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Contents

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INTRODUCTION

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CASES RELATING TO THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS — THE "NEW YORK" CONVENTION

Case 947: New York Convention III; V (1)(b); V (2)(b)
Russian Federation: Supreme Court
No. 78-G00-40
6 July 2000
Original in Russian

Abstract prepared by A. S. Komarov, National Correspondent, and A. I. Muranov and D. L. Davydenko

[**Keywords**: *award — recognition and enforcement; public policy; notification; inadmissibility of enforcement in another currency*]

A French company applied to the St. Petersburg City Court for the recognition and enforcement in the Russian Federation of an award by the International Court of Arbitration of the International Chamber of Commerce ordering the seizure of financial assets from a Russian company. The debtor pleaded for dismissal of the application on the grounds that the party in the arbitration proceeding was another person, that the arbitral award was contrary to public policy and, in addition, that it had not been notified of the arbitration proceedings.

The Court granted the plaintiff's petition. The Supreme Court of the Russian Federation considered the cassational appeal of the debtor in the capacity of a court of second instance and upheld the ruling, on the following grounds. The debtor's claim that the party in the arbitration proceedings was another person had not been confirmed. No evidence had been presented to the Court, or identified by the Court itself, that the arbitral award was contrary to public policy.

The debtor had failed to refute the plaintiff's claim that it had been timely notified, in accordance with the requirements of the relevant arbitration regulations. The debtor's claim that it had received no notification at all had not been confirmed in the course of the judicial proceedings. The records of the case provided confirmation of the fact that the documents from the secretariat of the arbitral authority had been delivered to the debtor.

The Supreme Court dismissed, however, the ruling of the court of first instance that, if the debtor did not have assets in United States dollars, the judgement could be enforced in roubles, according to the exchange rate of the Russian Federation Central Bank at the time of enforcement, since, by virtue of article III of the New York Convention, each Contracting State recognized arbitral awards as binding and enforced them on the conditions set out in the Convention.

Case 948: New York Convention V (1)(b); V (1)(c); V (2)(b)
Russian Federation: Supreme Court
No. 78-G02-1
18 February 2002
Original in Russian

Abstract prepared by A. S. Komarov, National Correspondent, and A. I. Muranov and D. L. Davydenko

[**Keywords**: *award — recognition and enforcement; arbitration agreement; arbitrators — mandate; public policy*]

A Turkish company applied to the St. Petersburg City Court for the recognition and enforcement in the territory of the Russian Federation of an award by the Arbitration Court of the Geneva Chamber of Commerce and Industry ordering a Russian bank to pay out a sum of money under a guarantee issued by it. The debtor pleaded for dismissal of the application, on the grounds that the Arbitration Court had exceeded its competence and delivered a ruling on a dispute not relating to the arbitration clause. The Arbitration Court had changed the subject of the claim, which it was not entitled to do, and deprived the debtor of the opportunity to present its case on the new requirements. The debtor had also asserted that the recognition and enforcement of the ruling in the Russian Federation was contrary to the public policy of the Russian Federation, since the Arbitration Court had awarded compensation of "hypothetical" losses, which was not permissible under Russian law.

The Court had granted the plaintiff's application.

The Supreme Court of the Russian Federation upheld this judgement, adding the following comments. A contract had been concluded between the debtor and the plaintiff whereby the plaintiff had undertaken to build a hotel in St. Petersburg. The debtor had also given the plaintiff a demand guarantee. The letter of guarantee had provided for the resolution of all disputed points arising with regard to or in connection with the guarantee in accordance with the arbitration rules of the Geneva Chamber of Commerce, Industry and Services. The Arbitration Court had ruled that the claim for recovery of the payment under the guarantee was unfounded. It had, however, on its own initiative, ordered the collection from the respondent of the losses caused by the bank's failure to meet its obligation to notify the plaintiff without delay of the incorrect formulation of the claim against the bank.

The Supreme Court held that this circumstance could not constitute grounds for dismissing the appeal for the enforcement of the ruling of the Arbitration Court, since the parties had reached agreement on arbitration proceedings not only with regard to disputes arising directly out of the guarantee but also with regard to any dispute connected with it, no special provision having been made for exceptions. The dispute about the claim for losses with interest had arisen from the conditions of the guarantee and, being a consequence of it, was accordingly subject to the arbitration clause.

The debtor's argument that the Arbitration Court had unilaterally changed the requirements and that the plaintiff had been deprived of the opportunity to present its case on the revised requirements was ruled unfounded. A representative of the debtor had taken part in the arbitration proceedings and had not been denied the

opportunity to present his case to the Court on all the issues that were relevant to the case. The Arbitration Court had reached its decision on payment for the losses without hearing additional arguments by the parties because it had found the claimant's claims for payment under the guarantee unfounded. On the question of whether such a judgement could be pronounced without giving the parties the opportunity to exchange views and put forward additional arguments, the Arbitration Court had come to the conclusion that it was entitled to pronounce such a judgement, since the subject of the arbitration proceedings was compliance with the guarantee and not any other legal relations between the parties.

The Court ruled that, insofar as the debtor had attended the arbitration proceedings, it had not been deprived of the opportunity to express its objections regarding the legally significant relevant circumstances, including the circumstances relating to the infliction of losses. The fact that, in mounting its legal defence, it had not foreseen the possibility that the Arbitration Court would reach such a decision could not be grounds for refusing to enforce the arbitral award. The Court stated that compensation for "hypothetical" losses was not contrary to the public policy of the Russian Federation. Moreover, it noted that the debtor's objection concerning the inadmissibility of compensation for such losses represented a challenge to the arbitral award on a matter of substance, which did not constitute a basis for refusing enforcement and was of no legal significance.

Case 949: New York Convention II; III; V (1)(a); V (2)
Russian Federation: Federal State Commercial Court, Volga-Vyatka Federal Area
No. A43-13260/02-15-28 execution
24 April 2003
Original in Russian
Published at http://kad.arbitr.ru, the register of judgements of State commercial courts of the Russian Federation

Abstract prepared by A. S. Komarov, National Correspondent, and A. I. Muranov and D. L. Davydenko

[**Keywords**: *award — recognition and enforcement; arbitration clause; arbitrator — mandate*]

A United States firm applied to the State Commercial Court of the Nizhny Novgorod region for the recognition and enforcement of an award by the Vienna International Arbitral Centre attached to the Austrian Federal Economic Chamber for the seizure of financial assets from a Russian person.

The Court granted the application.

The debtor lodged a cassational appeal with the Federal State Commercial Court of the Volga-Vyatka Federal Area (the court of second instance), on the grounds that the Arbitration Court lacked the competence to hear the dispute, since the contract concluded between the parties provided that disputes arising out of its implementation should be settled by the "Arbitration Court of the Austrian Chamber of Trade and Industry in Vienna". The debtor argued that this provision did not describe a specific body competent to resolve disputes arising out of the contract and that the parties had not reached agreement on the competence of the arbitral tribunal that had issued the ruling. The Federal State Commercial Court of the

Volga-Vyatka Federal Area had upheld the ruling of the court of first instance, on the following grounds.

Under article III of the New York Convention, the Russian Federation recognized arbitral awards as binding and enforced them in accordance with the country's rules of procedure, under the conditions laid down in the Convention. The court of first instance had not found any grounds to refuse the recognition and enforcement of a foreign arbitral award, under the terms of article V, paragraph 2, of the New York Convention.

The Court did not accept the debtor's objection that the Vienna International Arbitral Centre attached to the Austrian Federal Economic Chamber was not competent to settle the dispute that had arisen or that the arbitration clause was invalid, in the light of article V, paragraph 1 (a), of the New York Convention. The Vienna International Arbitral Centre attached to the Austrian Federal Economic Chamber had considered the question of its competence to resolve the dispute and delivered a separate ruling on that point. That ruling was that the parties to the foreign trade contract had not settled the question of the law applicable to the arbitration clause. In accordance with international practice, the procedure in this case was to apply the law of the country where the court was located, namely Austrian law. The Vienna International Arbitral Centre attached to the Austrian Federal Economic Chamber had thus interpreted the arbitration clause on the basis of Austrian law and concluded that the Vienna International Arbitral Centre attached to the Austrian Federal Economic Chamber could be translated into Russian as "Arbitration Court of the Austrian Chamber of Commerce and Industry". On this basis, it had ruled that it was competent to hear the dispute. This separate ruling had not been disputed by the parties. In these circumstances, the debtor had no legal grounds for claiming that the arbitration clause was invalid.

Case 950: New York Convention I; V (1)(e)
Russian Federation: Presidency of the Supreme State Commercial Court
No. 15359/03
30 March 2004
Original in Russian
Published in the journal *Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoy Federatsii* (Bulletin of the Supreme State Commercial Court of the Russian Federation), 2004, No. 8; http://kad.arbitr.ru, judgements of the State commercial courts of the Russian Federation; www.arbitr.ru, website of the Supreme State Commercial Court of the Russian Federation.

Abstract prepared by A. S. Komarov, National Correspondent, and A. I. Muranov and D. L. Davydenko

[**Keywords**: *award — setting aside*]

A Russian company applied to the State Commercial Court of the Belgorod Region with a petition that an award by an ad hoc arbitration court in Stockholm ordering the seizure of its financial assets to pay Swiss and Austrian companies should be set aside.

The Court granted the application.

The Federal State Commercial Court of the Central Federal Area (the court of second instance) upheld that decision.

The Presidency of the Supreme State Commercial Court of the Russian Federation set aside the decisions of the two courts and terminated the proceedings on the following grounds.

The two courts had set aside the foreign arbitral award on the grounds that the ruling on the dispute was based on the substantive law of the Russian Federation. In doing so, the judges had followed a rule of Russian procedural law under which, in certain cases provided for under international agreements entered into by the Russian Federation, a Russian State commercial court could challenge a foreign arbitral award invoked in application of Russian law.

The international agreements entered into by the Russian Federation that permitted the setting aside in the Russian Federation of foreign arbitral awards were the European Convention on International Commercial Arbitration, signed at Geneva on 21 April 1961, and the New York Convention. The court of first instance had considered both conventions, the court of second instance only the European Convention.

It had been a mistake in law to take the provisions of the New York Convention as justification for the setting aside in the Russian Federation of a foreign arbitral award, since the Convention did not deal with the question of setting aside foreign arbitral awards but set out the criteria that could be applied by an interested party for refusing recognition and enforcement of foreign arbitral awards in order to protect its interests against claims under such awards.

It was also unfounded to base the argument on the European Convention on International Commercial Arbitration. In view of the fact that the arbitral award was made in the territory and according to the procedural law of Sweden, where awards of arbitration courts made in its territory may be set aside, the award in this case ought to have been challenged in Sweden.

Case 951: New York Convention V (2)(b)
Russian Federation: Moscow Area Federal State Commercial Court
No. A40-3820/05-68-272
29 September 2005
Original in Russian
Published at http://kad.arbitr.ru, decisions by State commercial courts in the Russian Federation.

Abstract prepared by A. S. Komarov, National Correspondent, and A. I. Muranov and D. L. Davydenko

[**Keywords**: *award — recognition and enforcement; public policy*]

A Swiss company applied to the Moscow State Commercial Court for the recognition and enforcement in the territory of the Russian Federation of an award by the Arbitral Tribunal of Frankfurt am Main in a case heard by a single arbitrator for the seizure of financial assets from a Russian person.

The court of first instance granted the application.

The debtor lodged a cassational appeal with the Moscow Area Federal State Commercial Court (the court of second instance), on the grounds that the arbitral award was contrary to the public policy of the Russian Federation, since the Arbitral Tribunal had erred in the investigation of the factual circumstances of the case, had settled the dispute without inviting the participation of an appropriate respondent, in the form of Russian State authorities responsible for fulfilling the obligations of the former Union of Soviet Socialist Republics (USSR), and had incorrectly ruled on whether the debtor had liabilities under the contract and on the extent of such liabilities.

The Moscow Area Federal State Commercial Court upheld the ruling of the court of first instance, on the following grounds. An exhaustive list of grounds for refusing the recognition or enforcement of a foreign arbitral award appeared in article V of the New York Convention. The argument that the award of the Arbitral Tribunal was contrary to the public policy of the Russian Federation was unfounded, since the debtor had, in its submission, cited the mistakes made by the Arbitral Tribunal in investigating the factual circumstances of the case and, in particular, the question of whether the debtor had liabilities under the contract and their extent; in other words, it had expressed disagreement with the substance of the award by the Arbitral Tribunal.

The provisions of the New York Convention did not, however, give the State court of the country where the recognition and enforcement of a foreign arbitral award was sought the right to review the substance of such an award and, moreover, Russian procedural legislation directly prohibited such review of an arbitral award.

In addition, article V, paragraph 2 (b), of the New York Convention gave as one reason for refusal to recognize or enforce a foreign arbitral clause a situation in which it was not the arbitral award in itself that was contrary to public policy, as claimed in the plaintiff's cassational appeal, but its enforcement in the State where enforcement was sought.

Furthermore, the arguments of the debtor had not indicated that there were any circumstances that might provide evidence that enforcement of the arbitral award would be contrary to the public policy of the Russian Federation, which presumably meant the basic principles of law and order, generally recognized principles of conduct and morality and the defence interests of the country where enforcement of the foreign arbitral award was sought.

Case 952: New York Convention II (2); V (2)(b)
Russian Federation: Presidency of the Supreme State Commercial Court
No. 15954/06
19 June 2007
Original in Russian
Published in the journal *Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoy Federatsii* (Bulletin of the Supreme State Commercial Court of the Russian Federation), 2007, No. 10; http://kad.arbitr.ru, decisions of the State commercial courts of the Russian Federation; www.arbitr.ru, website of the Supreme State Commercial Court of the Russian Federation.

Abstract prepared by A. S. Komarov, National Correspondent, and A. I. Muranov and D. L. Davydenko

[**Keywords**: *award — recognition and enforcement; arbitration clause; competence of arbitrators; public policy; assignment*]

A Cypriot company applied to the Moscow State Commercial Court for the recognition and enforcement of an award by the London Court of International Arbitration (LCIA) to seize financial assets from a Russian company. The debtor objected to the application being granted, on the grounds, among others, that there was no arbitration agreement between it and the plaintiff. The plaintiff argued that it had acquired the right to claim from the credit agreement, which contained an arbitration clause, under an assignment of claims agreement with the person concerned, which, in turn, had obtained that right under the assignment of claims agreement from the party to the credit agreement in question.

The Court refused the application.

The Moscow Area Federal State Commercial Court (the court of second instance) upheld the ruling.

The grounds on which the two courts' judgements were based were as follows. The right to have a dispute arising out of the contract to be heard by LCIA had not been transferred to the plaintiff. The arbitration clause did not appear in the requisite written form. The documentation on the assignment of the claim did not contain provisions on extending the conditions of the arbitration clause to the new creditor. The plaintiff had not provided the court with evidence of a written agreement with the debtor on the transfer of disputes arising out of the agreement to LCIA for consideration. Moreover, enforcement of the award by LCIA was contrary to the public policy of the Russian Federation.

The Presidency of the Supreme State Commercial Court of the Russian Federation set aside these judgements and ordered a retrial, having come to the following conclusions.

According to the credit agreement containing the arbitration clause providing that disputes should be heard by LCIA, all the creditor's rights and obligations passed, under the agreement, in the event of an assignment of receivables, to the new creditor. The documentation on the assignment of the debt under the credit agreement did not indicate any restriction on the scope of the rights passing to the new creditor under the new agreement. Nor did such a restriction appear in the arbitration clause. Under the principle of freedom of contract, the new creditor had acquired the rights and obligations arising out of the credit agreement.

Under article II, paragraph 2, of the New York Convention, an arbitration agreement might be concluded by the parties by means of an exchange of letters. This action constituted the proof that an agreement on referring a dispute to arbitration had been concluded by the parties. The debtor had been present at the hearing of the case by LCIA and expressed no reservations as to the competence of the arbitrators. In a statement of defence it had agreed that the dispute should be heard by LCIA and submitted written statements on the case. LCIA had assessed the plaintiff's actions and asserted its competence. This decision had not been challenged by the parties and there had been no application on these grounds to the State courts for the arbitrators' decision to be set aside.

Bringing suit to protect rights that had been violated was part of an assignment transferred to a new creditor. Retaining a procedure for the settlement of disputes agreed beforehand by the parties and confirmed by an exchange of letters in the course of arbitration proceedings did not, as a rule, infringe the right of the assignee and provided appropriate protection for the interests of the debtor.

The lower courts had also failed to indicate in what way the consequences of enforcing the award were contrary to the public policy of the Russian Federation.

In view of the fact that the Russian Federation had a bankruptcy procedure for debtors, the court stated that a retrial must inquire into the affiliations of the plaintiff and the main shareholders of the debtor. On the basis of this information, it could assess the consequences of enforcing the LCIA award with a view to maintaining the Russian Federation's public policy, which consisted of maintaining a balance of interests between the debtor, its shareholders and persons affiliated with it, on the one hand, and its creditors, on the other, in implementing the country's bankruptcy procedure.

Case 953: New York Convention I; V (1)(e)
Russian Federation: Federal State Commercial Court of the North-West Area
No. A05-4274/2007
25 July 2007
Original in Russian
Published at http://kad.arbitr.ru, decisions of the State commercial courts of the Russian Federation.

Abstract prepared by A. S. Komarov, National Correspondent, and A. I. Muranov and D. L. Davydenko

[**Keywords**: *award — set aside*]

A Russian corporation lodged a petition with the State Commercial Court of the Arkhangelsk Region that an award against it by an arbitration court in Oslo in favour of a Norwegian company seeking to seize its financial assets should be set aside.

The Court terminated the proceedings, on the basis that there were no grounds on which to challenge a foreign arbitral award in the Russian Federation.

The plaintiff lodged a cassational appeal with the Federal State Commercial Court of the North-West Area (the court of second instance). The plaintiff argued that Russian procedural law provided for the possibility that an arbitral award invoked outside the Russian Federation on the basis of Russian legislation could be set aside

by a Russian court, where that was permissible under an international treaty entered into by the Russian Federation. The fact that the Oslo Arbitral Tribunal, in invoking the award, had considered the claimant's arguments, which were based on Russian legislation, meant that Russian legislation had also been applied for the foreign arbitral award. This entitled the person against whom it was invoked to apply to the relevant Russian court for it to be set aside.

The Federal State Commercial Court of the North-West Area upheld the decision of the court of first instance. It held that the plaintiff's citation of the New York Convention as a basis for challenging a foreign arbitral award in the Russian Federation was mistaken, since the Convention did not apply to the question of setting aside foreign arbitral awards. It only set out the criteria for refusal to recognize or enforce foreign arbitral awards, which criteria could be used by the person concerned to protect its interests under the procedure established under Russian procedural law.

Case 954: New York Convention III; V (1)(b)
Russian Federation: Presidency of the Supreme State Commercial Court of the Russian Federation
No. 10613/08
20 January 2009
Original in Russian
Published in the journal *Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoy Federatsii* (Bulletin of the Supreme State Commercial Court of the Russian Federation), 2009, No. 5; http://kad.arbitr.ru, decisions of the State commercial courts of the Russian Federation; www.arbitr.ru, website of the Supreme State Commercial Court of the Russian Federation.

Abstract prepared by A. S. Komarov, National Correspondent, and A. I. Muranov and D. L. Davydenko

[**Keywords**: *award — recognition and enforcement; notification; possibility of giving oral testimony; location of arbitration proceedings*]

A United States company applied to the Moscow City State Commercial Court for the recognition and enforcement of an award by the London Court of International Arbitration (LCIA) to seize financial assets from a Russian company.

The Court refused the application.

The basis for the refusal to recognize and enforce the award was article V, paragraph 1 (b) and (d), of the New York Convention, because the debtor had specifically argued, inter alia, that he had not been duly notified that the case was going to arbitration. What little notification he had received he had considered inadequate, since no single communication had contained full information concerning the time and place of the arbitration proceedings at a specific address in London. In the debtor's view, this had prevented it from obtaining a visa to the United Kingdom for its representative in good time and, as a result, giving oral testimony to the Court.

The Moscow Area Federal State Commercial Court (the court of second instance) set aside the lower court's decision and ordered a retrial. At the retrial, the court of first instance again refused the application, on the same grounds. On the second

occasion, the court of second instance upheld the ruling. The Presidency of the Supreme State Commercial Court of the Russian Federation overturned these decisions and granted the application for the award to be enforced, on the following grounds.

The question about the form of a proper notification of the parties concerning arbitration proceedings in a permanent arbitral tribunal should be settled in accordance with the rules of that tribunal. Under article 14.2 of the LCIA Rules, unless otherwise agreed by the parties, the arbitral tribunal had the widest discretion to discharge its duties. The action of the arbitral tribunal in setting the date of the hearing and proposing London as the location of arbitration complied with article 16.1 of the Rules. Meanwhile, under article 19.2 of the Rules, the arbitral tribunal fixed the date, time and physical place of any meetings and gave the parties reasonable notice thereof. Notification was not required to be in the form of a single document.

The location of the arbitration proceedings in London had been agreed by the parties to the dispute when they concluded the loan contract. The arbitral tribunal had informed the respondent by facsimile almost three months in advance that the hearing would be held in London on a specified date at a location to be agreed by the parties and subsequently confirmed the date by facsimile more than six weeks before the hearing, and again a month before. The debtor had not denied having received these communications.

The absence in the facsimile sent almost three months before the hearing of an indication of the time at which the hearing would start or the exact address in London where it would be held could be considered legally significant for the purposes of obtaining a visa or to have misled the company as to the time limits for obtaining a visa for its representatives or the country to which application should be made. Moreover, the debtor had informed the court that its representatives had not applied for a visa to the United Kingdom, without which they would not have been able to participate in the oral hearings. The debtor had therefore failed to take the necessary action that it claimed itself was essential for the arbitration proceedings, thus violating the requirements of article 14.2 of the Rules.

Case 955: New York Convention VI
Russian Federation: Moscow Region State Commercial Court
No. A 41-20447/08
23 April 2009
Original in Russian
Published at www.asmo.arbitr.ru, website of the Moscow Region State Commercial Court.

Abstract prepared by A. S. Komarov, National Correspondent, and A. I. Muranov and D. L. Davydenko

[**Keywords**: *award — recognition and enforcement; procedure; security*]

A Ukrainian company appealed to the Moscow Region State Commercial Court for the recognition and enforcement of an arbitral award invoked by the International Commercial Arbitral Tribunal of the Ukrainian Chamber of Commerce and Industry requiring a Russian company to pay off a financial debt.

The Court ruled that the proceedings should be suspended until the decision of the Ukrainian court on the debtor's petition to set aside the arbitral award had come into force.

The plaintiff lodged an application with the Court, on the basis of Russian procedural legislation on interim measures of protection (including seizure and confiscation) and article VI of the New York Convention, that interim measures of protection should be adopted with a view to the seizure and confiscation of financial assets or other property belonging to the debtor. The plaintiff stated that the remaining financial assets in the debtor's possession had been seized and confiscated by order of the customs, while, according to the accountant's report, the debtor's debts amounted to 99.05 per cent of its general assets. The plaintiff maintained that, unless interim measures of protection were taken, it would be impossible to implement the tribunal's decision on enforcing the arbitral award.

The Court came to the conclusion that the plaintiff had justified the need to take interim measures of protection, since, if they were not taken, it would be harder to implement the tribunal's decision on enforcing the arbitral award, which could cause the plaintiff considerable material harm. In its ruling, the Court granted the application for seizure and confiscation, on the basis of Russian procedural legislation on interim measures of protection (including seizure and confiscation) and article VI of the New York Convention.

The Court ruled that the suitable security referred to in article VI of the New York Convention could be provided by the institution of Russian interim measures adopted by the Court on the application of the party in whose favour the arbitral award had been invoked.

A higher appeal court rejected the debtor's application that interim measures of protection should be adopted.