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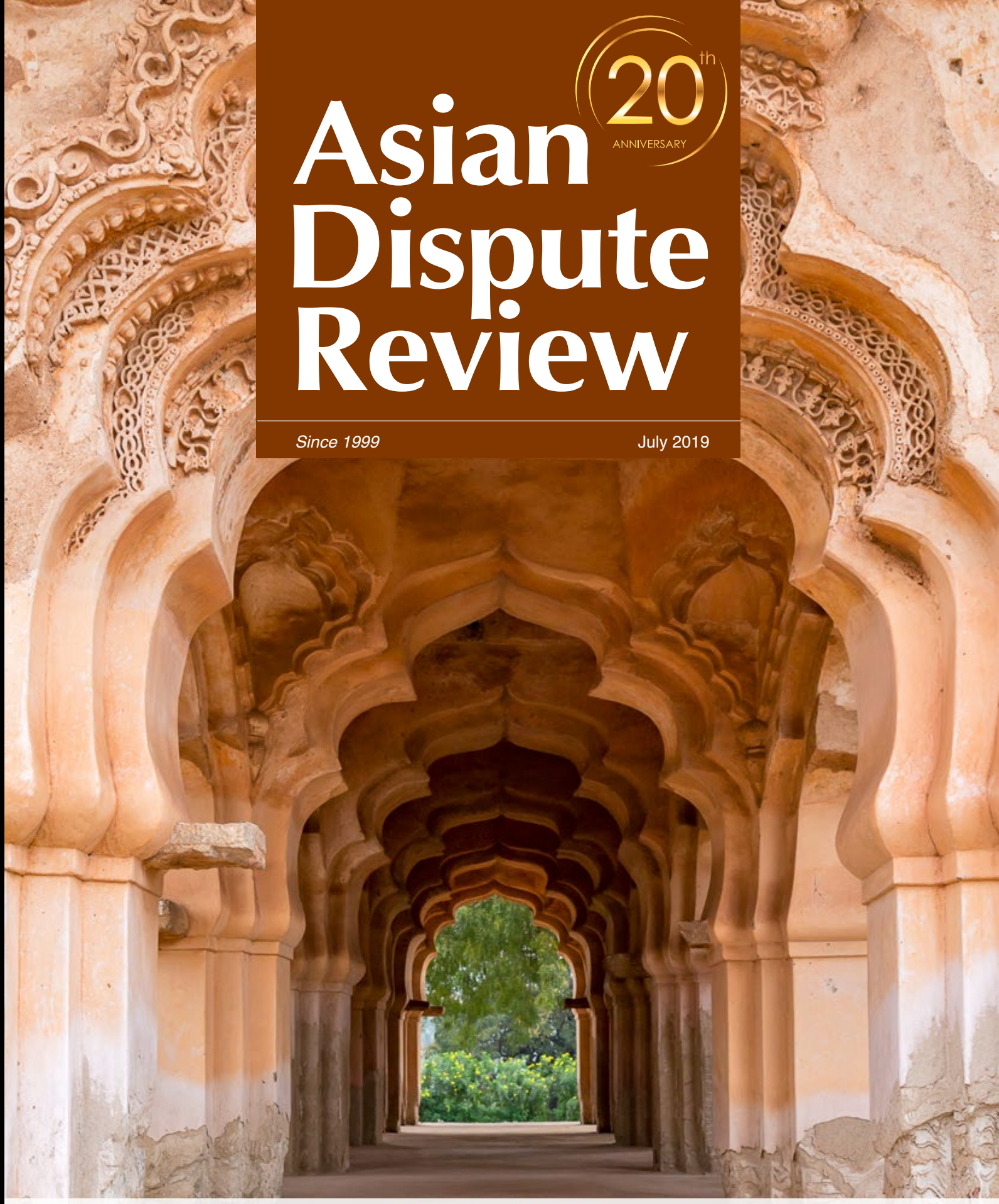

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EDITORIAL

This issue of *Asian Dispute Review* commences with an article by John Cock which compares the statutory adjudication of construction disputes under security of payment legislation across a number of jurisdictions, including the United Kingdom, Australia, Ireland, New Zealand, Singapore and Malaysia. It also considers the position in Hong Kong, where security of payment legislation is yet to be introduced.

Rustem Karimullin then discusses the enforcement of international arbitral awards in Russia. This is followed by an article by Huw Watkins which looks at the restructuring of the Japan Commercial Arbitration Association's arbitration rules.

The 'In-house Counsel Focus' article by Mustafa Hadi considers the pros and cons of tribunal-appointed experts by comparison with party-appointed experts. The 'Jurisdiction Focus' article by Christina Pak discusses Fiji's accession to the New York Convention in 2010, its enactment of a modern International Arbitration Act in 2017 and the future of international arbitration in Fiji.

The issue concludes with a book review by Joshua Fellenbaum of *Tribunal Secretaries in International Arbitration* by Dr J Ole Jensen.

We regret that this will be the final issue in which Filip Nordlund and Jonathan Mackojc serve as Editorial Assistants. We thank them for the excellent support they have provided and wish them well in their future endeavours.

Byron Perez and Jacky Fung will be our new Editorial Assistants. We are grateful to have them on board and look forward to working with them.

General Editors

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The Enforcement of International Arbitral Awards in Russia

Rustem Karimullin

This article discusses the enforcement of international arbitral awards (primarily foreign-seated awards). In addition to reviewing recent arbitration legislation, arbitration-related rules of court, public policy and non-arbitrability objections, the article focuses on a number of specific areas, including the recognition and enforcement of declaratory awards, non-monetary awards, awards against individuals, and awards and interim measures concerning interests in registered real property and registered stocks.

Introduction

Pursuant to a 2010 HKIAC arbitral award reported with regard to its enforcement in Russia, the well-known electronics manufacturer Huawei Tech Investment Co Ltd succeeded in recovering the purchase price of US$1.6 million plus interest under the framework contract and two delivery orders from Closed Joint-Stock Company (ZAO) Orenburg-GSM.[1] The award also dealt with a claim for foreclosure against the respondent's property charged in favour of the Hong Kong-based claimant. The Russian enforcement court in Orenburg recognised the award, which had been upheld in Hong Kong and had satisfied an application for the issuance of a writ of execution in Russia,[2] which ruling was upheld by the appeal court.[3]

The legal background

According to the 2015 QMUL/White & Case International Arbitration Survey, 65% of respondents to the Survey

see the enforceability of arbitral awards as arbitration's most valuable characteristic.[4] This feature is of particular importance to Russian businesses since, with the exception of treaties with several former socialist and Commonwealth of Independent States (CIS) countries (including China, Vietnam and Mongolia), along with India, Russia is a party to few treaties for the reciprocal enforcement of commercial court judgments.[5]

> "… [The] enforceability of awards … is of particular importance to Russian businesses since ... Russia is a party to few treaties for the reciprocal enforcement of commercial court judgments."

On 1 September, 2016, reformed Russian legislation came into effect, including the new version[6] of the Russian Federation (RF) International Commercial Arbitration Law of 7 July 1993 (Federal Law No 5338-1), which mostly follows the UNCITRAL Model Law as revised in 2006 (the Model Law). Further, some important amendments were added to the RF State Commercial Procedure Code (SCPC)[7] and the RF Civil Procedure Code, both of which address, among other things, the recognition and enforcement of foreign arbitral awards.

Similar to Hong Kong's arbitration law before 2011, the Russian arbitration legislation still distinguishes between domestic and international arbitration and so, with some exceptions, follows a dualist or bifurcated approach. The enforcement of domestic arbitral awards, which is subject to Federal Law No 382-FZ of 29 December 2015 on Arbitration (Arbitration Proceedings) in the Russian Federation (the Amendment Law),[8] is generally not discussed in this article.

As the USSR's legal successor since 24 December 1991, Russia is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (the New York Convention).[9]

Procedure for seeking enforcement

Under art 36(1) of the RF International Commercial Arbitration Law as amended, an arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the competent court, shall be enforced where a commercial respondent does not voluntarily comply with it.

The court that is competent to enforce a foreign commercial arbitral award is the commercial (*Arbitrazh*) court located in the Russian region at which enforcement is sought.

The court's enforcement order may be appealed to the cassation (second appeal) court. The approach of vesting sole jurisdiction to review and enforce international arbitral awards in a single supervisory court, such as the Commercial Court and the Technology and Construction Court in England & Wales or the Hong Kong Court of the First Instance, has not been followed in Russia.

> "The approach of vesting sole jurisdiction to review and enforce international arbitral awards in a single supervisory court, such as the Commercial Court and the Technology and Construction Court in England & Wales or the Hong Kong Court of the First Instance, has not been followed in Russia."

The enforcing party should file the following documents in support of its application to enforce: (1) the award; (2) the underlying arbitration agreement; (3) a power of attorney; (4) the receipted invoice for the filing fee; (5) the incorporation certificate (if any) and an excerpt from the company register for the enforcing party; and (6) an excerpt from the company register for the Russian debtor entity valid for 30 days. All official foreign language documents should be notarised or certified (apostilled). All translations into Russian must be verified by a Russian public notary.

In *Korea Trading and Industries Co Ltd v TOO Sputnik, SP Morskie Tekhnologii*,[10] the Russian court did not accept a claim by the claimant Korean entity since no notarised copy of its registration certificate had been attached to the claim. The court invited the claimant to provide this in a valid form.

In *Korea National Insurance Corporation v OOO Insurance Company VTB-Strakhovanie*,[11] an application by a North Korean company for enforcement of 12 London-based *ad hoc* arbitral awards was rejected because it had not furnished original or notarised copies of the arbitration agreements.

The filing fee for enforcement applications is low, amounting to 3,000 roubles, or some HK$365.

Under art 243(5) of the amended SCPC, the Russian court may adjourn its decision on enforcement to allow a foreign court to complete a pending review of an application to set aside the award at the seat. On application by the enforcing party, the court may also order security against the debtor's assets for the duration of the adjournment. In practice, however, it is not guaranteed that an application for such interim relief would be satisfied, even where a foreign award has already been recognised by the first instance enforcement court and there are good prospects that this enforcement ruling will stand. As in the case of domestic commercial disputes, the successful application for interim relief should be well grounded or supported by a form of counter-security proffered by the claimant.

In *Ho Chi Minh City MTV Food Company v OOO Trading House Virosco* the court denied an application for an interim injunction against bank accounts of the Russian debtor to secure a US$1.5 million payment under a Vietnam International Arbitration Centre (VIAC) award as disproportionate. The court took the view that this measure would lead to the seizure of all available cash in the debtor's bank account, block its activities and cause irreparable harm.[12] The award was granted recognition in Russia.[13]

Time limits for seeking enforcement of awards, particularly partial awards

> "With effect from 1 January 2017, the time limit for seeking a court decree to enforce a foreign award has been decreased from three months to one."

Due attention should be paid with regard to time limits for commencing proceedings to enforce an arbitral award.

With effect from 1 January 2017, the time limit for seeking a court decree to enforce a foreign award has been decreased from three months to one.[14]

An application for permission to issue a writ of execution for a foreign judgment or a foreign arbitral award may be filed within three years after the judgment or award has become binding. A similar three-year time limit applies to the issuance of a writ of execution for a Russian-seated international arbitral award, such as an ICAC award.[15]

Limitation periods for partial awards start running separately. The same principle applies to final arbitral awards resolving only part of a dispute. The claimant should not take a risk

by waiting until all of the partial awards have been issued. Although partial awards, especially those save as to costs, are quite common for HKIAC or LCIA awards, Russian arbitral tribunals rarely issue such awards. As a result, Russian enforcement courts are sometimes uncertain about how to treat foreign partial awards.

Grounds for objecting to enforcement

The grounds for refusing recognition and enforcement of foreign awards in Russia,[16] which is a Model Law jurisdiction, duplicate those set out in Article V of the New York Convention.

In general, it is arguable that Russia follows a trend toward applying the identified international policy favouring enforcement of international commercial awards.[17] 'Horror stories' about the non-enforcement of foreign awards in Russia, which were common to enforcement practice some 10-20 years ago, are becoming rare today. According to recently published statistics, the Russian courts of first instance recognised and enforced 378 arbitral awards and denied 45 awards in 423 cases during the period 2008-2017.[18]

In seeking the court's assistance to resist enforcement of awards, losing parties tend to prefer invoking the grounds of incompatibility with public policy or non-arbitrability of a dispute.

In 2013, the RF Supreme Commercial Court issued guidelines, according to which irregularities, such as severe civil sanctions, lack of corporate approval or Russian rules comparable to those applied by foreign tribunals (eg, as to liquidated damages), and an affiliation between an arbitrator and a party disclosed but not timeously challenged would not be seen as incompatible with Russian public policy.[19]

An example of violation of public policy would be the enforcement of a foreign award based on a service contract granted to a foreign service provider on manifest non-market and onerous conditions and involving bribery of a Russian counterparty's director, as evidenced by a criminal court judgment.[20]

In an interesting enforcement case heard by the RF Supreme Court in 2015, an issue arose as to whether the validity of a determination of non-arbitrability of the subject-matter of the dispute by a foreign tribunal should be decided under Russian law (the law of enforcement) or Serbian law (the law of the seat). The Serbian privatisation agency had applied for enforcement of a Serbian institutional award ordering a defaulting Russian bid privatisation participant (the purchaser of stocks in a privatised Serbian entity) to pay penalties. The first instance court in Russia declined enforcement of the award, holding that a privatisation dispute could not be referred to arbitration and that the relevant arbitration clause was invalid under art 168 of the RF Civil Code.

Overturning the lower court's ruling, the cassation instance court stated that the issue of non-arbitrability of the subject-matter of a dispute and the validity of an arbitration clause should be reviewed under the *lex arbitri*, ie, under Serbian and not Russian law.[21] The RF Supreme Court upheld the cassation ruling on the basis of the distinction between the rules to be applied to Russian-seated and foreign awards. It also explicitly confirmed that references to public policy and non-arbitrability in the enforcement provisions may not be used to justify a review of the award as to the merits.[22]

> "The RF Supreme Court … [has] explicitly confirmed that references to public policy and non-arbitrability in the enforcement provisions may not be used to justify a review of the award as to the merits."

In a recent case, the RF Supreme Court denied an appeal against enforcement of a GAFTA award involving a Seychelles grain buyer (the creditor), while at the same time confirming the general right of a bankruptcy creditor to challenge an illegal asset-stripping transaction based on an award. However, as there was no way to recognise this as a valid public policy defence without sound supporting evidence, the the court upheld the enforcement order issued in favour of the foreign creditor.[23]

Special procedures for enforcing awards against Russian individuals

By comparison with HKIAC arbitrations, which often involve individuals (particularly as shareholders, providers of collateral, employees or even heirs), Russian international arbitration procedures, which are based on the Model Law, have previously applied only only to commercial disputes. Although claims may be filed against Russian sole traders, such disputes are rather rare in domestic arbitration practice. It appears that Russian VIPs are more willing to participate in foreign arbitrations, such as those under the LCIA or HKIAC rules.

Which rules apply in relation to individual Russian enforcement debtors who are not listed in the Russian register of sole traders? Enforcement procedures concerning individuals are governed by the provisons of the RF Civil Procedure Code, which are substantially the same as the rules discussed above in relation to and embodied in the amended SCPC for legal entities and sole traders.

Enforcement of non-monetary awards

The Amendment Law has added useful implementation rules with regard to the enforcement of non-monetary awards under which the tribunal may order specific performance of a real estate or OOO shares transfer that is subject to state registration in Russia.

For example, under the former Immovable Property Registration Law, only court judgments were explicitly mentioned as documents that may be filed for state registration of real estate ownership transfers. As a result, the registry generally declined registration of a mortgage (fixed charge) of a house used as an office, on the basis of an agreement containing an arbitration clause. Where not rejected at the registration stage, an arbitration clause forming a part of a mortgage contract may in fact be inoperative at the enforcement stage, although in 2011 the RF Constitutional Court clearly confirmed the arbitrability of real estate-related disputes, including mortgage and long-term lease contracts.[24]

Under art 5(1) of the Amendment Law, an arbitral award, accompanied by a writ of execution resulting from a court order permitting enforcement of the award, must serve as a ground for state registration of the existence, creation, termination, transfer or restriction (encumbrance) of rights to immovable property and transactions thereon. Registration of a right to the immovable property established by an award, accompanied by a writ of execution, may only be declined for reasons set out in an exhaustive statutory list.

Unlike corporate law disputes involving Russian companies which, with effect from 1 February 2017, must be referred for resolution to permanent arbitration institutions registered and seated in Russia, there are no similar restrictions for real estate-related disputes. Thus, for example, awards made under the rules of a foreign arbitral institution on foreclosure against mortgaged property located in Russia may be made in the normal course of arbitral proceedings.

Furthermore, art 7(1) of the Amendment Law now requires that the filing of an award relating to a OOO share transfer must be accompanied by the original writ of execution and ensure that the new owner is registered by the state companies registry. Under another recently enacted provision, art 8(4) of the Limited Liability Companies Law, where that Law provides for judicial protection of the OOO shareholder's rights, the latter may have recourse to arbitration.

Those additional provisions enable the effective use of arbitration clauses in sale and purchase agreements or call option contracts and the enforcement, via specific performance, of awards based on them in situations where, for example, a seller has refused, in breach of contract, to transfer shares to an authorised buyer and has signed a notarised instrument.

It should be emphasised that awards - whether international or domestic - being private acts, are insufficient of themselves to create, alter or terminate civil rights and duties with regard to objects of state registration. Before filing an award with the registry, the enforcing party should obtain a writ of execution issued by a court.

Enforcement of declaratory awards

Although international arbitration conventions are generally silent on the authority of tribunals to order declaratory awards[25] and no valid rules for their making exist at present under Russian law, the Russian courts have upheld declaratory awards issued by foreign tribunals on the application of interested parties to international arbitrations.

"… [A]wards - whether international or domestic - being private acts, are insufficient of themselves to create, alter or terminate civil rights and duties with regard to objects of state registration."

For example, a Russian purchaser of stocks in a Russian entity was granted a declaratory award by the Court of Arbitration of the Island Chamber of Commerce confirming that it had duly paid for 24,300 stocks and had become their rightful owner with effect from 15 May 2006, pursuant to two sale and purchase agreements. The award was recognised by a St Petersburg court in 2009.[26]

Section 35(3) of the International Commercial Arbitration Law states that, where a foreign tribunal renders an award not requiring enforcement in Russia (*viz* a declaratory award), the opposing party may raise an objection against its recognition within one month. Generally, such awards shall be recognised without the need for any further proceedings. Where the opposing party is not seated or resident or has no property in Russia, the competent court shall be the State Commercial Court of the City of Moscow.

Enforcement of interim measures or provisional awards

Another area of concern in arbitration, to some extent revised in accordance with the advent of the 2006 amendments to the Model Law, refers to a tribunal's power to order interim measures and preliminary and evidentiary orders discussed below.

Although the New York Convention applies only to awards that are final on the merits and there is no international treaty expressly permitting the enforcement of interim

orders or provisional awards of a foreign arbitral institution, a freezing order against Russian-based assets of a sole trader or entity may still be granted by a Russian court at the request of a foreign creditor who is a party to pending foreign arbitral proceedings.[27]

> "Although … there is no international treaty expressly permitting the enforcement of interim orders or provisional awards of a foreign arbitral institution, a freezing order against Russian-based assets of a sole trader or entity may still be granted by a Russian court at the request of a foreign creditor who is a party to pending foreign arbitral proceedings."

In the well-known *Edimax Ltd v Shalva Chigirinsky* case, the RF Supreme Commercial Court recognised an order for interim relief granted by a London-seated LCIA tribunal against the Moscow apartment of an individual who, as the shadow director of the purchasing entity, had issued guarantees to secure payment under the share purchase agreements.[28]

Unlike Hong Kong and several other more arbitration-friendly jurisdictions, however, the Amendment Law has not introduced any statutory rules. It does not implement a regime for the recognition and enforcement of interim measures offered in arts 17H and 17I of the Model Law and modelled on the regime for the recognition and enforcement of final awards. Thus, the efficacy of interim measures offered by the recent legislation is negated to some extent.

In 2017, the RF Supreme Court confirmed that interim measures under a dispute that is pending before a competent foreign arbitration institution may be approved by a Russian commercial court at the location or residence of the Russian debtor under art 90(3) of the SCPC. Where a Russian commercial court is not competent to resolve the main dispute, however, this fact does not of itself prevent it from approving interim measures to secure a claim pending before a foreign court or tribunal.[29]

Conclusion

Apart from the development of court practice, the introduction of restrictions on recourse to public policy as a ground for challenging enforcement, the implementation of specific performance awards applicable to property and company registration, and declaratory relief are hallmarks of Russian arbitration enforcement reform.

Several other amendments, such as an explicit prohibition on rehearing enforcement cases on the merits, a reduction in the enforcement review period and the possibility of commencing new proceedings where the court has refused recognition of the award, parallel amendments to the procedure for setting aside Russian-seated awards.

> “Apart from the development of court practice, the introduction of restrictions on recourse to public policy as a ground for challenging enforcement, the implementation of specific performance awards applicable to property and company registration, and declaratory relief are hallmarks of Russian arbitration enforcement reform.”

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