

# Recognition and Enforcement of Foreign Arbitral Awards in Russia revisited: the case of Hipp GmbH & Co. Export KG (Austria) v. OOO SIVMA Detskoe Pitanie & ZAO SIVMA (Russia)

## **Kluwer Arbitration Blog**

December 6, 2010

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Please refer to this post as: Michael Wietzorek, 'Recognition and Enforcement of Foreign Arbitral Awards in Russia revisited: the case of Hipp GmbH & Co. Export KG (Austria) v. OOO SIVMA Detskoe Pitanie & ZAO SIVMA (Russia)', *Kluwer Arbitration Blog*, December 6 2010, <http://arbitrationblog.kluwerarbitration.com/2010/12/06/recognition-and-enforcement-of-foreign-arbitral-awards-in-russia-revisited-the-case-of-hipp-gmbh-co-export-kg-austria-v-ooo-sivma-detskoe-pitanie-zao-sivma-russia/>

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Paul Hobeck and Christian Stubbe explained that internationally operating companies fear a "surprising interpretation of the term public policy" [fn]"eine überraschende(...) Auslegung des Begriffs Ordre Public", *Hobeck / Stubbe*, *Genese einer Schiedsklausel (The Genesis of an Arbitration Clause)*, *German Arbitration Journal (SchiedsVZ)* 2003, p. 15, 19.[/fn] when it comes to the recognition and enforcement of foreign arbitral awards. Indeed, Russian public policy has been notorious for being unpredictable. *Diana V. Tapola* concluded in 2006 that "Russian judicial practice is inundated with a great variety of judgments and therefore no uniform interpretation can be given on the question of public policy of the RF." [fn]*Tapola*, *Enforcement of Foreign Arbitral Awards: Application of the Public Policy Rule in Russia*, 2006 *Arbitration International* Vol. 22, No. 1, p. 151, 160[/fn] It has been argued that this statement remains true in 2010, after an analysis of recent Russian court cases, by *Eugenia Kurzynsky-Singer* and *Dmitry Davydenko*. [fn]*Kurzynsky-Singer / Davydenko*, *Materiellrechtlicher ordre public bei der Anerkennung und Vollstreckbarerklärung von schiedsgerichtlichen Urteilen in der Russischen Föderation - Eine Rechtsprechungsanalyse (Substantive law public policy with regards to the recognition and declaration of enforceability of arbitral awards in the Russian Federation - an analysis of court decisions)*, *German Arbitration Journal (SchiedsVZ)* 2010, p. 203.[/fn]

*David Goldberg* and *Eugenia Levine* concluded on this blog on 31 August 2010 that "[i]n the past, Russian authorities have exhibited some reluctance to enforce arbitration awards or court decisions rendered outside Russia against Russian entities" and that Russian courts "have previously refused enforcement on the basis of very broad interpretations of public policy." However, in the very same contribution, the authors pointed out that "there is a recent trend within the Russian judiciary towards greater support of arbitration and litigation taking place abroad." This positive trend, based on the cases that were provided as evidence, is certainly a good sign. Other recent Russian decisions, such as the decision of the Supreme Arbitrazh / Commercial Court in the case of *Hebenstreit-Rapido GmbH (Germany) v. OAO Konditerskaya Fabrika "Saratovskaya"* (Russia), decided on 22 September 2009, further prove the statement made to be true.

Does this mean that the recognition and enforcement of foreign arbitral awards in the Russian Federation is predictable now?

To answer this question, one may have a look at a very recent decision (26 August 2010) by the Arbitrazh / Commercial Court for the City of Moscow: On 6 July 2005, the Austrian company Hipp GmbH & Co. Export KG concluded an exclusive distributorship contract with the Russian OOO SIVMA Detskoe Pitanie (Children's Nutrition) which contained an arbitration clause referring to the Vienna International Arbitration Center (VIAC) and the Vienna Rules. On 6 November 2006, Hipp concluded a guarantee contract with the OOO and the ZAO SIVMA, according to which the ZAO declared to be jointly reliable for the obligations of the OOO towards Hipp. This guarantee contract also contained an arbitration clause referring to VIAC and the Vienna Rules. Based on these arbitration clauses, an arbitral tribunal constituted according to the Vienna Rules decided on 19 August 2009 that the OOO and the ZAO jointly had to pay approximately 4,271,060 Euros, as well as interest and procedural costs, to Hipp.

Hipp filed a request for recognition and enforcement of this arbitral award in the Arbitrazh / Commercial Court for the City of Moscow on 18 January 2010, which refused this request on 25 March 2010. The Arbitrazh Court based its decision on the reasoning that delivery from Hipp to the OOO did not take place as a fulfillment of the 2005 contract, but as fulfillment of a frame contract concluded between Hipp and the OOO in 2001, which contained a different forum selection clause. This clause referred all disputes to the "Arbitrazh Court" of the country of the seller. The Court held that this clause was ambiguous, since it did not specify which court has local jurisdiction and furthermore, the German notarized translation of the contract – where it says "Arbitrazhnyj sud" (Arbitrazh Court, or: State Commercial Court) in Russian – used the term "Schiedsgericht" (arbitration court / arbitral tribunal), which corresponds to the Russian term "tretejskij sud". Thus, since it was not specified which language should apply in case of ambiguities, the parties had not concluded a valid arbitration clause. In addition, the Court held that since there was no principal contract at the moment that the guarantee contract was concluded, the guarantee contract is null and void; thus, the VIAC tribunal rendered an arbitral award in a dispute where it did not have jurisdiction.

Following an appeal to the Federal Arbitrazh / Commercial Court for the Moscow District by Hipp, the decision of the Arbitrazh Court for the City of Moscow was reversed on 20 May 2010. The Federal Arbitrazh / Commercial Court for the Moscow District found that in the arbitral award, it was established that the delivery took place both in fulfillment of the 2001 contract and the 2005 contract. It further held that the Arbitrazh / Commercial Court had no legal basis to revise the arbitral award on the merits. With regards to the guarantee contract, the Federal Arbitrazh / Commercial Court held that the contract clearly established that all disputes in relation with this contract were subject to arbitration according to the Vienna Rules, with all legal consequences.

As a consequence of the decision of the Federal Arbitrazh / Commercial Court for the Moscow District, Hipp again requested recognition and enforcement of the arbitral award in the Arbitrazh / Commercial Court for the City of Moscow on 3 June 2010. The Arbitrazh Court again refused to recognize and enforce the award on 26 August 2010, elaborating further on its previous findings that the VIAC arbitral tribunal had no jurisdiction to hear the case with regards to the OOO and consequently, also with regards to the ZAO. It furthermore based its refusal of recognition and enforcement on Art. V Sec. 1 c of the New York Convention and stated that the VIAC award contradicts public policy.

It should be noted that the Arbitrazh / Commercial Court for the City of Moscow, in its first decision in the Hipp case, had not made reference to public policy. The second decision of the Arbitrazh / Commercial Court for the City of Moscow, disregarding the previous decision of the Federal Arbitrazh / Commercial Court, shows that despite the positive trend noted above, the court practice regarding recognition and enforcement of foreign arbitral awards in the Russian Federation remains

unpredictable, as of August 2010, and that Russian lower courts continue to resort to “public policy” in order to prevent foreign arbitral awards from being recognized.

The decision by the Arbitrazh / Commercial Court for the City of Moscow will not be the last one in this case: As expected, Hipp made use of the right to appeal against the second decision of the Arbitrazh / Commercial Court for the City of Moscow in the Federal Arbitrazh / Commercial Court for the Moscow District on 16 September 2010, where the next hearing in this case will be held on 27 October 2010. Perhaps the upcoming decision will further clarify the interpretation of “public policy” under Russian law.