NEWSLETTER

CIETAC Hong Kong Arbitration Center & CMAC Hong Kong Arbitration Center

CIETAC Guidelines on Evidence effective since March 2015

To assist in handling the evidence issues in the arbitration proceedings, CIETAC Guidelines on Evidence has been put into effect since Mar, 2015.

For soft copy of the guideline, please visit: http://cn.cietac.org/rules/Guidelines%20on%20Evidence_e.pdf

HKSAR to hold arbitration cases of PCA

HKSAR will begin to hold arbitration for disputes involving states and private and public companies, after China and HKSAR signed agreements with PCA early this year.

The agreement with the PCA, based in the Hague, means HKSAR could handle many of its outstanding cases involving Asian parties.

HK court freeze CHN restaurant founder's assets

A Mareva order was granted by High Court Justice Andrew Chung of Hong Kong Hight Court on 6 Mar, directing against Zhang Lan, and two other respondents, Grand Lan Holdings Group (BVI) Limited and South Beauty Development Limited.

Ms Zhang's argument that there was"insufficient evidence of a real risk of dissipation of assets" was rejected by Mr. Chung.

SPC reiterate its pro-arbitration stance

He Rong, Vice President of the SPC of China stated that SPC will keep on support arbitration in the 7th Arbitration and Judiciary Forum of China Academy of Arbitration Law.

Gain the experience of EA of CIETAC HKAC NOW!

中国国际经济贸易仲裁委员会 香港仲裁中心
China International Economic and Trade Arbitration Commission
Hong Kong Arbitration Center

SAVE THE DATE: 12 June 2015

EMERGENCY ARBITRATOR PROCEDURE PLUS

12:30-14:00 pm
13F Gloucester Tower, the Landmark, Hong Kong

A real taste of EAP under CIETAC Arbitration Rules (2015)
with an extra flavour of concurrent application for the Mainland court injunction.

Mock Arbitration Team:

Emergency Arbitrator: Paul STARR

Counsels: May TAI, James ROGERS, & Cameron HASSALL

*For free registration, please contact hkevents@cietac.org

Reports of overseas enforcement of China-seated arbitral awards (4)

In this edition, we invite you to enjoy the reading of:

(I) Legal bases and procedure for enforcing foreign arbitral awards in Russia and analysis of some of the commercial courts' decisions that granted or denied enforcement of foreign arbitral awards;

(II) How China-seated arbitration awards have been enforced overseas – the French perspective.

In the next edition, we will cover Germany and re-visit 2 popular destinations of enforcement – the Netherlands and the U.S..

The Enforcement of Foreign Arbitral Awards in the Russian Federation

Anna Kozmenko, Christopher Boog

Schellenberg Wittmer, Singapore and Zurich

Introduction

Russia is a major player in international commerce, and the number of arbitrations involving Russian parties is growing rapidly. As a result, many parties have to apply to Russian courts to recognize and enforce foreign arbitral awards in Russia.[1] Ever since sanctions have been imposed on certain Russian entities and individuals by Western states, Russian players have increasingly been looking to the East. Against this background, it can be expected that the future will see a steep increase in the enforcement of arbitral awards issued in Asian seats of arbitration and favor of Asian entities in Russia.

Until recently, enforcing foreign arbitral awards in Russia has been quite problematic. Russian courts, especially lower courts located outside Moscow and St. Petersburg, were reluctant to enforce foreign arbitral awards due to their skepticism of international arbitration, their inexperience in enforcing foreign arbitral awards, the excessive formalism at times found under Russian law, and the courts' inconsistent interpretation and application of the public policy exception under the New York Convention.

However, the enforcement rate has steadily increased to average rates of 85-89% in the decade between 2003 and 2013.[2] This growth stems from the development of relevant Russian legislation, the increasing experience of Russian judges with international arbitration, and the favorable practice of the Supreme Commercial Court of the Russian Federation ("SCC").

This article provides an overview of the legal bases and procedure for enforcing foreign arbitral awards in Russia and analyzes some of the commercial ("arbitrazh")[3] courts' decisions that granted or denied enforcement of foreign arbitral awards.

Legal Framework

The enforcement of foreign arbitral awards in Russia is governed by the Russian Commercial Procedure Code dated 24 July 2002 ("CPC"), the Russian *lex arbitri* – Law of the Russian Federation on International Commercial Arbitration No. 5338-1 dated 14 August 1993 ("ICA Law"), and international treaties, primarily the New York Convention.

In addition, the SCC has issued two "Informational Letters" (Informacionnie Pisma) that analyze and interpret relevant legislation and selected case law and offer guidance to the lower courts on the enforcement of foreign arbitral awards.

The Commercial Procedure Code of the Russian Federation

The CPC provides the procedural framework for enforcement of foreign arbitral awards. CPC Chapter 30 applies to domestic awards. Chapter 31 establishes the procedures for enforcement of foreign judgments and foreign arbitral awards, but incorporates parts of Chapter 30.

CPC Chapter 31 also provides the grounds for refusal of enforcement of foreign arbitral awards, which correspond to the grounds contained in Article V of the New York Convention.

Law of the Russian Federation on International Commercial Arbitration

Based on the UNCITRAL Model Law, the ICA Law mirrors the provisions of the New York Convention concerning the refusal of enforcement of foreign arbitral awards.[4]

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[1] See generally William R. Spiegelberger, The Enforcement of Foreign Arbitral Awards in Russia, Juris 2014 ("Spiegelberger"); Boris Karabelnikov, Isponenie Resheniy Mezhdunarodnix Kommercheskix Arbitrazhey. Kommentarii k Nju-Yorkskoy Konvencii 1958 g. i Glavam 30 i 31 APK RF 2002 g. (Enforcement of Foreign Commercial Arbitral Awards. Commentary to the New York Convention of 1958 and Chapters 30 and 31 of the CPC RF), FBK Press, 2003; Boris Karabelnikov and Dominic Pellew, Enforcement of International Arbitral Awards in Russia – Still a Mixed Picture, 19(1) Bul. Int'l Com. Arb. 65 (2008).

[2] Spiegelberger, p. xxiv.

[3] State courts that deal with enforcement of foreign arbitral awards in Russia are called in Russian "arbitrazhniye soudy". This term is often translated into English as "arbitration" or "arbitrazh" courts. Such a translation can be misleading and lead to confusion between state "arbitration" courts and arbitral tribunals. Therefore, we shall refer to the state courts that deal with enforcement of foreign awards in Russia as "commercial courts."

[4] Article 36 of the ICA Law mirrors provisions of Article V of the New York Convention and the courts tend to cite them together. In case of a discrepancy between Russian law and international treaties ratified by Russia, pursuant to Article 15(4) of the Russian Constitution, provisions of international treaties prevail.

The ICA Law applies to international commercial arbitrations if the place of the arbitration is in the territory of the Russian Federation. However, the provisions of Articles 8, 9, 35 and 36 apply when the place of arbitration is outside of the territory of the Russian Federation.[5] Article 8 deals with cases where a court has to decide on the validity of an arbitration agreement. Article 9 deals with interim measures. Articles 35 and 36 address the recognition and enforcement of an arbitral award, in particular the grounds for refusal of recognition or enforcement of an award.

The New York Convention and Other Relevant Treaties

The New York Convention came into legal force in the territory of the Soviet Union on 22 November 1960.[6] Russia is a party to the convention as the successor to the Soviet Union.[7] The Soviet Union made the reservation under Article I(3) of the New York Convention that it would apply the provisions of the convention in respect of arbitral awards made in the territories of non-contracting States "only to the extent to which they grant reciprocal treatment."[8] However, as far as the authors can determine, Russian courts have never applied this reservation.

Russian courts have applied some other international treaties in cases related to the enforcement of foreign arbitral awards. These treaties include the European Convention on Foreign Trade Arbitration of 1961 and the Moscow Convention of 1972.

The Soviet Union ratified the European Convention on Foreign Trade Arbitration in 1962. The Convention regulates the arbitration of disputes between European trading partners. The European Convention enhances the enforceability of arbitral awards in two ways. First, it provides that the courts of a signatory state may not refuse enforcement of an award on the ground that it was set aside in the state where it was made. Second, it limits the grounds for refusing to enforce an award to the grounds specified in Article V of the New York Convention, however excluding Article V(1)(e).[9]

The Moscow Convention came into force for the USSR on 13 August 1973. This convention's role has significantly declined since the Soviet Union's dissolution, when most of the members renounced the treaty leaving only Russia, Mongolia and Cuba as potentially active signatories.[10] The convention only covers awards rendered in one of the contracting states. It provides that enforcement of such awards may be denied on three alternative grounds: (1) that the award violated the convention's competence rules, or (2) the party against which the award has been made proves that it was deprived of the possibility to exercise its rights because the arbitral procedure rules were violated or other circumstances that it could not prevent and that were known to the arbitral tribunal, impaired its rights, or (3) the party against which the award had been made proves that the award has been set aside or its enforcement has been suspended on the basis of national legislation of the country in which the award was made.[11]

Informational Letters of the Supreme Commercial Court

The Presidium of the SCC[12] issued two Informational letters that provide important guidance on the enforcement of arbitral awards in Russia.

Informational Letter No. 96 dated 22 December 2005 provides summaries of thirty-one cases decided by commercial courts of different levels, including the SCC, and provides recommendations to lower courts on deciding future cases.[13]

Information Letter No. 156 dated 26 February 2013 provides an overview of case law addressing public policy as a ground to deny recognition and enforcement of a foreign arbitral award. The SCC Presidium outlined scenarios that

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[5] See ICA Law, Article 1(1).

[6] See Status, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

[7] See Letter of the Supreme Court of the Russian Federation No. OM-230 dated 16 August 1995, on the List of International Treaties and Agreements in the Execution of Which the Arbitration Courts of Russia Take Part.

[8] See Gazette of the Supreme Soviet of the USSR No. 46, 1960, item 421.

[9] The European Convention on Foreign Trade Arbitration dated 21 April 1961 available at https://treaties.un.org/doc/Treaties/1964/01/.../Ch_XXII_02p.pdf, Article IX.

[10] Spiegelberger, p. 20.

[11] See Convention on the Settlement by Arbitration of Civil Law Disputes Resulting From Relations of Economic and Scientific-Technical Cooperation dated 26 May 1972 available at arbitrations.ru/userfiles/file/Law/Treaty/Moscow%20Convention.pdf, Article V.

[12] Due to the judicial reform that took place in 2014, the two highest courts of the Russian Federation – the Supreme Commercial Court and the Supreme Court – merged. As a result of this merger, the Supreme Commercial Court was abolished and its functions were transferred to the Supreme Court. See The Constitutional Law of the Russian Federation No 4-FKZ dated 5 February 2014.

[13] The Informational Letter of the Supreme Commercial Court of the Russian Federation No. 96 dated 22 December 2005, available in Russian at http://www.arbitr.ru/as/pract/vas_info_letter/2949.html.

may or may not constitute a violation of public policy as well as certain provisions relating to general matters on the application of the public policy exception to enforcement.

The Procedure of Recognition and Enforcement of Arbitral Awards

The recognition and enforcement of foreign arbitral awards is handled by the commercial courts of the Russian Federation.[14] A party seeking enforcement has to file an application for the recognition and enforcement of a foreign arbitral award with a commercial court of the constituent entity of the Russian Federation at the debtor's domicile or, if the debtor's domicile is unknown or outside of the Russian Federation, at the location of the debtor's assets.[15] The application must be filed with an original or a duly certified copy of the arbitral award and the arbitration agreement within three years after the arbitral award was rendered.[16] The documents filed with the application must be in Russian or be translated into Russian, with the translations being notarized and apostilled.[17]

After the relevant commercial court receives an application, it schedules a hearing and notifies the parties of the hearing's time and place. A party's default does not prevent the court from considering the case.[18] The application is considered by a single judge within three months from the day of receipt of the application by the commercial court.[19] The enforcement proceedings usually take between six months and 1.5 years.

If the application for enforcement of a foreign arbitral award is granted, the court issues a writ of execution.[20] If the debtor does not satisfy the judgment voluntarily, the claiming party can initiate an execution procedure through the bailiff service in accordance with the Law on Execution Procedure No. 229-FZ dated 2 October 2007.

The decision of the competent commercial court may be appealed to the federal commercial district courts within one month from the day of issuance of the decision by a commercial court.[21] Appeals are filed through the commercial court that issued the decision.[22]

The decisions of the federal commercial district courts are final and come into force immediately. However, upon application of a party, the judicial chamber of the Supreme Court of the Russian Federation can review the decisions of the federal commercial district courts. A party can apply to the Supreme Court within two months after the decision of the federal commercial district court enters into force, if it believes that such a decision contains a fundamental breach of the substantive and/or procedural law that can affect the outcome of judicial proceedings and lead to a violation of the party's rights and legitimate interests.[23]

Furthermore, a decision rendered by the judicial chamber of the Supreme Court can be appealed to the Presidium of the Supreme Court in exercise of its supervisory powers within three months after the decision of the Supreme Court's judicial chamber enters into force.[24] The decision can be set aside or modified if it violates: (1) human and civil rights and freedoms that are guaranteed by the Constitution of the Russian Federation, by the vested principles and rules of international law, and by the international treaties to which the Russian Federation is a party; (2) public legal and other interests; (3) uniformity in application and interpretation of law by the courts. Resolutions by the Presidium of the Supreme Court of the Russian Federation enter into force from the date of their rendering and cannot be appealed.[25]

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[14] See CPC, Article 241(2).

[15] See id., Article 242(1); see also Article 36(3).

[16] See id., Article 246(2).

[17] Id., Article 242(4).

[18] See id., Article 243(2).

[19] See id., Article 243(1).

[20] See id., Article 246(1).

[21] See id., Articles 245(3) and 274(1). See also the Federal Constitutional Law of the Russian Federation No. 1-FKZ on Commercial Courts in the Russian Federation dated 28 April 1995, Article 24.

[22] See id., Article 275(1).

[23] See id., Articles 291.1(1) and 291.2(1).

[24] See id., Article 308.1

[25] See id., Article 308.13.

Although there is no doctrine of binding precedent in the Russian legal system, lower courts take into account the decisions and resolutions of the Supreme Court as guidelines while deciding on certain issues.

Court Practice on the Enforcement of Foreign Arbitral Awards in Russia

Various decisions that granted or denied enforcement of foreign arbitral awards illustrate how the commercial courts apply grounds for refusal of enforcement under Article V of the New York Convention and corresponding provisions of Russian law.

Article V(1)(a) of the New York Convention and Article 36(1)(1) of the ICA Law

Russian courts have denied enforcement in numerous cases on the ground of insufficient form or content of the arbitration clause.

In Sokofl Star Shipping Co. Inc. v. Technopromexport, the Commercial Court of the city of Moscow denied enforcement because the claimant's name was wrongly written in the award and in the time-charter contract that contained the arbitration clause. The arbitration agreement referred to the claimant as "Sokofl Star Shipping Co. Ltd." However, the application for enforcement was filed by "Sokofl Star Shipping Co. Inc." Therefore, the court denied enforcement, reasoning that because Sokofl Star Shipping Co. Inc. was not party to the arbitration agreement it was not entitled to enforce the award. This decision was appealed to the Federal Commercial Court of the Moscow District, which upheld it.[26] The SCC, however, held that the question of the agreement's validity was beyond the scope of the court's consideration during the enforcement proceedings.[27]

Russian courts have denied enforcement on the ground that the resisting party's signature contained in the arbitration clause was forged. In Vinkoncern v. Terminal Service, the court refused to enforce the award based on the conclusion of the graphologist appointed by the court that the signature on the contract's addendum containing the arbitration clause was a color copy. Since no original of the addendum was in evidence and the respondent denied that its representative signed the addendum, the court found there was no objective, relevant and admissible evidence that the parties concluded an addendum containing the arbitration clause and, therefore, there was no evidence that the arbitral tribunal had been competent to hear the dispute.[28]

Russian courts have declined to enforce an award on the ground the arbitration clause contained a translation mistake erroneously providing for the arbitration of disputes. In Agroproliv v. Vermeer East AG, the court refused to enforce two awards on the ground that there was no valid arbitration agreement. The contract seemed to have been drafted in Russian and then translated into German with both versions having equal force. However, the arbitration clauses in the German and Russian versions differed. The Russian version provided for the resolution of all disputes in the "arbitrazh court of Almaty" which strongly suggested a state court, while the German version provided for resolution of disputes in the "arbitration court at the Chamber of Commerce and Industry in Almaty." However, the term "arbitrazh courts" had not been used in Kazakhstan since 1995, when the term "economic courts" was introduced. Also, there were two chambers of commerce and industry in Almaty – one of the city of Almaty and the other of Kazakhstan, but only the latter had an arbitration institution. Therefore, the court found that the German version of the arbitration agreement contained a translation error and the parties had not agreed to arbitration.[29]

Russian courts have both enforced and denied enforcement of an award when the arbitration clause referred to an indeterminate arbitration institution.

In HiPP GmbH & Co. Export KG v. SIVMA LLC, HiPP commenced arbitration under various contracts providing for arbitration in the Vienna International Arbitration Centre as well as for arbitration in the country of the seller, HiPP. The commercial court of first instance denied enforcement and the federal commercial district court upheld the decision on the ground that the arbitration clause was pathologically indeterminate.[30] The SCC vacated the decisions of the below courts and enforced the award, stating that the "original declaration of intent of the parties for resolution of a private dispute by an alternative means is supported by the facts of the case. It follows, therefore, that consideration of questions relating to the competence of the arbitration in Austria [and] validity of the guarantee

[26] Decision of the Federal Commercial Court of the Moscow District dated 11 April 1997, Case No 5-G01-35.

[27] Decision of the SCC dated 13 April 2001, Case No. 5-G01-35.

[28] Decision of the Commercial Court of the Kaluga Region dated 27 December 2007, Case No. A23-3716/06G-19-305. See also Informational Letter of the SCC No. 96 dated 22 December 2006, at 30.

[29] Decision of the Commercial Court of the City of Moscow dated 10 October 2013, Case No. A40-68965/13.

[30] Decision of the Commercial Court of the City of Moscow dated 26 August 2010, Case No. A40-4113/10-25-33; Decision of the Federal Commercial Court of the Moscow District dated 13 November 2010, Case No. A40-4113/10-25-33.

contract ... amounts to review of the merits of the award … which is impermissible pursuant to the terms of the [NY] Convention."[31]

The award also was enforced in ACM Engineering v. Volna where the contesting party argued that the arbitration agreement was invalid because it referred the disputes to the "Arbitration Court at the Chamber of Commerce and Industry of Austria in the city of Vienna" which is not the right name of the arbitration institution located in Vienna – the Vienna International Arbitration Centre. The Russian court of first instance enforced the award and the cassation court upheld the decision.[32]

However, in another case, the Federal Commercial Court of the Moscow District denied enforcement in a case in which the arbitration institution was referred to as the "Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation" instead of "International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation."[33]

Another case concerned an amendment to the arbitration clause. In Lugana Handelsgeschellschaft mbH v. Ryazanskii Zavod Metallokeramicheskix Priborov, the parties originally agreed in the arbitration clause that all disputes were to be resolved by arbitration in Stockholm. The claimant subsequently proposed to amend the arbitration clause to provide for arbitration in the German Arbitration Institution ("DIS"). Respondent agreed to this proposal in writing and subsequently participated in the DIS arbitration. The commercial courts of the first and second instances denied the enforcement after finding the amended arbitration agreement invalid. However, the SCC vacated the decisions of the lower courts and enforced the award.[34]

In Fujitsu Technology Solutions GmbH v. LLC RRSi, the respondent argued against enforcing the award rendered by an arbitral tribunal of the Chamber of Commerce and Industry of Upper Bavaria on two grounds: (1) the arbitration clause relied on by the arbitral tribunal did not extend to the dispute it resolved; and, in any event, (2) the contract containing the arbitration clause had not been signed by an authorized representative of the respondent. The respondent based its objection on the alleged expiration of the agreement containing the arbitration clause. Both the arbitral tribunal and the German court in the set-aside proceedings, however, held that the parties had agreed to extend the term of the validity of the agreement. The Russian courts decided that in these circumstances they should defer to the findings made by the arbitral tribunal and the German court. The second objection was dismissed summarily. The courts noted that it was not raised either in the arbitral proceedings or at the set-aside application stage. Accordingly, the respondent was precluded from raising it at the enforcement stage. Russian courts have repeatedly held that if a party fails to raise an objection during the course of the arbitral proceedings it may not rely on it during the enforcement stage. The commercial court and the federal commercial district courts dismissed both objections.[35]

Article V(1)(b) of the New York Convention and Article 36(1)(2) of the ICA Law

Consistent with Article V(1)(b) of the New York Convention, Russian courts can deny enforcement if the party against whom the award is invoked was not given proper notice and the party was unable to present its case.

In most cases where the party resisting enforcement of an award invoked Article V(1)(b) of the New York Convention as a ground for refusal of enforcement, Russian courts have tended to deny enforcement. Russian courts tend to be very formalistic when it comes to proper notice.

In Forever Maritime Ltd. v. State Unitary Enterprise Foreign Trade Enterprise Mashinoimport, an ad hoc arbitral tribunal seated in London decided the case based only on documents and issued an award in favor of Forever Maritime Ltd. which that then sought enforcement of the award in Russia. The commercial court of the city of Moscow refused enforcement on the grounds that Forever Maritime Ltd. could not prove that Mashinoimport had been properly notified of the arbitral proceedings.36 The Court did not consider that copies of correspondence between the parties constituted sufficient evidence to prove proper notification, as the Russian translation of this

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[31] Decision of the SCC dated 14 June 2012, Case No. A40-4113/10-25-33.

[32] Decision of the Federal Commercial Court of the Nizhgorod Region dated 27 February 2003, Case No. A43-13260/02-15-28isp; Decision of the Federal Commercial Court of the Volgo-Vyatsk Region dated 24 April 2003, Case No. A43-13260/02-15-28isp.

[33] Decision of Federal Commercial Court of the Moscow District dated 6 November 2003, Case No. KG-A40/7725-03.

[34] Decision of the SCC dated 2 February 2010, Case No. A54-3028/2008.

[35] See also S. Usoskin, Enforcement of Arbitral Awards in Russia: Effect of Foreign Court Proceedings, CIS Arbitration Forum, 10 April 2013, available at http://www.cisarbitration.com/2013/04/19/enforcement-of-arbitral-awards-in-russia-effect-of-foreign-court-proceedings/.

[36] Decision of the Commercial Court of the City of Moscow dated 12 September 2003, Case No. A40-15797/03-25-48.

correspondence had not been notarized. This decision was upheld by both the Federal Court of the Moscow District and the SCC[37] on the ground that there was no evidence proving that the arbitral tribunal had duly notified Mashinoimport that the dispute would be decided based on documents only.[38]

In Berezastroymaterial v. D.V. Gorelov, Berezastroymaterial's application for enforcement was denied, because it failed to provide evidence that Gorelov was properly notified of the arbitral proceedings.[39] The federal commercial court of the North Caucasus District upheld the lower commercial court's decision and found that Gorleov was not duly notified as, even though there was evidence that the notice was sent to Gorelov, there was no evidence that he actually received it.[40]

In OOO Ukrros-trans v. OOO Asia Yug Transit, the federal commercial court enforced the award of the International Commercial Arbitration Court under the Chamber of Commerce and Industry of Ukraine. The defendant argued that it had not been properly notified about the place and time of the hearing, because the two employees who actually accepted the notice had resigned before they received it. The court rejected the defendant's argument and did not consider the two employees' letters of resignation as sufficient evidence to prove that there was no proper notification.[41]

In Inko Fud v. Myasokombinat Gvardeyskiy Plius, enforcement was denied because the notice to the resisting party was sent to the address that was orally agreed by the parties, which was however not a registered address of the resisting party.[42]

In OAO Maysokombinat "Vladivostokskiy" v. Tsin Yan, the Federal Commercial Court of the Far East District upheld the decision of the lower commercial court and denied enforcement of USD 785,815 award issued under the auspices of the Mudantsayn Arbitration Commission. The court relied on Article 244(1)(2) of the CPC that provides that recognition and enforcement shall be denied if a party against which the award was made was not duly notified of the time and place of the hearing of the case or was otherwise unable to present its case. The Mudantsayn Arbitration Commission sent notification to OAO Maysokombinat "Vladivostokskiy" through the competent authorities of China and Russia instructing Primorskiy regional court to notify the respondent of the proceedings. The Russian authorities notified the Chinese authorities that this instruction was executed by letter dated 6 February 2008, while the Mudantsayn Arbitration Commission opened the arbitration proceedings on 8 June 2007, i.e. before the notification from the Russian authorities was received. Therefore, the evidence of proper notification of the arbitration proceedings was missing in the record and the enforcement was denied.[43]

Article V(1)(c) of the New York Convention and Article 36(1)(3) of the ICA Law

The recognition and enforcement of the award may be refused if the award deals with a dispute that is not in whole or in part contemplated by or falls within the terms of the arbitration agreement. When decisions on matters submitted to arbitration can be separated from those not submitted to arbitration, the New York Convention permits the recognition and enforcement of the parts of an award that contain the decision on the matters submitted to arbitration.

In Living Consulting Group AB v. OOO Sokotel, the SCC affirmed the lower commercial courts' decisions to enforce the award of the Arbitration Institute of the Stockholm Chamber of Commerce. The defendant argued that the lower courts had misinterpreted Articles V(1)(a) and V(1)(c) of the New York Convention, which afford national courts discretion to refuse to enforce awards on certain grounds. The commercial courts established that the Arbitration Institute of the Stockholm Chamber of Commerce had ruled it had jurisdiction, and this decision was not appealed to the Swedish courts. Thus, the Russian courts rejected the defendant's objections and enforced the award.[44]

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[37] Decision of the SCC dated June 22, 2004, Case No. 3253/04.

[38] Decision of the Federal Commercial Court of the Moscow District dated 5 December 2003.

[39] Decision of the Federal Commercial Court of the Adygey Republic dated 6 April 2009, Case No. A01-342/2009.

[40] Decision of the Federal Commercial Court of the North Caucasus District dated 14 September 2009, Case No. A01-342/2009.

[41] Decision of the Federal Commercial Court of the Moscow District dated 8 February 2012, Case No. A40-84997/11-52-701.

[42] Decision of the SCC dated 8 May 2007, Case No. A21-4111/2006.

[43] Decision of the Federal Commercial Court of the Far East District dated 18 March 2009, Case No. A51-2548/2008.

[44] Decision of the SCC dated 12 December 2011, Case No. VAS-11800/2011.

In Oil & Natural Gas Corporation v. Amurskiy Sudostroitelniy Zavod, the SCC upheld the decision of the lower commercial courts and refused enforcement of the award, because the damages awarded in the arbitration were beyond the scope of a ship construction contract that contained the arbitration clause.[45]

Article V(1)(d) of the New York Convention and Article 36(1)(4) of the ICA Law

This ground is rarely invoked by parties resisting enforcement of awards in Russian courts, and even if invoked, it is rarely successful.

However, in Duk Invest Limited v. Kaliningrad Region & the Regional Development Fond of Kaliningrad Region, the commercial court refused the recognition and enforcement of an award issued by an ad hoc tribunal in London on the ground that the composition of the arbitral tribunal did not accord with the parties' arbitration agreement. The Russian court determined that the parties had arranged to use the UNCITRAL Arbitration Rules. Under these rules, if one of the parties fails to appoint an arbitrator, the other party has the right to apply to the Secretary-General of the Permanent Court of Arbitration at the Hague for the appointment of a body empowered to appoint the second arbitrator. Instead of following this procedure, the applicant party applied directly to the London Court of International Arbitration, which appointed the second arbitrator. According to the commercial court, his violated the arbitration agreement as to the procedure for composing the arbitral tribunal.[46]

Article V(1)(e) of the New York Convention and Article 36(1)(4) of the ICA Law

Russian courts have reached different conclusions with regard to the evidence required to show whether an award is binding. The commercial courts have generally held that the award would be assumed binding in the absence of evidence to the contrary.[47]

In addition, Russian commercial courts consider awards on costs to qualify for enforcement under the New York Convention,[48] while arbitral tribunals' orders such as interim measures are deemed to be not final and, therefore, are not considered to constitute awards that qualify for enforcement under the New York Convention.[49]

The Federal Commercial Court of the Moscow District also refused to enforce an award that was partially set aside. In MIR Müteahhitlik ve Ticaret A.Ş. v. KB Most Bank, the court refused even partially to enforce the award of the Arbitration Institute of the Stockholm Chamber of Commerce on the ground that the Swedish court had partially set it aside.[50]

Article V(2)(a) of the New York Convention and Article 36(2) of the ICA Law

Russian law contains no clear definition of which disputes are or are not arbitrable. While Russian academics have written at length on the necessity of a definition of arbitrability, no legislation has followed, and the presumption is that a matter is arbitrable unless otherwise provided by law.[51]

Article 248 of the CPC provides for the commercial courts' exclusive jurisdiction over the following categories of disputes: 1) cases concerning state property of the Russian Federation, including disputes concerning the privatization of state property and eminent domain; 2) cases whose subject matter is immovable property or the rights to it, if this property is located on the territory of the Russian Federation; 3) cases concerning the registration or issuance of patents, the registration and issuance of certificates to trademarks, industrial designs and utility models, or the registration of other rights to results of intellectual activity, which require the registration or the issuance of a patent or of a certificate in the Russian Federation; 4) cases regarding the invalidation of entries in public registers (books of records, cadasters), made by a competent body of the Russian Federation, keeping such a public register (book of records, cadaster); 5) cases concerning the creation, liquidation or registration of legal entities and individual entrepreneurs on the territory of the Russian Federation, as well as the challenge of decisions of these legal entities' bodies.

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[45] Decision of the SCC dated 25 July 2011, Case No. A73-12888/2009.

[46] Decision of the Federal Commercial Court of the North-West District dated 3 May 2006, Case No. A21-5758/2005.

[47] Decision of the Federal Commercial Court of the Moscow District dated 9 October 2012, Case No. A40-105056/10-52-930; Decision of the SCC dated 25 July 2011, Case No. A73-12888/2009.

[48] Decision of the SCC dated 19 February 2009, Case No. A40-113545/12.

[49] Decision of the Commercial Court of the Chelyabinsk Region dated 26 January 2013, case No. A76-22652/2011.

[50] Decision of the Federal Commercial Court of the Moscow District dated 29 July 2003, Case No. A40-50538/02-8-561.

[51] See ICA Law, Article 1(4).

For example, in Kalinka-Stockmann v. Smolensky Passazh, the Commercial Court of Moscow denied the enforcement of an award that required the landlord to renew the lease. The court held that if the award were enforced, it would lead to the registration of the renewed lease in the State Registry that falls within public and administrative law.[52]

In Pressindustria S.p.A. v. OAO Tobolskii Neftehimicheskii Kombinat, the court refused to recognize and enforce an arbitral award of an ad hoc international commercial arbitration in Stockholm on the ground that the arbitral award decided issues that were beyond the arbitration agreement and included provisions that fell within the jurisdiction of the Russian Federation. In particular, the award included provisions on the reorganization of a Russian entity that could be done only under Russian legislative procedures.[53]

Article V(2)(b) of the New York Convention and Article 36(2) of the ICA Law

Until recently, Russian courts often denied enforcement of foreign arbitral awards on the ground that they contravened Russian public policy. However, Russian courts do not uniformly define the term "public policy".

Generally, the violation of public policy is understood as an outcome that contradicts the fundamental constitutional principles of the Russian Federation and the ratified international treaties.[54]

However, in 2013 the SCC issued very detailed guidelines describing what constitutes a violation of public order and what does not. The SCC explicitly mentions that courts must not review cases on the merits, and cites only two situations where public policy is deemed violated: (1) where the agreement in dispute was concluded as a result of bribery; and (2) where the arbitrator(s) were not impartial (for instance, as a result of their contact with one of the parties to the arbitration).[55]

The SCC emphasized that Russian courts should not refuse to recognize and enforce international arbitral awards on the following grounds: (1) the respondent contests the recognition and enforcement of an award based exclusively on the absence under Russian law of rules similar to those of the applicable foreign law; (2) the debtor fails to provide evidence that the arbitral tribunal applied punitive measures; (3) the foreign court has requested the Russian party to the proceedings to pay a deposit to it as a condition of appealing the award; (4) the foreign party has breached the procedure for the approval of large transactions provided for under its domestic law; (5) the enforcement is sought against property jointly owned by spouses, when the debtor's spouse has not participated in the arbitration proceedings; (6) the foreign arbitral award contains a typographical error that does not affect its substance or meaning; and (7) the arbitration proceedings ensured compliance with the principle of independence and impartiality of arbitrators.[56]

In addition, the SCC outlined certain guidelines for the courts on the use of the public policy ground: (1) the commercial courts may not revise the arbitral award on the merits when considering the consequences of the enforcement of such award; (2) the commercial courts shall deny recognition and enforcement of a foreign award on their own initiative if they find that such recognition and enforcement would contradict the public policy of the Russian Federation; (3) the party arguing that the recognition and enforcement of a foreign arbitral award is contrary to the public policy of the Russian Federation bears the burden of proof; and (4) the commercial courts should not invoke the public policy ground if there are other grounds for refusing to recognize and enforce a foreign arbitral award.[57]

Even though the informational letter provided very useful clarifications and guidelines to lower commercial courts on the application of the public policy exception, it is worth looking at some further cases where Russian courts denied or granted enforcement demonstrating how the public policy exemption is applied.

In United World v. Krasny Yakor, a commercial court enforced a USD 37,600 award against Krasny Yakor. However, the Federal Commercial Court of the Volgo-Vyatsk District overturned the lower court's decision and held that the enforcement of the arbitral award would lead to the bankruptcy of a state-owned company Krasny Yakor, which would have a negative influence on the social and economic stability of the city of Nizhniy Novgorod, and

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[52] Decision of the Commercial Court of the City of Moscow dated 14 August 2008, Case No. A40–28757/08–25–228. The decision was further upheld by the Federal Commercial Court of the Moscow District and the SCC.

[53] Decision of the SCC dated 14 January 2003, Case No. 2853/00.

[54] Diana V. Tapola, Enforcement of Foreign Arbitral Awards: Application of the Public Policy Rule in Russia, 22(1) Arb. J.151.

[55] See Letter of the Supreme Court of the Russian Federation No. 156 dated 26 February 2013; See also A. Grishchenkova, Recognition and Enforcement of Foreign Judgments in Russia, Yearbook of Private International Law, Vol. 15 (2013/2014), Germany, 2014, pp. 448 – 449.

[56] Id.

[57] Id.

consequently on the Russian Federation as a whole, because Krasny Yakor manufactured products of strategic value for the security and national safety of the state. Therefore, the enforcement of the award was declared to be in contravention to public policy.[58]

In Moscow National Bank Ltd. v. MNTK Microhirurgia glaza, the award also concerned the property of the Russian Federation.[59] MNTK Microhirurgia glaza was subsidized by its parent company – a state establishment – using funds that belonged to the Russian state. Therefore, if the award had been enforced, it would have indirectly damaged national property, which it was held would have constituted a violation of public policy.

In O&Y Investments Ltd. v. OAO Bummash, Bummash sought a declaration from the commercial court of the Udmurt Republic that the agreement that contained the arbitration clause was invalid. The commercial court decided that the agreement was invalid on the ground that it violated Articles 81 and 83 of the Federal Law on Joint-Stock Companies.[60] Despite this decision of the commercial court that had entered into force, the arbitral tribunal seated in the Netherlands decided in favor of O&Y Investments Ltd.[61] O&Y Investments Ltd. then sought to enforce the arbitral award in Russia. However, the commercial court of the Udmurt Republic denied enforcement because it would violate Russian public policy.[62] This decision was affirmed by the Federal Commercial Court of the Ural District.[63] The federal court held that the enforcement would lead to the existence of two judicial acts of equal force, containing mutually exclusive holdings, within the territory of the Russian Federation. Enforcement of an award based on an agreement that Russian courts previously deemed invalid would contradict the principle that judicial acts of the Russian Federation are mandatory in nature.[64] Since this principle is a part of Russian public policy, the enforcement would lead to its violation and, therefore, could not be granted.

In one of the recent cases decided by the newly formed Supreme Court of the Russian Federation, Mir Dizayn v. Konnilend AG, the court upheld the decisions of the lower commercial courts that denied the recognition and enforcement of an award of the Arbitration Institute of the Stockholm Chamber of Commerce. The lower courts found that the enforcement of the award would contradict the public policy of the Russian Federation, because based on the case materials the right of ownership on certain equipment did not pass to the claimant, and, therefore, it had no right to modernize this equipment and recover the related loss. The court further provided a very broad and vague definition of public policy stating that "the public policy shall be understood as the fundamental legal principles, which have the highest peremptory, versatility, special social and public significance, that form the basis for construction of economic, political and legal system of the state."[65] According to the court, these principles prohibit actions that violate mandatory rules of Russian law, are detrimental to the sovereignty or security of the state, affect the interests of large social groups, and violate constitutional rights and freedoms of individuals. The elements of public policy include the principles contained in the Constitution of the Russian Federation, in particular the principle of the inviolability of property. Since this principle was violated in the award, enforcement of the award would violate the public policy of the Russian Federation and, therefore, was denied.[66]

Considerations Related to the Recognition and Enforcement of PRC Awards

Based on the case law on the enforcement of PRC awards in the Russian Federation that was reviewed, there do not seem to be any specific particularities involved with the enforcement of such arbitral awards, and there is no reason to assume that Russian courts will treat the enforcement of Chinese arbitral awards any differently from awards from other jurisdictions. The procedures and considerations regarding the grounds for refusal of enforcement described above will apply to the enforcement of arbitral awards rendered in PRC to the same extent as to any other award.

The research conducted in preparation of this article did not reveal any cases related to the enforcement of arbitral awards rendered in China that would be of particular interest and that would call for specific conclusions to be

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[58] Decision of the Federal Commercial Court of the Volgo-Vyatsk Region dated 17 February 2003, Case No. A43- 10716/02-27-10.

[59] Decision of the Federal Commercial Court of the Moscow Region dated 19 June 2003, Case No. KG-A40/2448-03-P.

[60] Decision of the Federal Commercial Court of the Udmurtsk Republic dated 4 July 2003, Case No. A71-288/2002-G10.

[61] Netherlands Arbitration Institute, Case No. 2726.

[62] Decision of the Federal Commercial Court of the Udmurtsk Republic dated 14 May 2005, Case No. A71-8/05.

[63] Decision of the Federal Commercial Court of the Ural District dated 12 October 2005, Case No. F09-2110/05-S6.

[64] Id.

[65] Decision of the SCC dated 12 January 2015, Case No. 305-ES14-2600.

[66] Id.

drawn with regard to PRC or, more specifically, CIETAC awards rendered in PRC. In the few cases that the authors identified, the awards were enforced since the parties opposing enforcement failed to appear in the court proceedings and the court did not find any grounds for refusal of enforcement.[67] The case described above, OAO Maysokombinat "Vladivostokskiy" v. Tsin Yan, where the enforcement of the Mudantsayn Arbitration Commission's award was denied, demonstrates the importance that Russian judges attach to proper notification of a party to arbitration. It is advisable, therefore, to obtain evidence of such notice before moving forward with the proceedings.

One consideration that might be noteworthy and specific to arbitral awards rendered in China is the use of certain "mediation techniques" by arbitrators, in particular any type of ex parte communication, such as caucusing. Russian judges are not familiar with the nature of such procedures and might interpret them as a contact with an arbitrator that can affect his or her independence and impartiality in relation to a specific party and to the perception of the facts of the case in general. As a result, the enforcement of an award might be put at risk based on the application of the public policy ground to refuse enforcement. Therefore, the parties to a CIETAC arbitration might consider to enter into a separate agreement specifying that caucusing or similar techniques is an appropriate and agreed procedure within the arbitration proceedings in order to ensure enforcement of the final award in Russia, if need be.

Conclusion

Over the past decade Russian legislative and judiciary authorities have made significant progress in modernizing the laws governing the recognition and enforcement of foreign arbitral awards and in providing guidance and clarifications on the issue. The overall trend is a "friendlier" approach towards the recognition and enforcement of foreign arbitral awards, with an enforcement rate of 85-89 % in 2013 compared to 43 % in 2003.[68]

Even though significant progress has been made over the last years in relation to the enforcement and recognition of foreign arbitral awards, there are still a number of problems. First, Russian courts remain very formalistic and it is very important to carefully follow applicable procedures, such as filing documents and translations in accordance with the formal requirements. Second, even though the SCC has issued important guidelines to lower courts on the application of the public policy exception, as the latest Supreme Court's decision demonstrated this concept remains very broad and vague and its application by the lower courts is somewhat unpredictable. Third, Russian law does not define the concept of arbitrability and does not contain an inclusive list of matters that are not arbitrable.

Therefore, at the stage of signing the contract, it is advisable to ensure that the signatories have the necessary powers to sign the contract and that contractual provisions are in compliance with Russian mandatory rules, especially with regard to the matters that cannot be arbitrated. Once the dispute has arisen, it is important to keep receipts of delivery of the notice of arbitration and any related documents. It is also advisable at the time of filing the request for arbitration to obtain an extract from the Joint State Register of Companies of the Russian Federation that indicates the respondent's address.69 Special attention should also be given to disputes with participation of state companies as Russian courts tend to apply the public policy exception more often in such cases.

Finally, the judicial reform that took place in Russia recently under which the SCC was abolished and its responsibilities were transferred to the Supreme Court, raises many questions, in particular to what extent the Supreme Court will consider the previous practice of the SCC and in which direction its own practice will proceed.

Despite these uncertainties, though, parties to arbitrations seated in China in general and CIETAC arbitrations in particular can rest assured that the chances of the award issued in their arbitration being enforceable in the Russian Federation are as good as with respect to awards originating elsewhere. Aside from abiding by formalities of the process, parties may want to apply particular causing when it comes to any kind of ex parte communication between the arbitral tribunal and the parties during the course of the arbitration, particularly in the framework of settlement facilitation attempts by the arbitral tribunal.

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[67] See e.g. Decision of the Commercial Court of the City of Moscow dated 18 May 2012, Case No. A40-34450/12.

[68] Spiegelberger, p. xxiv.

[69] Many institutional rules request the institutions to send the requests for arbitration to the respondents. However, it is advisable to send an additional copy of the request to the respondent and to ask the institution for certified copies of delivery receipts.

How China-seated arbitration awards have been enforced overseas – the French perspective

Dr. Dorothee Ruckteschler and Georg Haas*

A. Introduction

As a result of the development of international trade with China, the number of related disputes has increased as well. If a dispute arises between Chinese and French business partners, international arbitration is the obvious method for its resolution. A Chinese business is unlikely to agree to litigation before a national court in France – and vice versa. International arbitration therefore provides a consensual and efficient alternative.

If the parties to a contract have mutually agreed to arbitration and an arbitral tribunal has decided their dispute, it is likely that the losing party will comply with the arbitral award voluntarily. In addition, arbitral proceedings conducted in China are receiving an increased amount of credibility and trust. This is why the recognition and enforcement of Chinese arbitral awards in France is not often challenged before the French national courts, leading to only few decisions in this area. However, in some cases it may be necessary to seize the courts in order to enforce an award against the will of the losing party. In this scenario, another advantage of international awards becomes apparent: Under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention, "NYC"), it is possible to enforce a foreign arbitral award in any of the member states. The New York Convention applies in France since 1959 and in China since 1987.

France is known as an arbitration and enforcement-friendly jurisdiction. Paris is a popular seat for arbitral tribunals and is home to the International Chamber of Commerce (ICC), one of the busiest arbitral institutions in the world. French courts and legal scholars are not only in line with international practice but have pioneered it frequently.

I. Legal Framework for Enforcement

The French law on arbitration forms part of the code on civil procedure (Code de Procédure civile, "CPC") and has been comprehensively revised and updated as of May 2011. With regard to the enforcement of foreign arbitral awards, France has signed and ratified the New York Convention that obliges each member state to enforce foreign arbitral awards (Art. III NYC) and provides only limited grounds for a refusal to enforce an award (Art. V NYC). In general, the French law on arbitration corresponds to the requirements of the New York Convention. Pursuant to Art. 1525 CPC, the grounds for annulment of a French arbitral award set out in Art. 1520 CPC also apply with regard to enforcement of a foreign arbitral award. Enforcement may only be refused if (1) the arbitral tribunal wrongly upheld or declined jurisdiction, (2) the arbitral tribunal was not properly constituted, (3) the arbitral tribunal ruled without complying with the mandate conferred upon it, (4) due process was violated or (5) recognition or enforcement of the award is contrary to international public policy. The French courts will assess these requirements de novo and independent of the findings of the arbitral tribunal. However, it is important to note that the French courts do not have jurisdiction to review the merits of the case (révision au fond) but only examine the specific requirements for recognition and enforcement.

As regards enforcement of arbitral awards, French courts are in line with international practice and follow an enforcement-friendly approach. The limited grounds for a refusal of enforcement set out in Art. 1520 CPC are therefore interpreted narrowly. In some regards, French arbitration law even goes beyond the requirements of the New York Convention. Most notably, enforcement may be refused if the award has been set aside in the country in which it was made under the New York Convention (Art. V (1)(e) NYC), but not under French arbitration law (cf. Art. 1520 CPC). This applies to domestic as well as foreign arbitral awards as it is considered a more favorable treatment under Art. III NYC.

II. Enforcement Proceedings

If enforcement of a foreign arbitral award is sought in France, an application has to be made to the Court of First Instance (Tribunal de grande instance) in Paris. The application must to be filed together with the original or authenticated copies of the arbitral award and the arbitration agreement. The enforcement proceedings before the Court of First Instance are not adversarial (ex parte).

The Court will grant an enforcement order (ordonnance d'exequatur) if the award does not manifestly violate international public policy. It is important to note that the Court of First Instance will not examine whether grounds for a refusal of enforcement under Art. 1520 CPC (see above) are present. These grounds will only be examined on appeal which has to be brought within one month following the service (signification) of the enforcement order to the other party. If the party to be served is situated abroad, this limitation period is extended by two months.

The competent court for any appeal against the enforcement order is the Court of Appeal (Cour d'appel) in Paris. An appeal against an enforcement order will not suspend the enforcement of the award unless ordered otherwise by the Court of First Instance. If the decision of the Court of Appeal is appealed against as well, the Court of Cassation (Cour de cassation) in Paris will render a final decision. It is common ground in French jurisprudence that a party is precluded from invoking a ground for refusal of enforcement if it did not object at every possible stage of the arbitral proceedings (see case B.II. below). A successful appeal against the enforcement order will result in its revocation so that the arbitral award becomes unenforceable in France.

The proceedings regarding appeals against the enforcement order will be conducted according to the general rules of the ordinary litigation procedure. This means that the parties have to instruct a French lawyer (avocat à la cour) for the necessary procedural steps. If an appeal is filed for frivolous reasons and/or in bad faith by the losing party, then the Court of Appeal may award heavy damages to the successful party and even fines for misuse of process.

B. Cases

I. Cour de Cassation, 28 March 2012

On 28 March 2012, the Court of Cassation of France annulled a decision by the Court of Appeal in Paris granting enforcement of a CIETAC award for formal reasons.

1. Facts

In 1999, a French company entered into a contract with a Chinese company for the delivery of an industrial plant. The contract contained a dispute resolution clause providing that disputes that could not be settled by amicable negotiations would be submitted to CIETAC for mediation and arbitration; if no agreement could be reached, the dispute would be finally settled by ICC arbitration.

The Chinese company claimed that the French company failed to perform its contractual obligations and seized the CIETAC to commence arbitration. On 22 December 2004, an arbitral tribunal in Beijing rendered an award in favour of the Chinese company. The award was declared enforceable by the Court of First Instance in Paris and the French company appealed. On 19 October 2010, the Court of Appeal in Paris affirmed the enforcement order. The Court of Cassation of France, however, reversed the appellate decision on 28 March 2012 and referred the parties back to the Court of Appeal in Paris.

2. Decision by the Court of Appeal

The Court of Appeal held that the dispute resolution clause did not stipulate "amicable negotiations" as a preliminary and mandatory formality for the commencement of arbitration. As such negotiations were thus not prerequisite to the jurisdiction of the arbitral tribunal, the Court found that the Chinese company was free to initiate arbitral proceedings with the CIETAC even if there had not been any negotiations. The Court therefore concluded that it did not have to ascertain whether international public policy was violated by the fact that arbitral proceedings with the CIETAC had been held in the present case. As a result, the Court of Appeal upheld the decision by the Court of First instance granting enforcement of the award.

3. Decision by the Court of Cassation

The Court of Cassation found that the Court of Appeal had not replied to a fundamental ground for appeal by the French company and thereby violated French law on civil procedure. According to the Court of Cassation, the French company had argued "in a detailed, precise and reasoned manner" that international public policy was violated independently of any preliminary negotiations because the dispute resolution clause provided for arbitration administered by the ICC instead of CIETAC. The French law on civil procedure requires the courts to set out and assess any claims by the parties, which the Court of Appeal had thus not done. The Court of Cassation therefore annulled the judgment granting enforcement without a decision on the merits and remitted the case to the Court of Appeal.

4. Commentary

This case demonstrates how diligent and proficient the French court system works with regard to issues of international arbitration. While the Court of Appeal seems to have missed an argument of the French company against the enforcement order, the Court of Cassation corrected the error and referred the case back for a decision on the issue of a potential violation of international public policy. Parties before French courts can therefore be confident that sophisticated legal arguments regarding international arbitration will be treated with knowledge and experience even if they fall outside the scope of French national law.

However, this case also shows the importance of a properly drafted dispute resolution clause. The clause at hand seems to have been a particularly bad example: First, it was unclear if the preliminary negotiations should be a mandatory requirement for arbitration. Second, there seems to have been confusion regarding the desired arbitral institution as the clause provided for arbitration both with CIETAC and the ICC. In the worst case, this could mean that the arbitral award rendered under CIETAC administration would not be enforceable in France and the respective efforts of the Chinese company would have been in vain.

II. Cour d'Appel de Paris, 31 January 2008

On 31 January 2008, the Court of Appeal in Paris handed down a decision granting enforcement of a CIETAC award. This decision is of particular interest because it addresses various criticisms of the CIETAC rules with regard to the fairness of the proceedings that had been voiced in the arbitration community. The Court addresses each of these criticisms, but ultimately finds none of them convincing.

1. Facts

A French company had contracted with a Chinese company for the sale of packaging machines. The Chinese buyer was not satisfied with the machines delivered by the French seller and raised claims for restitution of the purchase price and for damages. As the contract provided for dispute resolution by arbitration under the CIETAC arbitration rules, the Chinese buyer initiated arbitration proceedings against the French seller. The arbitral tribunal rendered an award on 31 March 2005, granting the Chinese buyer's claims for the most part.

The Chinese buyer then sought recognition and enforcement of the award in France and obtained an enforcement order by the Court of First Instance in Paris on 11 July 2006. The French seller appealed this decision on 21 August 2006 before the Court of Appeal in Paris, claiming that the award could not be enforced under French arbitration law for various reasons. On 31 January 2008, the Court decided on the matter, confirming the enforceability of the award and rejecting all of the French seller's grounds for appeal.

2. Decision

The Court of Appeal's decision is particularly interesting because the French seller claimed that certain features of the applicable CIETAC rules of 2000 unfairly favour Chinese parties. According to the seller, the award therefore violates provisions of French arbitration law, rendering it unenforceable pursuant to Art. 1520, 1525 CPC. Some of these claims against the fairness of arbitration under the CIETAC rules had previously been raised within the arbitration community.

a) Composition of the arbitral tribunal

The French seller claimed that the award was not enforceable pursuant to Art. 1502-2 CPC (now Art. 1520-2 CPC) with regard to the composition of the arbitral tribunal. The seller argued that: First, the arbitral tribunal consisted solely of Chinese arbitrators. Second, the seller did not have enough time to designate its own arbitrator. Third, the CIETAC rules did not allow the seller to choose an arbitrator outside the official list of arbitrators.

The court dismissed the French seller's claims for two reasons: First, the procedure for the constitution of the arbitral tribunal had been entirely in line with the applicable CIETAC rules. Under these rules, the seller had had 20 days to designate an arbitrator. As the seller did not participate in the constitution of the arbitral tribunal, the president of CIETAC nominated an arbitrator for the seller as provided for in the rules. The composition of the arbitral tribunal had therefore been in line with the CIETAC rules to which the seller had agreed in the contract.

Second, the court held that French arbitration law requires that each ground for refusal of enforcement under Art. 1502 CPC must be pleaded before the arbitral tribunal by the aggrieved party at every possible opportunity. As the French seller never contested the composition of the tribunal during the arbitral proceedings, this ground for refusal of enforcement was now precluded in any case.

b) Scope of the arbitration agreement

The French seller further claimed that the arbitral tribunal did not adhere to the scope of the arbitration agreement, rendering the award unenforceable pursuant to Art. 1502-3 CPC (now Art. 1520-3 CPC). The seller argued that the tribunal declined to transmit its request for the nomination of an expert witness to CIETAC, even though the tribunal had no power to grant or decline interim measures under Chinese arbitration law.

The Court held that the issue of an expert witness does not concern interim measures which indeed may only be granted by Chinese courts, but is a matter of evidence which is entirely left for the tribunal to decide. In addition, the French seller again did not raise an objection in this regard before the arbitral tribunal and is now precluded.

c) Fair trial

As a third ground for appeal, the French seller argued that the fair trial principle of Art. 1502-4 CPC (now Art. 1520-4 CPC) was violated: First, the seller argued that the time limits contained in the CIETAC rules were too burdensome and did not allow it to nominated an arbitrator or prepare a meaningful defense. Second, the seller deemed the use of the Chinese language during the arbitration a violation of the fair trial principle.

Again, the Court held that both parties agreed to the CIETAC rules which expressly provide for specific time limits as well as the Chinese language. In any event, the French seller never objected to either the time limits or the use of the Chinese language during the arbitral proceedings.

d) Public policy

Finally, the French seller submitted various reasons why the award violates international public policy pursuant to Art. 1502-5 CPC (now Art. 1520-5 CPC): The nomination of its arbitrator by the president of CIETAC, the short time limits, the fact that there was an additional oral hearing, the fact that the tribunal did not hear the seller's expert witness as well as the fact that it was awarded 80% of the cost of the arbitration. In conclusion, the French seller claimed that the award violated the principle of equality of the parties.

The Court of Appeal held that none of the seller's grounds of appeal violate international public policy. Instead, the Court found that the seller merely attempted to object to the merits of the arbitral award which will not be reviewed in the enforcement stage.

3. Commentary

This case leaves the informed reader with mixed feelings. On the one hand, the Court granted enforcement of the award despite the various attacks of the French seller. On the other hand, the Court did so for formal reasons, namely because the French seller failed to make his objections known during the arbitral proceedings and was now precluded. This preclusion made it easy for the Court to summarily dismiss all arguments against enforcement of the award without going into much detail. Had the Court been compelled to assess the merits of all the arguments, the result might have been different.

As one author notes, this is particularly true for the composition of the arbitral tribunal. The French company was faced with a tribunal consisting of only Chinese arbitrators in an arbitration against a Chinese company. In addition, the proceedings were conducted on Chinese soil and in the Chinese language. Although the arbitration met all the legal requirements of the mutually agreed CIETAC rules, this scenario in its entirety could leave doubts regarding the fairness of the proceedings.

These criticisms of the CIETAC arbitration rules have been addressed and remedied in the latest revision of May 1, 2012. First, the default language of arbitral proceedings under the CIETAC rules is still Chinese, but now a different language can be designated by CIETAC "having regard to the circumstances of the case". Second, CIETAC still provides a panel of arbitrators from which the parties shall choose but now allows for arbitrators outside this panel "subject to the confirmation by the Chairman of CIETAC in accordance with the law". Third, if the chairman of CIETAC is tasked with the appointment of an arbitrator, he or she "shall take into consideration the law as it applies to the dispute, the place of arbitration, the language of arbitration, the nationalities of the parties, and any other factor(s) the Chairman considers relevant."

Considering these recent changes, it is unlikely that CIETAC would allow for a future case to be conducted under the same procedural circumstances as in the case at hand. This would in turn remove any potential doubts in the case at hand regarding enforcement of the award in France. The changes further show that CIETAC is responsive to criticisms of its arbitration rules and prepared to adapt to international standards in arbitration.

C. Conclusion

The cases above demonstrate that the French courts apply not only the letter, but also the spirit of the New York Convention. Foreign arbitral awards in general and Chinese awards in particular will be recognized and enforcement is denied only in exceptional circumstances as envisioned by Art. V NYC. These exceptional grounds for non-enforcement are interpreted narrowly by the French courts in turn. Most notably, the parties will be held to their arbitration agreement and the procedural rules set out therein, even if this might result in an inconvenience for one of the parties as in the case above. Further, the parties are held to a strict rule as regards preclusion, meaning that any perceived ground for non-enforcement will have to be pleaded at every possible stage of the arbitral proceedings.

The consistent and enforcement-friendly application of the New York Convention by the French courts results in predictable decisions and legal certainty for both parties involved. The recent revisions of the CIETAC arbitration rules have removed any potential remaining doubt with regard to the fairness of the proceedings and will likely

increase the popularity of CIETAC as an arbitral institution. International businesses are well advised to opt for arbitration in China as they can expect arbitration proceedings in line with international standards, leading to an award that will readily be enforced in France. As a result, sino-french business relationships can be expected to increase, not the least due to arbitration in China as an efficient and reliable tool for dispute resolution.

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