or arbitration clause between the parties within the meaning interpreted by Chapter 31 of the Arbitration Procedure Code of Russia, in particular, by Clause 4 of Article 242 of the Arbitration Procedure Code of Russia.

The court of cassation supported the arguments provided in the decision of the court of first instance and refused to recognize and enforce the foreign award. In March 2021, the Russian Supreme Court took on the case[4].

Comment: The Russian Supreme Court[5] has previously clarified that the requirement for a written form of an arbitration agreement will also be met if it is concluded by exchange of letters, telegrams, telex, fax, or any other documents, including electronic documents transmitted through communication channels that make it possible to reliably establish that the document comes from another party. An arbitration clause may be concluded by reference to standard terms and conditions (e.g., organised trading or clearing rules) or a standard form contract.

At the same time, if the Russian Supreme Court opens the case for consideration, the new judicial decision may address other issues important for the arbitration community, in particular, interpretation of the desire of the parties to conclude an arbitration agreement, procedure for its conclusion through exchanging e-mails, etc.

[4] At the time of preparation of this overview, no ruling to refer or refuse to refer the case for consideration at a session of the Judicial Chamber for Economic Disputes has been given.

[5] Resolution of the Plenum of the Russian Supreme Court No. 53 dated 10 December 2019 On Performance by the Courts of the Russian Federation of Their Functions of Assistance and Control with Regard to Arbitration Proceedings and International Commercial Arbitration.

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