Kluwer Arbitration Blog

English Court Denies Application to Enforce Russian Arbitral Award Set Aside by Russian Courts

Jonathan Kelly, Adam Grant, Marina Zarubin (Cleary Gottlieb Steen & Hamilton LLP) · Monday, October 9th, 2017

A recent decision by the English Court shows once again the very high bar that a claimant must reach to enforce an award that had been set aside by the court at the seat of jurisdiction. The judgment handed down in *Maximov v OJSC Novolipetsky Metallurgichesky Kombinat* [2017] EWHC 1911 (Comm) on 27 July 2017 denied an application to enforce an award issued by the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation ("ICAC").

The arbitration award had been set aside by a decision of the Moscow Arbitrazh Court, which was then upheld by the Federal Arbitrazh Court of Moscow District and the Supreme Arbitrazh Court of the Russian Federation.

Despite some trenchant criticism of the Russian courts' reasoning, the judge found that the set aside decision was not so "extreme and perverse" that it could only have been reached as a result of actual bias.

The Maximov Case

The application arose from an arbitration between claimant Nikolay Maximov, a Russian businessman, and the defendant company, majority owned and controlled by Russian businessman Vladimir Lisin. The dispute centered around the calculation of the purchase price under a share purchase agreement by which the defendant agreed to acquire the claimant's 50% plus one share stake in OJSC Maxi-Group, a Russian metallurgical business. The ICAC arbitrators rendered an award of 8.9 billion rubles in favour of the claimant.

The defendant successfully applied to the Moscow Arbitrazh Court to have the award set aside. Following the set aside decision by the Moscow Arbitrazh Court, the claimant failed to overturn the decision on appeal to the higher Russian courts. The claimant then sought to enforce the arbitral award in multiple other jurisdictions in Europe, including France, the Netherlands, and England.

In the English court, Burton J held that the applicable test was whether the Russian courts' decisions were so extreme and incorrect that the Russian courts could not have been acting in good faith. Burton J determined that *apparent* bias would not be sufficient and *actual* bias must be shown, although if direct evidence of bias or corruption were lacking, *actual* bias could be inferred

from the surrounding circumstances. The judge's reasoning therefore centered around an analysis of the Russian court decisions setting aside the arbitral award.

The Moscow Arbitrazh Court based its set aside decision on three grounds:

1. that two arbitrators failed to disclose their links to expert witnesses put forward by the claimant in the arbitration (the "Non-Disclosure Ground");
2. that the award was in conflict with Russian public policy (the "Public Policy Ground"); and
3. that the dispute was a corporate dispute and was therefore not arbitrable (the "Non-Arbitrability Ground").

Burton J severely criticised all three grounds for the set aside decision, referring to the decision on the Non-Disclosure Ground as an "unsupportable conclusion", the decision on the Public Policy Ground as "hopeless" and the decision on the Non-Arbitrability Ground as "adventurous" but "arguable". The judge also expressed concern that the Public Policy Ground and the Non-Arbitrability Ground were "unfairly" not raised or argued before the first instance Russian court and were only referenced in the Russian judge's subsequent written reasons.

Burton J appeared to agree with the claimant's case, but ultimately said that he was more persuaded by counsel for the defendant who argued that the Russian Court's reasoning can be explained other than by bias against the claimant. In a finding that appeared to be at odds with his assessment of the defendant's case, Burton J concluded that the decisions were not "so extreme and perverse that they [could] only be ascribed to bias against the claimant".

The judge found it significant that the Russian first instance judgment was public, and was not regarded as an outlier, since it was regularly followed by later judges. Burton J held that the Russian courts' criticism of the arbitrators appeared to be rooted in the general negative treatment of arbitration by Russian courts in general and did not constitute cogent evidence of bias. The judge also noted that the Moscow Arbitrazh Court rejected allegations of fraud as a basis for setting aside the award, which it might have accepted if the court was determined to find against the claimant.

English Court Treatment of Arbitral Awards Set Aside at the Seat

The English High Court's decision in *Maximov* followed the English law approach that decisions setting aside arbitral awards should be treated according to the ordinary principles for recognition of foreign judgments (*see, e.g.*, Dallah Estate and Tourism Holding Co v Ministry of Religious Affairs of Government of Pakistan [2011] 1 AC 763, 798). A party will, therefore, generally be able to rely on a foreign decision setting aside an award unless that decision is found to be contrary to basic principles of honesty, natural justice and domestic concepts of public policy.

Burton J also stressed that the English court should not simply accept that a foreign court had set aside an arbitral award where there was at least an arguable case that the award had been set aside in breach of natural justice.

This echoed the court's reasoning in *Yukos Capital SARL v OJSC Rosneft Oil Company* [2014] EWHC 2188 (Comm). In that case, the English High Court considered whether an arbitral award could in principle be enforced despite the set aside decision of the Moscow Arbitrazh Court, which was upheld on appeal. The defendant in that case pleaded the principle of *ex nihilo nil fit* (or 'nothing comes of nothing'), the legal theory that if an arbitral award is set aside in the seat of the

arbitration, it ceases to exist in a legal sense. The High Court held that there is no principle of *ex nihilo nil fit* in English law precluding the enforcement of arbitral awards set aside at the seat. Instead, the court must consider whether an award can be given effect notwithstanding a set aside decision, and that it is not bound to recognise a decision contrary to the principles of honesty, natural justice, and public policy.

?ounsel for the defendant in Maximov also pleaded the principle of *ex nihilo nil fit*. Burton J said he did not have to decide "this interesting point" but made obiter remarks echoing *Yukos Capital SARL v OJSC Rosneft Oil Company*. The *ex nihilo nil fit* principle has yet to be considered on appeal by higher courts.

Conclusion

The *Maximov* judgment shows that a claimant must surmount a very high bar to enforce an arbitral award that has been set aside by a court at the seat of the arbitration. Absent cogent evidence that the set aside decision offends basic principles of honesty and domestic public policy, the arbitral award may be doomed at the enforcement stage before English courts.

Parties should be aware of the English courts' reluctance to enforce arbitral awards in these cases. When drafting arbitration agreements, parties should think carefully whether or not the enforcement of any future award will be required against assets in England and, if so, consider choosing this jurisdiction as a seat. After an award has already been set aside by a court at the seat, a claimant should carefully consider what evidence is available to him to claim that the decision to set aside the award is contrary to basic principles of justice. If cogent evidence is not available, a claimant may wish to abandon attempts to enforce it in England.

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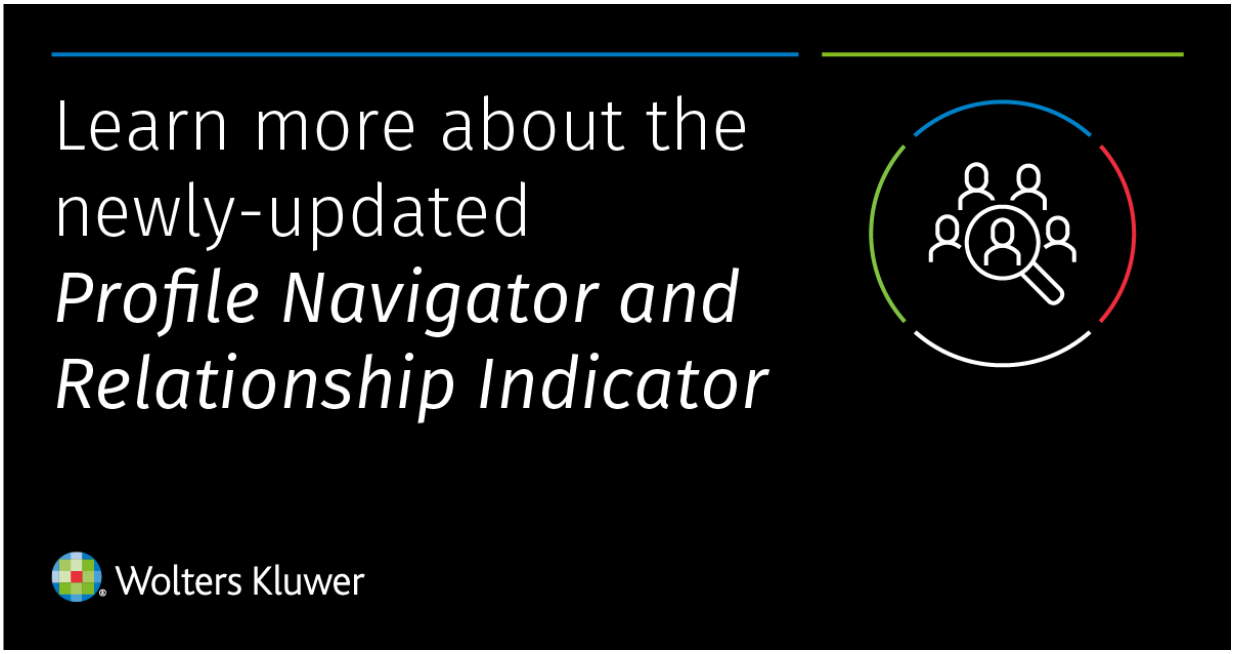

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