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ARBITRATION IN CIS COUNTRIES: CURRENT ISSUES

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BICCS

RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS ANNULLED IN THE FORUM STATE (EXPERIENCE OF RUSSIA)

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Roadmap

1. Relevant legislation
2. Recognition in Russia of the award annulled in Turkey
3. Enforcement in the Netherlands of awards annulled in Russia

1. Relevant legislation

a) New York Convention (1958), Article V (1)(e);
b) European Convention (1961), Article IX;
c) More favorable national legislation further to Article VII of the New York Convention;
d) New York Convention – European Convention – more favorable national legislation;
e) Russian legislation

1a) New York Convention (NYC)

- Article V(1)(e):

  refusal of recognition and enforcement of the award if the debtor furnishes the proof that the award "has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made"

1b) European Convention (EC)

- planned as amendment to NYC;
- currently 31 states – parties to EC
- focus on organization of all stages of arbitral proceedings;
- recognition and enforcement – only Article IX – regarding annulled awards

1b) European Convention (contd.)

- Article IX(1) – grounds for annulment of awards which justify the refusal of award's recognition and enforcement – similar to V(1)(a-d) of the NYC:

1. party incapacity or invalidity of the arbitration agreement;
2. lack of notice and a right to be heard;
3. issues beyond the scope of the arbitration agreement;
4. Irregularity in the composition of the tribunal or the procedure

NB! No public policy and arbitrability!

1b) European Convention (contd.)

- Article IX(2) – interrelation between NYC and EC if both are applicable:

Article IX of EC limits the application of Article V(1)(e) of NYC solely to cases of setting aside on the grounds in Article IX(1)

1c) More favorable national legislation

- Article VII(1) of NYC:
  "[t]he provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards (…) nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent **allowed by the law or the treaties of the country where such award is sought to be relied upon**".
- National law can be relied upon if it provides for fewer reasons to refuse enforcement (f.e. Article 1502 – French Law on Arbitration).

1d) NYC– EC – more favorable national law

- Article IX(1) of the EC – precedence over Article V(1)(e) of the NYC
- More favorable national law priority over Article V(1)(e) of the NYC
- EC – more favorable national law?

More favorable national law priority over Article IX(1) of EC

1e) Russian legislation

- Party to NYC (in1960) and EC (in1962);
- Commercial (Arbitrazh) Procedure Code, 2002;
- Law on International Commercial Arbitration, 1993;
- International treaties of the RF have priority over national laws;
- National legislation is not more favorable to enforcement as compared to NYC

2. Recognition in Russia of award annulled in Turkey

a) Facts of the case;
b) Arbitration and annulment of award in Turkey;
c) Recognition at Kemerovo Court
d) Refusal of recognition at Federal Court
e) Proceedings at the Supreme Commercial Court
f) Proceedings in case N A27-4626/2009

2a) Facts of the case

- Ciments Francais (seller), Sibirskiy Tsement (buyer), Cimento Istanbul – SPA (March 26, 2008)
- Conditions: payment in cash and in shares of ST. Advance of EUR 50 million
- March 31, 2008 – the advance transferred
- October 21, 2008: CF terminated SPA: the buyer failed to transfer the shares. CF retained the advance

2b) Arbitration and annulment of award in Turkey

- Article 7.1 of SPA: ICC arbitration in Turkey
- CF v. SB and CI
- December 7, 2010 – partial award:

i. SPA valid and binding on all signatories
ii. CF was entitled to terminate SPA and retain the advance
iii. Provisional enforcement of the award in respect of CF and ST

2b) Arbitration and annulment of award in Turkey (contd.)

- ST appealed , May 31, 2011 – 2nd Court of First Instance of RT annulled the partial award
- Reasons:

i. Arbitral award was not rendered within the set time limit

ii. Arbitral tribunal exceeded its jurisdiction (did not consider ST's argument regarding termination of SPA in the context of good faith)

iii. Arbitral award violated public policy (provisional enforceability of the award and agreement of parties to waive the right of application for annullment)

- All reasons for setting aside – in Turkish Law on International Arbitration N 4686
- Annulment decision was appealed

2c) Recognition at Kemerovo Court

- Kemerovo court recognized the annulled award
- Reasoning:

i. Request for recognition only is not against provisions of CPC RF: it is a prerequisite of enforcement;

ii. Russia, France, Turkey –parties to NYC and EC. In Russia international treaties have priority over national legislation. Article IX(1) of EC has an exhaustive list of reasons for setting aside that must lead to refusal of enforcement. All three reasons for annulment in Turkey – domestic and are not listed in Article IX(1) of EC

2c) Recognition at Kemerovo Court (contd.)

iii. Recognition will not contravene public policy because of another case N A27-4626/2009 where on August 13, 2010 Kemerovo Court found invalid the same SPA and obliged CF to return ST the paid advance because that decision had not yet come into force.

⇒ Russian court disregarded local standards of annulment at the place of arbitration as they were not in line with the applicable international standards

2d) Refusal of recognition at Federal Court

- ST appealed and the Federal Commercial Court of West Siberian Circuit cancelled decision of Kemerovo Court on December 5, 2011
- Reasons:

i. NB! No comment regarding EC

ii. Violation of public policy under NYC due to violation of the principle of mandatory nature of judicial acts of Russian courts (existence on the territory of Russia of judicial acts containing mutually exclusive conclusions)

2d) Refusal of recognition at Federal Court (contd.)

Suggestion:

Case should have been examined from the perspective of EC. Limiting factor of Article IX(1) – unless an award was set aside for one of the reasons indicated therein, the fact of being set aside cannot be used to refuse enforcement. However, this does not prevent the state to refuse recognition and enforcement if it violates public policy according to laws of the enforcing state.

2e) Proceedings at the Supreme Commercial Court

- CF applied to the SCC RF for a supervisory review of the Federal Court's ruling
- Case accepted on December 26, 2011 but on March 21, 2012 proceedings suspended until finalization of supervisory proceedings in another case N A27-4626/2009

2f) Proceedings in case N A27-4626/2009

Grounds of invalidity of SPA:

1. Invalidity of the decision of the Extraordinary General Meeting of SC's shareholders approving SPA as a major transaction. Sibkonkord (47%) was unduly represented at the meeting;
2. By transferring the advance to CF, ST became deprived of 44% of its assets with no consideration – losses for ST and adverse consequences for ST and its shareholders.

- Decision of Kemerovo Court on August 13, 2010 , upheld by 7th Commercial Appeal Court on September 26, 2011and by Federal Court on December 6, 2011

2f) Proceedings in case N A27-4626/2009 (contd.)

Supreme Commercial Court disagreed:

- For transaction to be found invalid there must be evidence of losses incurred by a shareholder due to such transaction
- Grounds for invalidity should arise either before or at the moment of its conclusion, not afterwards
- Improper performance of a transaction by a company which causes a loss is not sufficient to regard it as detrimental for shareholders
- Transfer of advance to CF without consideration ≠ violation of rights and detriment

Case A27-4626/2009 was transferred to the SCC RF Presidium for elaboration of a uniform interpretation of rules of law

Further developments in the award's recognition proceedings

- Once there is a decision in A27-4626/2009 – supervisory proceedings in respect of Federal Court's refusal of the award's recognition will be resumed
- If SCC RF Presidium finds the validity of transaction and SPA ⇒the ground for Federal Court's refusal of the award's recognition (conflicting court decisions) will not be applicable anymore

3. Enforcement in the Netherlands of awards annulled in Russia

a) Arbitral proceedings and annulment of awards in Russia
b) Enforcement proceedings in the Netherlands

3a) Arbitration and annulment of awards in Russia

- Yukos Capital v. Rosneft – four awards on September 16, 2006;
- May 2007 Commercial Court of the City of Moscow annulled the awards due to:

a) violation of principle of equal treatment;
b) non-compliance with the agreed procedure;
c) lack of impartiality and independence of arbitrators

- Annulment upheld by Federal Commercial Court of the Moscow District and the SCC RF

3b) Enforcement proceedings in the Netherlands

- February 28, 2008 – enforcement denied by the President of the District Court in Amsterdam (Article V(1)(e) of the NYC)
- April 28, 2009 – enforcement granted by the Court of Appeal in Amsterdam
- June 25, 2010 – recourse of Rosneft in respect of Court of Appeal's enforcement inadmissible–Dutch Supreme Court
- December 16, 2010 – Rosneft applied to the European Court of Human Rights

Enforcement by the Court of Appeal in Amsterdam

Reasoning:

- close involvement of Rosneft and Russian state
- Russian judiciary was instructed by the Russian executive branch in annulling awards
- indirect evidence of that in press, reports, court decisions
- setting aside judgments in Russia are " the result of a judicial process that must be qualified as partial and dependent and these judgments cannot be recognized in the Netherlands"

Enforcement by the Court of Appeal in Amsterdam (contd)

- However, no direct evidence on partiality and dependence of the judges who set aside
- Decision was based on a mere assumption because in court's view "partiality and dependence, by their nature, take place behind the scenes".

Decision is wrong: the mere fact that the decision was rendered in Russia would mean that the judges examining the request for setting aside could not be independent and impartial

Recourse to the Dutch Supreme Court

- Rosneft's application
- June 25, 2010 – recourse inadmissible – as would impose a more onerous condition on the enforcement of foreign awards than on domestic awards ⇒ violation of non-discrimination principle (Article III of the NYC)
- Grounds untenable under the NYC and Dutch arbitration law

Application to the ECHR

- December 16, 2010 – application of Rosneft to the ECHR against the Kingdom of Netherlands
- Basis: violation of the principle of equality of arms under Article 6 of the European Convention on Human Rights.
- So far, no decision

Conclusions

- Recognition proceedings in Russia – unique situation (Article IX of EC) – legal basis for recognition and enforcement of the annulled award
- Enforcement is possible if the ground for setting aside is violation of public policy, but
- State can still refuse recognition and enforcement if it would violate public policy according to the laws of the enforcing state

Conclusions (contd)

- Kemerovo Court recognized the annulled award (further to Article IX of EC)
- Federal Court reversed because of the violation of public policy of Russia (NYC and domestic legislation, no EC)
- File is at the SCC RF for a supervisory review
- EC is not applicable to enforcement proceedings in the Netherlands
- Dutch legislation does not have more favorable enforcement provisions ⇒ no legal basis for enforcement of annulled arbitral awards in the Netherlands