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The Forgotten Bilateral Arbitration Agreement Between Sweden and The USSR: A New View on Enforcement of Sweden and Russia

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It is well known that the New York Convention is widely recognized as a foundational instrument of international arbitration. In addition to this Convention, there are also international bilateral agreements in which Paragraph 1 of Article VII of the New York Convention specifically refers to and determines the relationship between its provisions and other agreements.

One interesting and noteworthy bilateral agreement is the Trade and Payments Agreement concluded between the USSR and Sweden in Moscow on 7 September 1940 (the "Agreement"). Although this agreement was entered into during the Soviet time, it still continues to operate in Russia, particularly with regard to Article 14 of the Agreement with the Annex "Agreement on Arbitration Courts" and Article 15 dealing with arbitral awards' enforcement. (The articles are quite lengthy; therefore, their texts were omitted from the note).

This Agreement was signed 70 years ago during the Soviet era, yet after the collapse of the USSR, Sweden and new Russia decided to retain it. On 29 September 1993, a Protocol was signed in Stockholm on the termination of application with regard to the relations between the two countries concerning certain previous agreements. However, according to Article 3 of the Protocol, that termination did not affect the legal force of Articles 14 and Article 15 of the 1940 Agreement. The Protocol was ratified in Russia by Federal Law ? 18-FZ on 17 February 1995 and became effective on 1 May 1995.

I would like to note five reasons why, in my opinion, the provisions of the 1940 Agreement require particular consideration.

Firstly, Stockholm is probably the city where the majority of arbitration cases to which Russia is a party to are considered, and the awards are subsequently enforced in Russia. This situation is inherited from the Soviet period.

Secondly, the provisions concerning recognition and/or enforcement of arbitral awards contained in the 1940 Agreement differ from the New York Convention's provisions as they are less generous to the prevailing party. Accordingly, it should make quite a difference for such a party, as well as for debtors under such awards, whether the provisions regarding arbitration and enforcement of arbitral awards in the 1940 Agreement are applicable or not. This issue is also very important for Russian courts, especially for the High Arbitrazh Court which is responsible for

shaping a uniform judicial practice.

Thirdly, the Agreement concerns provisions which have prevailing force over domestic Russian regulations. Their correct application by Russian courts do not merely constitute controversial issues which are imperative and sensitive for society, economy and state but also form a sphere which has not been completely mastered in Russia so far, and which involves a multitude of issues and problems.

Fourthly, the provisions of the Agreement are unique: there are no other ones of a like nature in any other international agreement to which Russia is a party to.

Finally, the analysis of such provisions results in rather curious and even somewhat unexpected legal conclusions.

There are two important points in the effective provisions of the 1940 Agreement: (1) the special procedure of constituting the arbitral tribunal according to the provisions of the Annex and; (2) the two grounds for refusal to recognize and enforce an arbitral award which differ from the grounds provided for in the New York Convention and the Russian Law “On International Commercial Arbitration”. The first ground for refusal to enforce an arbitral award under the Agreement is when an application to set aside an arbitral award is being considered at the seat of arbitration. This is sufficient ground to refuse recognition and enforcement of the award in Russia under Article 15 of the Agreement. A similar ground for refusal can be the fact that the time for challenging the arbitral award in its seat has not yet expired.

The second ground for refusal is “the award being contrary to the state legal principles of the country where arbitral award enforcement is requested”. The concept of “state-legal principles” is used in Article 15 along with the concept of “public order”, and not as a synonym to the latter. The concept of “state-legal principles” is distinct from the traditional public policy exception. The concept of “state legal principles of Russia” is similar to the “constitutional legal principles of Russia”, which is broader than the concept of “public order of Russia”, and would aggravate problems of enforcement of arbitral awards.

In 1940 nobody in the USSR thought there was a difference between the concepts of “public order” and “state legal principles”, except perhaps that the former was considered more acceptable for foreign states and the latter as more suitable for the USSR. From the viewpoint of modern Russian domestic law, the recognition of the two concepts as “separate” was confirmed in 1993. It is obvious that the possibility of using the concept as is in legal practice creates the risk that fewer awards will be enforced in Russia.

Despite highlighting the relevant provisions of the Agreement and their legal force as confirmed by the 1993 Protocol, it is high time for such provisions to be abolished. It is an outdated Agreement that most lawyers in Russia and Sweden are not aware of, and if they were aware of it, it would almost certainly lead to a movement to abolish the articles in effect.

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