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A Recent ICC Award Enforcement in Russia: are Russian Courts Really Becoming More Arbitration-Friendly?

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In post-Soviet time Russian courts have already developed quite a vast practice of recognition and enforcement of international arbitral awards. One can even already fetch out some trends in such practice. Thorough case study shows that certain distrust to international arbitration and unexpected obstacles to the enforcement of the awards caused by lack of experience in dealing with foreign-related matters, reflected in some early judgments, gradually go.

In Russia the decisions on requests for enforcement of the arbitral awards made in disputes of commercial or other economic nature are vested with the commercial courts ("arbitrazhnyie sudy"). It should be mentioned that the arbitrazh courts have nothing in common with arbitral (non-state) tribunals, whether domestic or international. So the term "arbitrazh" ("arbitral" in the Russian language) as used in the modern Russian law has two meanings: the first stands for arbitral (non-state) tribunals while the second implies the state commercial courts. This is a particular heritage of the Soviet times, caused by historic peculiarities of domestic regulations.

A new noteworthy case is Venture Global Engineering LLC v. Avtotor-Holding Group OJSC heard by the Commercial Court of Kaliningrad region (court of first instance) and Federal Commercial Court of North-Western Circuit (court of cassation) in 2009. The arguments of the parties in this case as well as the courts' approach in dealing with them are quite typical for the last years' cases on foreign arbitral awards enforcement; hence worth special attention. The arbitration took place in Stockholm. On 22 December 2008 the ICC International Arbitration Court consisting of a sole arbitrator in case No. 13756/EBS/VRO ordered the Russian OJSC Avtotor-Holding Group to pay debt from the agency agreement in the amount of 1,233,917 USD, penalty at the rate of 8 % annually till the date the award was rendered, 63,000 USD of arbitration costs and 230,444.94 USD of attorney fees in favor of the US Venture Global Engineering LLC. Furthermore, upon the claimant's request, the arbitrator obliged the defendant to prepare and provide to the claimant a complete and correct detailed list of items acquired from General Motors Corporation and some other information related to the agency agreement.

The debtor failed to fulfill the award voluntarily and the creditor applied at the Commercial Court of Kaliningrad region for its recognition and enforcement. The court granted recognition and enforcement by its ruling of 27 October 2009 in case No. A21-802/2009. The debtor challenged the court's ruling at the Federal Commercial Court of North-Western Circuit. The range of grounds for refusal to recognize and enforce an award under the New York Convention being quite limited and the qualification of international arbitrators generally being high, yet as a matter of fact the

debtors often advance plenty of reasons to oppose the recognition and enforcement. The case in question illustrates it well. The debtor advanced, to name but a few, the following objections:

> 1) The arbitrator rejected four of the five respondent's motions to call for crucial evidence and the motion to demand and hear a witness and thus the respondent was unable to present his case;
> 2) The recognition and enforcement of the award would be contrary to Russian public policy as:
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> > (a) the arbitrator incorrectly decided on the validity of the agency agreement;
> > (b) the arbitrator set the agent's fees while neglecting the facts of the case and the evidence presented by the parties;
> > (c) the penalty in the amount of 8 % awarded under the law of the state of Michigan constituted punitive damages and was inadequate to the consequences of the breach. Such adequacy is an integral part of the Russian public policy.

However, the court of cassation rejected all the objections and upheld the lower court ruling.

The court clearly stated that the said debtor's arguments amounted to attempts to review the case on the merits. In particular, the court refused to check the validity of the agency agreement and noted that this issue was fully in the competence of the arbitrator as it fell within the scope of the arbitration clause, and that the arbitrator thoroughly examined such validity. Any objections concerning reconsideration of specific facts of the case established by the arbitral tribunal are irrelevant in the case on the recognition and enforcement of the arbitral award.

The court dealt in detail with the public policy argument. It is worth mentioning that invoking Russian public policy by debtors in the proceedings on the enforcement of the awards has been very popular. This is due to the past inclination of the Russian courts to broadly interpret this exception. In this case the court expressly mentioned that an essential difference between a foreign law applied by the arbitrator and Russian law does not itself constitute ground to apply the public policy clause. Otherwise it would be impossible to apply foreign law in Russia at all, which would be contrary to the principles of Russian law. 'Russian public policy' is a totally different notion than 'Russian law' and embraces "the bases of the morality, core economic and cultural traditions which formed Russian society, main religious postulates and fundamental principles of Russian law".

The court said that the public policy clause may be applied only in cases where the application of foreign law and/or enforcement of the arbitral award can engender a result inadmissible from the viewpoint of the Russian 'legal sense'. The court held that there is no reason to believe that enforcement of an award of debt and penalty by a Russian company to a foreign company under agency agreement could engender such a result.

The case reflects positive trends in the practice of enforcement of arbitral awards in Russia. Indeed, there are already many a judgment which confirm that a judicial review on the merits of a case resolved by an arbitrator is inadmissible, including the judgments by the High Commercial Court

of the Russian Federation which is the court of the highest instance in the system of Russian commercial courts.

In particular, in a recent case the Federal Commercial Court of Moscow Circuit (ruling of 27 August 2009 ??-?40/8155-09) held that “an argument that the awarded damages amount does not correspond to the principle of adequacy of civil liability measure to the consequences of the breach falls into the merits of the resolved case and does not pertain to the grounds for refusal of recognition and enforcement of a foreign judgment and a foreign arbitral award”. As it happens, understanding the approach of this court is of great importance: many big Russian companies involved in international business are registered in the Russian capital, and thus in accordance with the Russian procedural rules many cases on the recognition and enforcement of foreign arbitral awards are heard by the Commercial Court of Moscow in the first instance and by the Federal Commercial Court of Moscow Circuit in the cassation instance.

One of the main points illustrated by the above case is that now to oppose a foreign arbitral award recognition and enforcement using the public policy exception the debtor must refer to some grave consequences which such recognition and enforcement would engender in Russia. What such consequences could be is a good subject for a separate discussion.

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