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Enforcement of Awards Against Sovereign States in Russia: Recent Developments

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Several authors have already discussed the enforcement of arbitral awards in Russia (see for example the recent posts on the issue estoppel and public policy in recognition and enforcement proceedings, on the confusion relating to the material scope of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and on the enforceability of awards rendered on the basis of model arbitration clauses).

Notwithstanding the above, the issues related to recognition and enforcement of awards issued against sovereign states in Russian courts have not yet been discussed on this blog. While this issue was also recently addressed in recognition and enforcement proceedings in *Entes Industrial Plants* (see case A40-230382/2018), the analysis made by Russian courts during recognition of *OJSC Tatneft v. Ukraine* award remains the most thorough one.

The outcome of the recognition and enforcement proceedings in both cases can have considerable practical implications. A few former Soviet states may still have assets in Russia that claimants can use to enforce arbitral awards. For instance, as only Belarus, Kazakhstan and Uzbekistan are now involved in at least ten ICSID cases altogether, it is likely that investors may eventually seek recognition and enforcement in Russia should they succeed with their claims. Therefore, the outcome of both the above-mentioned proceedings becomes relevant, given their likely impact on the approach of Russian courts to enforcement against other states' assets in Russian territory.

The *Tatneft* Award

The *Tatneft* award dealt with a number of claims of the Russian oil company Tatneft under the Russia-Ukraine BIT ("BIT"). On 29 June 2014, the tribunal, seated in Paris (France), unanimously found that Ukraine had breached the BIT and was liable to pay compensation amounting to 112 Million USD to Tatneft.

Tatneft sought to recognize and enforce the award in several jurisdictions, including Russia. The approach of the Russian courts to *Tatneft*'s application was rather peculiar. The Russian courts initially refused to recognize and enforce the award on the ground that Russian courts could only assume jurisdiction over such proceeding if Ukraine had assets that could be used to enforce the award within their territorial jurisdiction. It took Tatneft almost two years to convince the courts to reconsider this position.

Enforcement in Moscow Courts – The Requirement of "*Effective Jurisdiction*"

The legal framework governing sovereign immunities in Russia is set by the Federal law "On jurisdictional immunities of foreign states and their property in Russian Federation" ("FIL"). This law draws a distinction between immunity from jurisdiction, i.e. immunity of a state from being sued in the courts of another state, and immunity from enforcement, i.e. immunity of the property of a state from measures aimed at enforcement of court decisions by another state. According to the FIL, a number of sovereign properties, e.g. properties used for diplomatic purposes, enjoy immunity from enforcement.

The rules for enforcement of arbitral awards in Russia are governed by the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the NY Convention"), the Code of Arbitrazh Procedure of the Russian Federation ("CAP"), and the arbitration law largely based on the UNCITRAL Model Law on International Commercial Arbitration. Within that framework, the recognition and enforcement of foreign arbitral awards and actual enforcement of recognized awards are two distinct stages of proceedings. The courts handle the recognition and enforcement proceedings of foreign arbitral awards in accordance with the NY Convention and other applicable domestic laws. After the competent court recognizes a foreign award in Russia, the court bailiff carries out the actual enforcement against debtor's assets.

Article 242 of the CAP provides that the application for enforcement of an award can be filed either at the place where the debtor of the award is located ("*seat criterion*") or at the place where the debtor's property is located ("*property criterion*"). Unless either of these criteria is met, Russian courts will not accept jurisdiction (see e.g. the Ruling of the Russian Supreme Court in the case A40-183971/2016 dated 11 September 2017).

As Ukraine owned several buildings in Moscow, Tatneft apparently chose to rely on the property criterion and filed its application for recognition and enforcement with the Arbitrazh Court of Moscow (the court of first instance). In its Ruling, the Arbitrazh Court or Moscow held that Tatneft had failed to demonstrate that Ukraine had waived its immunity from jurisdiction in enforcement proceedings, even if it agreed to arbitration under the BIT. Adopting an interesting interpretation of Article 242 CAP, the court also found that it lacked territorial "*effective jurisdiction*" in the case under the property criterion, as Ukraine's buildings in Moscow were used for diplomatic purposes and enjoyed immunity from enforcement. Tatneft subsequently challenged this ruling before the cassation court, the Arbitrazh Court of Moscow District.

In its Decree of 29 August 2017, the cassation court disagreed with the reasoning of the court of first instance. ***Firstly***, it found that Ukraine had waived its immunity from jurisdiction both in respect of arbitration proceedings and any subsequent recognition and enforcement proceedings by agreeing to arbitration under the BIT. ***Secondly***, the cassation court concluded that the NY Convention does not allow a refusal of recognition and enforcement of an award on the grounds of immunity of the debtor's property from enforcement. Therefore, the court implicitly concluded that immunity of debtor's property from enforcement was irrelevant at the stage of the recognition and enforcement proceedings. The cassation court also reasoned that the court of first instance misapplied Article 242 the CAP because the seat criteria of Article 242 of the CAP was still met, as Ukraine's official diplomatic representative was located in Moscow.

On those considerations, the cassation court returned the case back to the court of first instance, i.e. Arbitrazh Court of Moscow, for reconsideration. Ukraine unsuccessfully tried to challenge this

ruling in the Supreme Court of the Russian Federation (the respective ruling can be found here).

Upon receiving the case back, the court of first instance, the Arbitrazh Court of Moscow, chose to refer the case to another court. In its Ruling of 22 June 2018, the Arbitrazh Court of Moscow reiterated its position on "*effective jurisdiction*". As, in the view of the court, Tatneft did not demonstrate that Ukraine held property that could have been used for actual enforcement of the award in Moscow, the court referred the case to the Arbitrazh Court of the Stavropol Region, because Ukraine had other assets in the territorial jurisdiction of that court. In its reasoning, the Arbitrazh Court of Moscow did not draw any distinction between the relevance of immunity from jurisdiction and the relevance of immunity from enforcement in recognition and enforcement proceedings. It also declined to apply the seat criterion of Article 242 CAP *ultra petita*, as was suggested by the cassation court. Tatneft tried to challenge this ruling before the cassation court but failed (the respective decree can be found here).

Recently, the Arbitrazh Court of Moscow once again endorsed the "*effective jurisdiction*" approach in recognition and enforcement proceedings concerning the *Entes Industrial Plants award* (see case A40-230382/18), an arbitral award issued against the Ministry of Transportation of the Kyrgyz Republic. The enforcement proceeding, in that case, was complex and the interplay between immunity from jurisdiction and immunity from enforcement was only a part of the court's inquiry. Nonetheless, the Arbitrazh Court of Moscow *obiter dictum* reiterated its position on the role of "*effective jurisdiction*" in recognition and enforcement proceedings in its Ruling.

Enforcement in the Stavropol Court – The Requirement of "*Effective Jurisdiction*" Is Rejected

In its Ruling of 11 March 2019, the Arbitrazh Court of the Stavropol Region did not agree with the logic of the Arbitrazh Court of Moscow. The court found that there is a clear difference between the roles of immunity from jurisdiction and immunity from enforcement at the stage of recognition and enforcement of arbitral awards. The court agreed with the proposition that Ukraine had waived its immunity from jurisdiction in respect of arbitral proceedings and any subsequent recognition and enforcement proceedings by consenting to arbitration under the BIT. The court also concluded that Russian law applicable to recognition and enforcement proceedings does not suggest that applicants must show that a state holds property free from the enforcement immunity on the territory of the recognizing state for the application for recognition of an award to be granted.

Even though Tatneft eventually succeeded with its application almost two years after it had been filed for recognition and enforcement, the battle over the enforcement of the *Tatneft* award is not over. The decision of the Arbitrazh Court of the Stavropol Region can still be challenged by Ukraine.

Conclusions

In light of the above, one can draw two conclusions in respect of enforcement of arbitral awards rendered against sovereign states in Russia. ***Firstly***, for now Russian courts have not developed a uniform position with regards to the role of sovereign immunity from enforcement at the stage of recognition and enforcement of arbitral awards. It is not unlikely that this issue will eventually have to be addressed by the Russian Supreme Court. ***Secondly***, Russian courts have acknowledged that states waive their immunity from jurisdiction in respect of recognition and enforcement proceedings once they give their consent to arbitration.

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