

# Kluwer Arbitration Blog

## The Material Scope of the 1958 New York Convention: Russian Courts Make It Broader

Mikhail Samoylov (Egorov Puginsky Afanasiev & Partners) · Tuesday, September 25th, 2018

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) has its own scope – it states that it “*shall apply to the recognition and enforcement of arbitral awards*”. Only decisions made by arbitrators are to be considered “awards” within the meaning of the New York Convention<sup>1</sup>, rather than decisions handed down by judges. As one prominent academic notes: “[t]here is no universal international treaty governing the recognition and enforcement of foreign court judgments.”<sup>2</sup>) Despite that, Russian courts are invoking the New York Convention in the *exequatur* proceedings of foreign court judgements.

This blog post will first briefly reveal the results from the research conducted by the author on the issue (I). The next part of this contribution then discusses some possible reasons why Russian courts apply the New York Convention erroneously (II), and some consequences of such practices (III). The author summarizes conclusions in a final part (IV).

### I. A Case Study of Erroneous Practice

Research carried out by the author shows that in at least 81 cases, which were considered in recent years, Russian courts invoked the New York Convention in the *exequatur* proceedings of foreign court judgements.

The table below reveals (i) the countries where foreign court judgements were rendered (the nationality of a foreign court judgement); and (ii) the number of *exequatur* proceedings in Russian courts in which the New York Convention was applied to such judgements:

N	The nationality of a foreign court judgement	The number of <i>exequatur</i> proceedings in Russia
1.	Belarus	6
2.	Cyprus	3
3.	China (Hong Kong)	1
4.	Finland	2

5.	France	2
6.	Georgia	1
7.	Italy	2
8.	Japan	2
9.	Kazakhstan	29
10.	Kyrgyzstan	2
11.	Lithuania	4
12.	Moldova	4
13.	Mongolia	1
14.	Netherlands	1
15.	Poland	1
16.	Ukraine	17
17.	United Kingdom of Great Britain and Northern	2

Moreover, Russian courts apply the New York Convention even in cases where a foreign judgement was rendered in a State (a territory) that is not a party to the New York Convention. For instance, in case No A41-55167/16, the New York Convention was invoked for the recognition and enforcement of the Nampkhosky court on sea matters of the Democratic People's Republic of Korea in Russia.

## II. Prerequisites for Erroneous Practice

There might be several possible explanations for such erroneous practice. First, there is a dual meaning of the word "arbitrage" in the Russian language. The word "*arbitrazh*" in Russian comes from "arbitrage" in French. While in French, "arbitrage" is an alternative method of dispute settlement ("*[r]èglement d'un différend ou sentence arbitrale rendu par une ou plusieurs personnes, auxquelles les parties ont décidé, d'un commun accord, de s'en remettre.*"<sup>3)</sup>), in the terms of Russian law and the language, the word has a dual meaning, and it means :

(i) dispute resolution by a state court - an *arbitrazh* court;

(ii) dispute resolution by arbitral tribunals.

This dual meaning confuses Russian courts and foreign courts. For example, a Sweden court in the *exequatur* proceedings, confused by a translation of "an *arbitrazh* court" from Russian to Swedish, applied Sections 54-55 of the Swedish Arbitration Act (which correspond to Article V of the New York Convention) and declared the ruling of a Russian *arbitrazh* court enforceable.<sup>4)</sup> However, the Swedish Supreme Court corrected the lower court, clarified that in the case at hand, the enforcement was sought for a *court* ruling, rather than for an *arbitral award* (Swedish Supreme Court decision on 30 March 2017, Case No. Ö 5209-13).

Further misunderstanding can be possibly caused by the wording of Russian procedural law. Article 241 (1) of the *Arbitrazh* Procedure Code of the Russian Federation reads as follow:

**“foreign courts judgements <...>, and awards of arbitral tribunals and international commercial arbitration courts are recognized and enforced in the Russian Federation by *arbitrazh* courts, if the recognition and enforcement of such decisions are stipulated in an international treaty of the Russian Federation and in federal law.”** (emphasis added).

In 1996, the Supreme *Arbitrazh* Court of the Russian Federation clarified that the New York Convention deals only with arbitral awards, whereas the recognition and enforcement of foreign court judgements are governed either by an international treaty to which Russia is a party to, or by Russian law. The notion of “a foreign court judgement” is not equal to the notion of “an arbitral award”.

Article 241 (1) of the *Arbitrazh* Procedure Code of the Russian Federation, which became law in 2002, rests upon the mentioned rationale. One would say that the same approach should have been true regarding its application by Russian courts. Notwithstanding the clarification of the highest court, Russian courts often consider the notions “a foreign court judgement” and “an arbitral award” as the synonyms of a common notion – a court judgement. For example, in case No A40-187536/2015 the *Arbitrazh* court of the city of Moscow threatened a LCIA award as a foreign court judgement. Opposite, in case No A53-11372/2017, the *Arbitrazh* court of the Rostov region treated a foreign court judgement as an arbitral award, and stated:

*“Grounds for refusing the recognition and enforcement of a decision of the Economical court of the Kharkov region [Ukraine] <...> providing for Article V of the [New York] Convention are not established <...> the petition [for the enforcement] shall be satisfied.”*

Finally, recognizing that Russia may not have an international treaty on the recognition and enforcement of court judgements with a country where a court judgment was rendered, Russian courts often use the New York Convention instead of such an international treaty, or use the New York Convention simultaneously with an international treaty (*see, e.g.,* the decision of the *Arbitrazh* court of the Pskov region dated 16 February 2017 in case No A52-2950/2016).

### **III. The Consequences of Erroneous Application**

The erroneous application of the New York Convention in the *exequatur* proceedings of foreign court judgements may, and, in fact, leads to the adverse effects to judgment creditors. At the outset, in 23 of 81 examined cases, Russian courts refused the recognition and enforcement of foreign court judgements and based its conclusions on the provisions of the New York Convention. Articles V(1)(b) and V(2)(b) of the New York Convention were the article most frequently applied by Russian courts in those cases.

#### *(a) Proper Notice*

Article V(1)(b) of the New York Convention requires that the party against whom the award is invoked was properly notified of the appointment of the arbitrator and of the arbitral proceedings. Although Russian procedural law contains similar provisions regarding foreign court judgements, Russian courts apply Article V(1)(b) of the New

York Convention instead of a relevant provision of a procedural law. For example, in case No A47-2947/2010, the *Arbitrazh* court of the Orenburg region refused the enforcement and recognition of a Kazakhstan court judgement having established that the judgement debtor was not properly notified of a court proceeding in Kazakhstan.

#### *(b) Public Policy*

The public policy defence is one of the most often invoked by the parties against whom arbitral awards, or foreign courts decisions, are invoked.

Russian procedural law entitles Russian courts to refuse the enforcement of a foreign court judgement if the enforcement of such judgement would violate of the Russian public policy (Article 244 (1)(7) the *Arbitrazh* Procedure Code the Russian Federation). Hence, recourse to the New York Convention is not needed. Nevertheless, Russian courts invoke Article V(2)(b) of the New York Convention, instead of a relevant provision of the *Arbitrazh* Procedure Code of the Russian Federation. One among numerous examples of such application is the following statement given by the *Arbitrazh* court of the city of Moscow in the case No A40-29792/15:

*“[t]he court considers that consideration on the territory of the Republic of Moldova of a dispute that falls under the exclusive competence of a Russian arbitrazh court, violates sovereignty of the Russian Federation, Article V(2)(b) of the New York Convention, <...>, therefore the recognition and enforcement of such decision should be rejected due to violation of the public order of the Russian Federation.”*

#### **IV. Conclusion**

The application of the New York Convention to foreign court judgments is undoubtedly an erroneous practice of Russian courts, and such practice should be discontinued by the Russian Supreme Court. Until that moment, the following guidance may be useful for a party seeking enforcement of a foreign court judgment in Russia:

1. All procedural requests submitting to Russian courts shall be drafted clearly, stressing that enforcement of the foreign court judgment is the aim of *exequatur*, rather than enforcement of an arbitral award;
2. The party shall keep in mind that Russian courts can invoke Article V (1) of the New York Convention by its own discretion. For example, in case No A51-14965/2016, the *Arbitrazh* court of the Primorsky Krai faced with the recognition and enforcement of a court judgement rendered by a Hong Kong court. Despite the fact that a judgement debtor had no objections to the enforcement of the judgement, the court, guided by Article V(1)(b) of the New York Convention, examined whether the judgement debtor was properly notified of a court proceeding at the Hong Kong court;
3. Legal arguments showing to a court that the New York Convention is not applicable in the *exequatur* proceedings shall be put into the case at an early stage of the proceedings. A reference to the Russian Supreme *Arbitrazh* Court letter of 1996 is a useful argument.

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### References

- ↑<sup>1</sup> *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958) (2016) para 22.
- ↑<sup>2</sup> Gary B. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (Fifth Edition) (Kluwer Law International 2016) p. 129  
*Le Nouveau Petit Robert*. Dictionnaire alphabétique et analogique de la langue française ; texte remanié et amplifié sous la direction de Josette Rey-Debove et Alain Rey (Dictionnaires Le Robert, Paris 2009), p. 129
- ↑<sup>3</sup> française ; texte remanié et amplifié sous la direction de Josette Rey-Debove et Alain Rey (Dictionnaires Le Robert, Paris 2009), p. 129
- ↑<sup>4</sup> Eric Johnson, *'The "Award" Not Recognized - and Rightfully So'* (10 April 2017).

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