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New Belarusian Resolution on the Recognition and Enforcement of Foreign Arbitral Awards: Is There No Rose Without a Thorn?

Timour Sysouev (Sysouev, Bondar, Khrapoutski LLC) · Saturday, May 2nd, 2015

Co-Authored with Karyna Loban (Sysouev, Bondar, Khrapoutski)

On 23 December 2014, the Plenum of the Supreme Court of the Republic of Belarus adopted Resolution No 18 "On the Application of Legislation on the Recognition and Enforcement of Foreign Judgments and Foreign Arbitral Awards" ("Resolution No 18"). By adopting Resolution No 18, the Resolution No 10 of the Plenum of the Supreme Economic Court of the Republic of Belarus dated 29 June 2006 ("Resolution No 10"), which was governing the same matter, ceased to exist. Additional regulation on the recognition and enforcement of foreign arbitral awards is provided, for commercial disputes, by the Code of Economic Procedure of the Republic of Belarus ("CEP") and, for civil disputes, by the Code of Civil Procedure of the Republic of Belarus ("CCP").

Resolution No 18 contains the basic principles and guidelines for considering applications for the recognition and enforcement of foreign judgments, as well as applications for the recognition and enforcement of foreign arbitral awards in the territory of the Republic of Belarus. Although the goal of the adoption of the Resolution No 18 was related to the harmonization of judicial practice in the light of the judicial reform on the creation of a unified judicial system, incorporating both economic and general courts, it left many gaps and questions unanswered.

The main drawback of the Resolution No 18 is the unjustified identification of procedures for recognition and enforcement of foreign judgments and foreign arbitral awards, which makes certain provisions of this Resolution unclear and, even, in some parts, contradictory to the international treaties. Several consequences of such identification are presented in this post.

The Burden of Proving the Grounds for Refusal of Recognition and Enforcement

One of the uncertainties reflected in the Resolution No 18 is that creditor is required to submit to the court, which considers the case on the recognition and enforcement of the foreign arbitral award, evidence that the party against which the award is rendered was informed of the arbitral proceedings.

Under Article V (1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ("NY Convention"), adopted by Republic of Belarus in 1961, the party, against

whom the award is invoked, has the burden of proving the grounds under which the recognition and enforcement of the arbitral award may be refused according to Article V (1). On the other hand, under paragraphs 5 and 12 of the Resolution No 18, it follows that, in the process of recognition and enforcement of foreign arbitral award, the claimant is required to submit to the court the evidence that the party against whom the award is invoked was duly informed about the arbitral proceedings. Moreover, in accordance with Article IV of the NY Convention, the party applying for recognition and enforcement shall, at the time of the application, supply exclusively the following documents: the duly authenticated original award or a duly certified copy thereof; and the original agreement referred to in Article II (i.e. arbitration agreement) or a duly certified copy thereof.

In addition, the provisions of paragraphs 5 and 12 of the Resolution No 18 are contradictory in relation to other provisions of the same Resolution. For example, the second part of paragraph 15 of the Resolution No 18 contains a provision stating that the obligation to submit proof that the proper notice was not given is on the debtor, i.e. the person resisting the enforcement.

Recognition and Enforcement of Interim Awards

The previous Resolution No 10 prohibited the recognition and enforcement of any arbitral awards except those that finally resolve the dispute on the merits. Although the Resolution No 18 has a similar provision, it does not resolve the issue on the enforcement of partial awards, preliminary awards or awards on costs that provide the final decision on the part of the claim or certain procedural aspects. It may be assumed that the absence of a relevant provision in this regard is not a change in the approach of the national courts in this matter, but rather another missed opportunity to acknowledge the practical relevance of the provision of recognition and enforcement of interim awards.

The Competence of the Belarusian Courts to Consider Application on the Recognition and Enforcement of Foreign Arbitral Awards

Under paragraph 8 of the Resolution No 18, the court shall have the right to reject the application for the recognition and enforcement of a foreign arbitral award in cases where the debtor does not have its seat and property in the territory of the Republic of Belarus. At the same time, according to Article 246 of the CEP, applications for the recognition and enforcement of foreign judgments and arbitral awards shall be submitted to the court at **the seat or place of residence of the debtor** or at **the seat of the debtor's property** *only if the seat or the place of residence of the debtor is unknown*.

Under the literal interpretation of this provision, if the debtor is seated outside of the Republic of Belarus (and its seat is known) and has only its property or another assets in the Republic of Belarus, Belarusian courts do not have jurisdiction to decide on the recognition and enforcement of foreign arbitral award against such debtor. This provision of the CEP is not in accordance with the policy behind the NY Convention, which does not subject the recognition and enforcement of foreign arbitral awards to the existence of the debtor's seat or assets on the territory of the State. In light of the Resolution No 18, the courts will, however, most likely reject the application for recognition and enforcement of a foreign arbitral award in cases where the debtor does not have both its seat and assets in the territory of the Republic of Belarus.

Consideration on the Principle of Reciprocity as an Independent Legal Basis for the

Recognition and Enforcement

Under Article 245 of the CEP, the principle of reciprocity is an independent legal basis for the recognition and the enforcement of foreign judgments and foreign arbitral awards on economic matters. At the same time, the provisions of the CCP do not indicate reciprocity as an independent basis for the recognition and enforcement of foreign judgments on civil matters, providing it as a basis only under international treaty.

The Resolution No 18 contains, in paragraph 2, almost a revolutionary innovation: the principle of reciprocity is considered as an independent legal basis for the recognition and enforcement of foreign judgments on both civil and economic matters. The acceptance by the Resolution No 18 of this principle as an independent legal basis for the recognition and enforcement of foreign judgments corresponds to the current international trends and enforcement practice of courts in such states as Germany, Italy, Spain, Canada, Turkey, and France and it was welcomed by Belarusian scholars (E.E.TSVETKOVA, *Reciprocity as the basis for the recognition and enforcement of foreign judgments in civil and family matters in the Republic of Belarus* // SPS "ConsultantPlus: Belarus" [Electronic resource]. – Minsk, 2010).

Conclusion

Although the adoption of the new Resolution No 18 raises several issues, one should be aware that there is no rose without a thorn, and the work done in this area should nevertheless be considered a step forward. It remains to be seen whether the subsequent court practice will balance out its many controversial issues.

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