

# Kluwer Arbitration Blog

## Ciments Français: Russian Putrabali No More

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When the Arbitrazh Court of Kemerovo Region in Siberia granted leave to recognize an annulled ICC award in 2011 for the first time, international and domestic commentators rushed to acclaim the new arbitration-friendly attitude of the Russian courts, thus placing Russia ‘into line with a select number of jurisdictions’ (e.g. France and the Netherlands). Some compared the ruling in *Ciments Français* with the French *Hilmarton* and *Putrabali*, and the Dutch *Yukos* decisions, where the Cour de Cassation and the Amsterdam Court of Appeal, respectively, granted applications to enforce arbitral awards, even though the latter were set aside at the seat of arbitration.

Given the wide international response to the Russian recognition ruling in *Ciments Français*, one would expect some adequate follow-up on this matter as the case proceeded through the Arbitrazh court system. However, the recent decision of a cassation court, which reversed the recognition ruling, went largely unnoticed by the international arbitration community.

The Russian centuries old adage that can be loosely translated as ‘Catch the bear before you sell the skin’ warns against hasty conclusions. Although the Federal Arbitrazh court for the West Siberian district may be said to have finally ‘missed the bear’ as it overturned the recognition ruling of the lower court on 5th December 2011, some commentators might have already ‘sold the skin’ by tagging Russia as a ‘pro-arbitration jurisdiction’.

### Merits in a nutshell

The dispute between Ciments Français and a Russian joint-stock company (OAO) Sibirskiy Tsement arose out of a share purchase agreement (SPA). According to the terms of the SPA, Ciments Français committed itself to sell shares in three Turkish entities, and Sibirskiy Tsement undertook to pay EUR 377 300 000 and to transfer its shares worth EUR 200 000 000 to the seller. Upon conclusion of the agreement Ciments Français received an advance payment of EUR 50 000 000. The deal fell through when Sibirskiy Tsement failed to effect the agreed transfer of shares towards the purchase price.

Ciments Français initiated an ICC arbitration in Istanbul pursuant to an arbitration clause of the SPA. The tribunal confirmed the claimant’s right to terminate the agreement unilaterally and held that Ciments Français was entitled to retain the amounts received.

Sibirskiy Tsement filed a motion to set aside the award at the seat of arbitration. A Turkish court vacated the award on the grounds that: i) the award was not made within ICC time constraints; ii) the arbitrators allegedly exceeded their mandate by failing to address some of the respondent’s

arguments; and iii) the award violated the Turkish *ordre public*.

Nevertheless, Ciments Français sought to have the award recognized in the Russian Federation. The Arbitrazh Court of Kemerovo Region granted the application for recognition of the annulled award, thus allegedly marking a positive change of attitude of Russia's judiciary towards the enforcement of foreign arbitral awards.

### **Reasoning behind the recognition of the annulled Ciments Français award**

Although the recognition ruling of the Russian Arbitrazh court in *Ciments Français* has been commented upon extensively (see, e.g., a post of 28 September 2011, by Mike McClure), for ease of reference, a short summary of the reasoning employed by the recognizing court is provided below.

In an attempt to forestall recognition of the award in Russia, OAO Sibirskiy Tsement advanced two major arguments: (i) the said award was set aside at the seat of arbitration; and, (ii) the SPA was declared null and void by a Russian Arbitrazh court.

In its decision to grant leave to recognize the vacated ICC award, the court first noted that Russia, France and Turkey are member states of both the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention of 1958) and the European Convention on International Commercial Arbitration of 1961. The court then correctly observed that Article IX of the European Convention limits the grounds for refusal to recognize and enforce a vacated award, enumerated in Article V (1) of the New York Convention, to instances where the setting aside of an award was based on one of the following reasons: i) the parties to an arbitration agreement were under some incapacity or the said agreement is otherwise invalid; ii) the party requesting the setting aside of the award was not given proper notice or was otherwise unable to present her case; iii) the award deals with a difference not contemplated by the terms of the submission to arbitration; or, iv) the composition of a panel or the procedure was not in accordance with the agreement of the parties. The prevalence of Article IX (1) of the European Convention over Article V (1) (e) of the New York Convention is enshrined in Article IX (2) of the former.

Against this background, the Arbitrazh Court of Kemerovo Region held that the reasons for vacating the arbitral award in the dispute between Ciments Français and OAO Sibirskiy Tsement did not fall within the scope of Article IX (1) of the European Convention. It should be noted that Section 1 (i) of Article 36 of the Russian Law on International Commercial Arbitration provides that a court seized with an application for recognition and/or enforcement may decline to do so if an award has been vacated at the seat of arbitration. However, Article 13 (4) of the Arbitrazh Procedure Code (APC) states that provisions of international treaties, ratified by the Russian Federation, will prevail over domestic laws in case of discrepancy.

The court therefore rejected the argument of Sibirskiy Tsement that the setting aside of the ICC award by a Turkish court precludes its recognition in the Russian Federation.

The Arbitrazh Court also dismissed the respondent's contention of inadmissibility of an application for 'mere recognition' of an arbitral award. The sole judge concluded that the Russian Arbitrazh Procedure Code does allow a party to seek either recognition of an award or recognition and enforcement thereof.

As to the respondent's assertions that the award in *Ciments Français* contradicts the decision of a

national court, which declared the SPA null and void, and, therefore, the recognition of the former would violate the Russian public order, the court made two observations. First, an *ordre public* objection is not named among the grounds for refusal of recognition in the European Convention. Second, the wording of Article 244 (2) APC clearly indicates that a court may decline to recognize and enforce an arbitral award if an act of enforcement would be inconsistent with public order. The sole judge held that, because Ciments Français did not seek to enforce the ICC award, the court could dispense with analysis of the consistency of the said award with Russia's *ordre public*.

### **Decision of the Federal Arbitrazh court for the West Siberian District in Ciments Français**

The recognition ruling in *Ciments Français* was overturned in less than a half a year as the Arbitrazh Court for the West Siberian District upheld an appeal of OAO Sibirskiy Tsement.

The court of cassation did not address the relevant provisions of the European Convention. Instead, the court concluded that the ruling of a lower court is incompatible with the national *ordre public*, and denied recognition to the arbitral award according to paragraph 2 (b) of Article V of the New York Convention and paragraph 1 (7) of Article 244 APC.

In the court's view, recognition of a foreign arbitral award, which is at odds with a national court decision, is contrary to the domestic public order. Because the *Ciments Français* arbitral tribunal confirmed the validity of the SPA and the Russian Arbitrazh court declared the agreement null and void, recognition of the ICC award would lead to the existence of 'conflicting decisions of equal legal force'.

It is noteworthy that a Russian court, which heard the dispute on the validity of the SPA contemporaneously with the arbitration proceedings in Istanbul, opined that a dispute on the validity of an agreement is not a dispute 'arising out of an agreement' and, as such, does not fall within the scope of the parties' submission to arbitration. Having determined that the arbitrators lack competence to decide on the validity of the SPA, the Russian court proceeded with its own analysis of the matter.

The Russian APC and the Law on International Commercial Arbitration do not envisage such a ground for refusal to recognize and enforce an arbitral award as the latter's incompatibility with a decision of a national court. Therefore, the Arbitrazh court of cassation could not base its decision to reverse the recognition ruling on this premise as such. Rather, it had to determine which ground for refusal, provided for in Article V of the New York Convention and the corresponding clause of the Law on International Commercial Arbitration, comes closest to the conflict between a foreign arbitral award and a national court decision. The court of cassation held that the *ordre public* reservation encompasses instances of conflicting decisions and reversed the recognition ruling of a lower court on this ground.

Thorough reading of the cassation decision reveals that the court failed to address three important points, which secured the recognition of the vacated ICC award in the lower court proceeding, namely: i) Article 13 (4) of the Russian APC, stipulating priority of the ratified international treaties over the norms of the Arbitrazh Procedure Code; ii) Article IX (2) of the European Convention, which limits the applicability of Article V (1) (e) of the New York Convention; and, iii) the fact that Ciments Français did not seek to enforce the award in the Russian territory. As was mentioned previously, Article 244 APC gives a national court the authority to deny recognition and enforcement to a foreign arbitral award if the enforcement thereof would be contrary to the public

order of the Russian Federation.

It is not obvious why the Arbitrazh Court for the West Siberian District chose to disregard the provisions of the domestic law and international treaties, which provide a basis for recognition of annulled awards in certain settings. As a practical matter, the court of cassation had to determine whether the lower court correctly applied and interpreted the European Convention in *Ciments Français*. However, the cassation court did not discuss the applicability of the Convention and the conformity of the grounds for setting aside the ICC award with Article IX thereof.

### **Concluding points**

The decision of the Arbitrazh Court for the West Siberian District poses more questions than it answers. From the perspective of the Russian national legislation, incorporating ratified international treaties, the decision does not appear to be correct. In sum, the decision to overturn the recognition ruling in *Ciments Français*, coupled with the poor reasoning of the court, signifies a rather conservative approach of Russia's courts to the recognition of foreign arbitral awards.

Whereas *Ciments Français* is a rare example of a case falling within the scope of the European Convention, the Arbitrazh court of cassation merely skipped a comprehensive legal analysis in order to avoid 'inconvenient' conclusions.

It is a bit premature to put Russia in the 'pro-arbitration jurisdiction' category, although willingness of some courts (or judges) to grant recognition of awards, set aside on the 'local standard' grounds, may foreshadow a shift in the consciousness of Russia's judiciary.

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