NEWS

Mixed messages: developments in recognition of foreign arbitral awards in Russia

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The Russian Supreme Court in Moscow

Partner and head of international arbitration at Akin Gump Justin Williams, senior counsel Alexander Trukhtanov and counsel Jenny Arlington, assisted by Georgy Shashero, consider the current environment in Russia for the recognition and enforcement of foreign arbitral awards and offer some practical suggestions for users.

A recent Russian Supreme Court decision appears to have been markedly hostile to international arbitration. In *Dredging and Maritime Management SA v AO InzhTransStroy*, the court found that an arbitration agreement that appears to have been based in whole or in part

on the ICC's own model clause was defective, and that the resultant award should not be recognised or enforced.

Such has been the concern over this that on 12 November 2018 the president of the ICC Court took the rare step of writing to the chairman of the Russian Supreme Court asking for an explanation. But just a few days later, on 21 November 2018, the Russian Arbitration Association published an important year-long study of all Russian court decisions over the past 10 years that related to the New York Convention, concluding that: "Russian courts are arbitration friendly – in various years, 80 to 97% of all [recognition and enforcement] applications were granted".

So, what is the true position? Is the *Dredging and Maritime Management* decision an outlier, or should users of international arbitration that may require enforcement in Russia be concerned? And if this is a cause for concern, what steps should be taken to mitigate enforcement risk?

Dredging and Maritime Management v InzhTransStroy

Dredging and Maritime Management SA, a Luxembourg company, brought arbitration proceedings against AO InzhTransStroy, a Russian company, under a 2010 contract. The arbitration agreement provided for ICC rules and a Geneva seat. Only extracts from the arbitration clause are publicly available, but those extracts follow the ICC model clause.

The final award of the three-member tribunal was issued in 2014. It found in favour of Dredging and Maritime Management, awarding it damages of around €3.6 million, plus interest and costs.

In 2015, InzhTransStroy became subject to insolvency proceedings in Russia, and certain of its creditors entered into a global creditor agreement. Dredging and Maritime Management applied for recognition and enforcement of its arbitral award and to be registered as a creditor, but it seems the global creditor agreement had already been concluded by the time the court came to consider those applications.

In February 2018, the Moscow Arbitrazh Court dismissed Dredging and Maritime Management's applications on two grounds.

First, the judge found that recognition would be contrary to Russian public policy, as it would mean that Dredging and Maritime Management would be entitled to recover the full amount of the award and therefore would be treated preferentially to other creditors who would likely only recover a proportion of debts owed to them.

The second ground for rejecting recognition was that the arbitral tribunal did not properly have jurisdiction to hear the dispute, the judge said. This was on the basis that the relevant arbitration clause did not state the institution which was to administer the proceeding. Specifically, the judge noted that the clause did not expressly say that any arbitration was to be administered by the ICC International Arbitration Court, and that mere reference to international arbitration and the ICC rules might be read as permitting administration by another institution.

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The first instance decision was upheld by the Arbitrazh Court of the Moscow Region in April 2018, and on 26 September 2018 a single judge of the Supreme Court refused Dredging and Maritime Management's application for permission to appeal.

Implications of the Supreme Court's decision

Therefore, will use of the ICC model arbitration clause result in awards that are unenforceable in Russia? The answer is not necessarily.

Russia is a civil law jurisdiction in which the common law doctrine of precedent does not apply. Further, the decision in the *Dredging and Maritime Management* case was not by a panel of three judges on a substantive appeal. Nevertheless, the decision is certainly influential and will have persuasive effect in lower courts.

It is hard to escape the conclusion that there is now a somewhat greater risk that applications for recognition in Russia may fail if they are based on arbitration agreements similar to that considered by the Supreme Court. Indeed, in the wake of the Supreme Court's decision, the ICC has added a drafting note to its model clause to the effect that it is prudent for parties wishing to have an ICC arbitration in Russia (or in mainland China) to include in their clause an explicit reference to the ICC International Court of Arbitration.

On the logic of the decision in *Dredging and Maritime Management*, it would seem to follow that arbitration clauses referencing other institutional rules may face the same issue if they do not expressly specify which institution is to administer. Notably, the LCIA and the SCC model arbitration clauses do not expressly specify the administering institution, and the LCIA and the SCC have not, as at the time of writing, yet amended their drafting notes.

A broader concern is that if the Supreme Court found that an arbitration clause was unenforceable on grounds of uncertainty because the reference to ICC rules was not sufficiently certain to indicate ICC as the administering institution, how else might a clause be found to be too uncertain?

However, on 26 December 2018, the Supreme Court published a review of the practice of the Russian courts in relation to international commercial arbitration, in which it endorses the principle that an arbitration clause which follows the model clause of the arbitral institution chosen by the parties is enforceable. The review also states that any doubt should be resolved in favour of the enforceability of such a clause.

While not equivalent to legally binding guidance, the review carries some weight and the recommended approach is likely to be taken into consideration in most cases.

The broader track record of the Russian court

Historically the Russian courts have sometimes shown a tendency to go through both domestic and international arbitration agreements with a fine-tooth comb to look for defects, even where it might be thought that none existed.

For example, in February 2018 an *ad hoc* arbitration clause specifying arbitration in London under the UNCITRAL rules was held to be defective by the Russian Appeal Court as it did not

specify an administering institution. The *Dredging and Maritime Management* decision would seem to take this approach yet further. Nevertheless, the recent track record of the Russian court on recognition of international awards is broadly positive.

A study published on 21 November 2018 by the Russian Arbitration Association (RAA) considered the application of the New York Convention by the Russian court over a period of 10 years, from 2008 to 2017. It concludes that there were 472 applications for the recognition and enforcement of foreign arbitral awards during that period; of those, 378 (80%) were granted, 45 were rejected and 49 were not considered (mostly on procedural grounds).

Most of the applications, 71%, were in respect of arbitrations seated in Commonwealth of Independent States (CIS) or other former Soviet countries, mostly from Ukraine (195) and Belarus (99). 61% of the applications related to arbitrations under the rules of just two institutions, namely the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry and the International Arbitration Court at the Belarus Chamber of Commerce and Industry.

In contrast, of the total number of 472 applications, there were only 17 in relation to awards under the LCIA rules and 13 under ICC rules.

The published RAA study does not compare the success rate of applications relating to arbitrations under the rules of institutions based in the CIS and other former Soviet countries, as opposed to those under the rules of institutions based elsewhere. However, with special thanks to **Roman Zykov**, secretary general of the RAA, the writers have analysed the relevant underlying data collected by the RAA.

The analysis reveals that, excluding applications which were not considered (mostly on procedural grounds), for the period between 2008 and 2017, 47% of the recognition and enforcement applications for awards under the LCIA rules and 61% of those under the ICC rules were successful.

It seems therefore that the proportion of LCIA and ICC awards that have been granted recognition and enforcement in Russia is significantly below the average of all foreign awards, which is in the range 80% to 97%. This distinction should be treated with some caution since the sample size is relatively small – not only in comparison with the total number of recognition applications in Russia, but also compared to the total number of ICC and LCIA arbitrations involving Russian parties over this period that did not lead to such applications (178 and 153 respectively). Nevertheless, on their face, the statistics do raise an inference that there is a material difference in rates of success.

Therefore, although the RAA findings are encouraging, it appears there is still some way to go in relation to recognition in Russia of awards under "Western" arbitration rules.

What steps should arbitration users take?

Firstly, following the *Dredging and Maritime Management* decision and pending further clarification, users should draft arbitration clauses that relate to Russia as carefully and precisely as possible, and not assume that model clauses issued by arbitral institutions will always be water-tight. In particular, the institution which is to administer the arbitration

should be specifically named. For existing arbitration agreements, thought should be given to seeking to agree variations accordingly.

Secondly, users documenting transactions relating to Russia should consider whether to adopt the rules of institutions based in CIS or other former Soviet countries. This need not mean the seat of arbitration need also be in a CIS or former Soviet jurisdiction. While the rules of ICAC (International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry) do contain such a restriction, those of the Russian Arbitration Center (RAC) at the Russian Institute of Modern Arbitration allow the parties to choose any seat for their arbitration.

There is a mixed picture in Russia in terms of recognition and enforcement of foreign arbitration awards, but to the extent there are causes for concern there are steps that users can take to mitigate risks.

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