Kluwer Arbitration Blog

An unlikely mix – the Russian courts, a French cement company, and the 1961 European Convention on International Commercial Arbitration

Mike McClure (Herbert Smith Freehills LLP) · Wednesday, September 28th, 2011 · Herbert Smith Freehills

In 1961, three years after the adoption of the New York Convention, the European Convention on International Commercial Arbitration was adopted in Geneva (the Geneva Convention). At the time, the Geneva Convention was noteworthy as being the first international instrument to refer to "international commercial arbitration" by name. Today, however, many practitioners give little consideration to the Geneva Convention and consider it to be of no more than academic interest. The likely explanation for this position is the Geneva Convention's limited scope of application, in particular the fact that its application depends not only on both the state of the award's origin and the state of enforcement being signatories, but also requires that all parties to an arbitration agreement must have their place of residence or seat in a contracting state. This is a particular problem given the fact that the Geneva Convention has only been ratified by 31 states. Indeed, while the signatories include many EU states and several non-EU members such as Russia, notable absentees include Switzerland, Sweden and the UK (a full list of signatories is set out the end of this blog). Nonetheless, as a recent decision from the Arbitrazh Court of Kemerovo Oblast in Siberia demonstrates, should the relevant factors align so that the Geneva Convention is triggered, it can be a useful piece of legislation, particularly in relation to enforcement of arbitral awards.

The Geneva Convention regulates issues such as the appointment of arbitrators (Article IV), objections to jurisdiction (Article V), and the applicable law (Article VII). However, it is the Geneva Convention's provisions in relation to enforcement that are its most prominent feature. In particular, Article IX(2) of the Geneva Convention which limits the application of Article V(1)(e) of the New York Convention.

Article V(1)(e) of the New York Convention provides that recognition and enforcement of an award may be refused if the award has been set aside in the country in which it is made. However, Article IX(2) of the Geneva Convention provides that the fact the award has been set aside will only be relevant if the reason it was set aside was one of an exhaustive list of reasons set out in Article IX(1) of the Geneva Convention. The list of reasons in Article IX(1) of the Geneva Convention essentially mirror the grounds set out in Article (V)(1)(a) to (d) of the New York Convention (party incapacity; lack of notice and a right to be heard; issues beyond the scope of the arbitration agreement; and irregularity in the composition of the tribunal or the procedure). Notably, however, the exceptions set out in Article V(2) of the New York Convention do not appear in Article XI(1) of the Geneva Convention (namely: (i) lack of arbitrability; and (ii) public

policy). Therefore, if an award has been set aside in the country of origin on the basis of these reasons (or, indeed, any other reason not set out in Article IX(1) of the Geneva Convention), the enforcing state's courts may not refuse enforcement of the award on this basis.

Despite the limitations imposed by Article XI of the Geneva Convention, it is important to note that an enforcing state that is party to the New York Convention and the Geneva Convention can still refuse to enforce should the laws of the enforcing state provide that the subject matter of the dispute cannot be resolved by arbitration, or that enforcement would be contrary to public policy. Rather, the limiting factor in the Geneva Convention is that unless an award was set aside in the country of the arbitration for one of the reasons listed in Article IX(1), then the fact it was set aside cannot be used as a reason to refuse enforcement.

There are also two other notable features of the Geneva Convention. First, the Geneva Convention explicitly provides that "legal persons of public law" can validly conclude arbitration agreements (Article II). The term "legal persons of public law" has a wide scope and includes public corporations, the state itself and any of its independent state agencies as well as any federal states. This provision overrides any contradictory law within the home state's jurisdiction, although it is possible for contracting states to make a reservation on this issue (to date, only Belgium has done so).

Second, the Geneva Convention contains provisions that may help overcome the problem of defective/pathological arbitration agreements (Article IV). In particular, the Geneva Convention provides a mechanism for determining certain details of ambiguous and unclear arbitration agreements, including: (i) whether the parties to an arbitration agreement have to refer their dispute to ad-hoc or institutional arbitration; and (ii) as regards institutional arbitration, which institution a dispute must be referred to.

Nonetheless, as set out at the beginning of this blog, the significant limitation of the Geneva Convention is the fact that its application depends not only on both the state of the award's origin and the state of enforcement being signatories, but also that all parties to an arbitration agreement must have their place of residence or seat in a contracting state. Coupled with the fact that the Geneva Convention has been ratified by only 31 states, the Geneva Convention's application is, in reality, severely limited.

However, on 20 July this year, the Arbitrazh Court of Kemerovo Oblast in Siberia relied on the Geneva Convention to recognise a partial ICC award that had been set aside in the country of the seat of the arbitration (Turkey). The decision is a timely reminder of the potential benefits of the Geneva Convention in promoting the enforcement of arbitral awards should all the relevant factors necessary to trigger the Geneva Convention apply.

Ciments Francais, a French company, Sibirskiy Cement, a Russian company, and Cimento Istanbul, a Turkish company, signed an SPA in 2008 under which Sibirskiy Cement undertook to buy shares in various Turkish companies controlled by Ciments Français. Sibersky paid a €50 million advance. The deal fell through and Ciments Français filed for arbitration under the ICC Rules with its seat in Istanbul. The tribunal rendered a partial award which declared that the agreement was valid and Clements Français was entitled to retain the €50 million advance.

The award was subsequently set aside by a Turkish court on three grounds set out in the 2001 Turkish arbitration law. These grounds were: (i) that the arbitrators exceeded their authority by

ruling on matters that fell outside the scope of the arbitration; (ii) that the case overran the time limits in the ICC Rules; and (iii) that the award violated Turkish public policy.

Despite the Turkish court ruling, Ciments Français applied to the Arbitrazh Court for recognition of the partial award. Under Article 13(4) of the Arbitrazh Procedure Code of the Russian Federation, if an international treaty signed by the Russian Federation establishes rules other than those which are provided for by the law, the Arbitrazh Court shall apply those rules of the international treaty. In this scenario, the two relevant treaties were the New York Convention and the Geneva Convention.

As set out above, under Article IX(2) of the Geneva Convention, where states are party to both the New York Convention and the Geneva Convention, the provisions of the Geneva Convention regarding recognition and enforcement of awards that have been set aside will prevail. Accordingly, the Arbitrazh Court concluded that none of the grounds for setting aside the award were present in Article IX(I) of the Geneva Convention. It therefore found in favour of Ciments Français and recognised the partial award.

The decision is significant for two main reasons. First, it is the first known instance where a Russian court has agreed to recognise an ICC award which has been annulled at the place of arbitration. This brings Russia (historically a jurisdiction that is perceived as hostile to international arbitration) into line with a select number of jurisdictions which have done so (notably France and the Netherlands). While the decision does not go as far as the French Hilmarton and Putrabali decisions, or the Dutch Yukos decision, it is nevertheless significant as it demonstrates that the Russian courts take the view that local standards of annulment at the place of arbitration shall not prevail if they are contrary to the applicable international standards – this is a very arbitration friendly position.

Second, the decision provides a rare examination of the interrelationship between the New York Convention and the Geneva Convention. It demonstrates that despite the Geneva Convention's limitations, it can be a powerful tool to be used in enforcement proceedings should circumstances dictate that it applies. However, at the same time, the decision also highlights a notable disparity between the Geneva Convention and the New York Convention.

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The following states are signatories to the Geneva Convention: Albania, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Burkina Faso, Croatia, Cuba, Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, Kazakhstan, Latvia, Luxembourg, Macedonia, Moldova, Montenegro, Poland, Romania, the Russia Federation, Serbia, Slovakia, Slovenia, Turkey and Ukraine.

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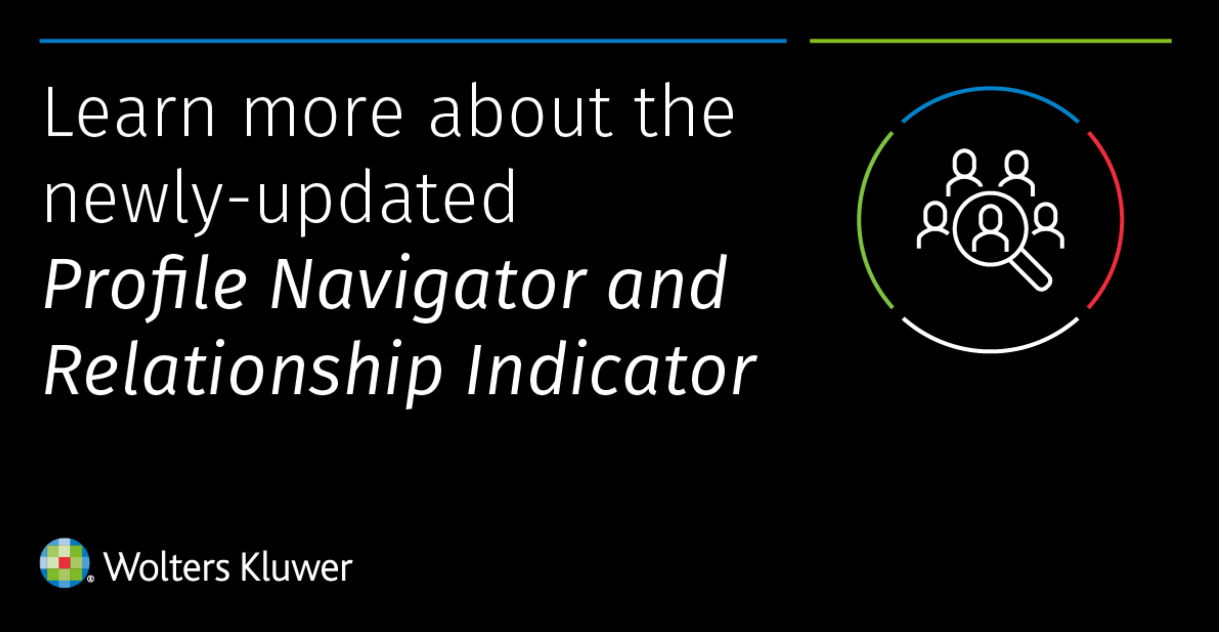

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