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ENFORCEMENT OF SCC AND RUSSIAN ARBITRATION AWARDS IN THE UNITED STATES COURTS: AN OVERVIEW



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Several published decisions by U.S. federal and state courts have addressed SCC and Russian arbitration awards and proceedings. Some of these decisions, which came after the collapse of the Soviet Union in 1991, strongly suggest that a Russian arbitration award will be enforced against a U.S. party or citizen by a U.S. court.

Moreover, the published decisions by U.S. courts lend support to the enforcement by a U.S. court of an arbitration award rendered by the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC") against a U.S. party.

1. Policy of New York Convention Favors Enforcement

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, commonly called the "New York Convention," was adopted with several reservations by the United States in 1970. The enabling legislation incorporated the New York Convention into Chapter Two of the United States Federal Arbitration Act, 9 U.S.C. §§ 201-208.

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Sweden, Russia, and the United States are signatories and contracting parties to the New York Convention. Moreover, Russian courts have applied provisions of the New York Convention under Russia's Civil Code.

Several commentators have already observed that the prospects for the enforcement of an SCC Institute award are very favorable in the courts of another party to the New York Convention.[1] Because Sweden has generous rules regarding the validity of arbitration agreements, an arbitral award rendered on the basis of such an agreement will rarely be refused enforcement.[2] Nevertheless, no published decision by a U.S. court has explicitly upheld enforcement of an SCC award.

The supreme law of the United States, as enunciated by the U.S. Supreme Court, certainly favors enforcement of SCC and Russian arbitration awards. In addressing the New York Convention, the Supreme Court has stated that the goal and principal purpose of the Convention was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts, and to unify the standards by which such agreements are observed and enforced.[3]

2. Minimal Legal Requirements Can Be Met to Invoke the New York Convention

When one resorts to the New York Convention for judicial enforcement of an award, one must comply with only a minimum of requirements. In particular, Article IV of the Convention stipulates that "the party applying for recognition and enforcement shall, … supply … the duly authenticated original award [and] … the original [arbitration] agreement …."[4] One U.S. court found that these technical requirements were met where the copies of the award and the agreement had been certified by a member of the arbitration panel.[5]

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[1] *See, e.g.*, K. Hober, Enforcement of Arbitral Awards, Stockholm Arbitration Report, 1999:1, SCC Institute, p. 74; E. Alley, International Arbitration, 22 Int'l Law 837, 840-841 (1988).

[2] K. Hober, *supra*, at p. 74.

[3] *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974).

[4] Convention of Recognition and Enforcement, 330 U.N.T.S. 38, No. 4739 (1959); *see also* Enforcement of Foreign Arbitral Awards, Md. J. Int'l Law & Trade, Vol. 11, pp. 16-17 (1987).

[5] *Bergesen v. Joseph Muller Corp.*, 548 F. Supp. 650, 654 (S.D.N.Y. 1982), *aff'd*, 710 F.2d 928 (2d Cir. 1983).

In addition to these minimal requirements to support a *prima facie* case for enforcement, the party seeking enforcement does not have the burden to prove the validity of the arbitral award. Instead, the burden of proving the *invalidity* of the award rests upon the party opposing enforcement.[6] In the event that a party were to seek enforcement of an SCC or Russian arbitral award in a U.S. court, the opposing party would have the burden to prove the invalidity of the award.

In order to prove the invalidity of an SCC or Russian arbitral award, the party opposing enforcement in the U.S. court must invoke and prevail upon one of the reservations with which the United States ratified the New York Convention. In the alternative, the opposing party must prove one of the seven defenses enumerated in the Convention.[7] In the absence of those defenses, the party opposing enforcement of the award would have to prove that the U.S. district court either lacks subject matter jurisdiction or personal jurisdiction over that party.

3. A U.S. District Court Has Jurisdiction to Enforce a Foreign Arbitral Award

A United States district court does have subject matter jurisdiction to enforce a foreign arbitral award.[8] So long as the award was not made in the country where enforcement is sought, and was made in another contracting state (so as to meet reciprocity requirements), the arbitral award may be enforced in a U.S. district court under the New York Convention.[9] Because an award rendered in Sweden or in Russia meets these criteria, a U.S. district court would have subject matter jurisdiction to enforce an SCC or a Russian arbitration award.

4. The U.S. Reservations to the Convention Would Usually Not Preclude Enforcement of the Award

The United States made two major reservations in its accession to the New York Convention in 1970. The first reservation allows a contracting

[6] Foreign Arbitral Awards, Md. J. of Int'l L. & Trade, *supra*, at 17 (citing other articles).

[7] *Id.* at 17.

[8] *See, e.g.*, 9 U.S.C. § 203; *Bergesen*, 710 F.2d at 934 (2d Cir. 1983) (federal question jurisdiction exists under overlapping provisions of New York Convention and Federal Arbitration Act); *Lander Co. v. MMP Investments*, 107 F.3d 476, 479 (7th Cir. 1997) (Chapter 2 of Title 9 creates jurisdiction to enforce awards under the New York Convention).

[9] 9 U.S.C. § 203.

state to apply the Convention only on the basis of reciprocity of ratification. A U.S. party to an SCC or Russian arbitration could not use this reservation to prevent enforcement because both Sweden and Russia are contracting parties to the New York Convention.

The second reservation is more complex. Under that reservation to the New York Convention, a foreign arbitral award will not be enforced under the Convention if it "arises out of such a relationship which is entirely between citizens of the United States … unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states." 9 U.S.C. § 202. In short, if both parties to the SCC or Russian arbitration were U.S. corporations or citizens, the losing party could argue that the award rendered in their dispute cannot be enforced under the New York Convention because the two parties to the arbitration were both citizens of the United States.

The reservation under the New York Convention simply does not apply to a relationship or business transaction that has "some other reasonable relation with one or more foreign states."[10] If the underlying business or contractual relationship that gave rise to the Agreement and arbitration had a "reasonable relation" to a non-U.S. country (like Sweden or Russia), the reservation by the U.S. to the New York Convention would not prevent enforcement of the SCC or Russian award in a U.S. court.

5. Russian Arbitration

To date, U.S. courts have viewed Russian arbitration tribunals and courts favorably. A prestigious U.S. federal appeals court, for example, upheld a $200 million award originally rendered by the court for international arbitration in Moscow, Russia.[11] In enforcing this substantial award against a U.S. corporation, the U.S. court applied the New York Convention and rejected an objection raised on the basis of "public policy" under Article V (2)(b) of the Convention. Ironically, the U.S. corporation contended that its own attempt to bribe one Russian arbitrator tainted the Russian award. The U.S. court was unswayed because it found that the U.S. company had waived the objection by proceeding with the arbitration.

A U.S. district court in New York considered whether a racketeering claim could be brought against the Bank of New York by Russian

[10] Md. J. of Int'l L. & Trade, *supra*, at 44.

[11] *AAOT Foreign Econ. Assn. v. Int'l Development and Trade Services*, 139 F.3d 980 (2d Cir. 1998).

depositors of an insolvent Russian bank.[12] The American bank successfully contended that a Russian arbitration court would provide a more convenient "forum" for the dispute's adjudication. The U.S. court dismissed the suit in New York largely because it found that Russian arbitration would provide a more suitable forum for the dispute. Significantly, the U.S. court rejected arguments that the Russian arbitration proceeding would be corrupt, and it imposed no requirements on the Russian arbitration court's evidentiary rules or discovery procedures.

In another case, a U.S. court in New York considered whether the Moscow City Arbitration Court would provide an "adequate alternative forum" to the dispute.[13] The U.S. court reasoned that the Russian Code of Arbitration procedure does allow foreign organizations to enforce their rights, and that the Russian judicial system offers adequate procedural protections to foreign parties. Further, the U.S. court found no actual support for the contention that Russian arbitration would be biased against a foreign litigant. Yet, because the U.S. court found that the specific type of the contract in dispute could not be enforced or litigated in Russia, the U.S. court decided to allow the suit to proceed before it.

In a different context, a U.S. state court enforced a Russian custodial decree in favor of a Russian mother against an American father.[14]

Broad-brush allegations of corruption and bias in Russian arbitration tribunals or courts have been rejected so far by the U.S. courts. To the contrary, the U.S. courts have recognized Russian arbitration as a legitimate and practical means for dispute resolution. According to one Russian source, the number of Russian arbitrations involving foreign parties doubled from 1995 to 1999.[15] Furthermore, the Russian arbitrators ruled in favor of the foreign party about "50%" of the time.[16]

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[12] *Pavlov v. Bank of New York*, 135 F. Supp. 426 (S.D.N.Y. 2001).

[13] *Parex Bank v. Russian Savings Bank*, 116 F. Supp. 2d 415 (S.D.N.Y. 2000).

[14] *Bliss v. Bliss,* 733 A.2d 954 (D.C. App. 1999): In that case, the decree enforced by the U.S. state court was originally entered by the inter-municipal district court in Moscow. The American father unsuccessfully appealed to the Moscow Municipal Court of Appeals, and he subsequently fled to the U.S. with the child. The U.S. court applied the Uniform Child Custody Jurisdiction Act to enforce the Russian decree against the U.S. father.

[15] *T. Neshatayeva*, 2000 WL 19381943, May 25, 2000, Interfax (Moscow).

[16] *Id.*

As the use of foreign domain names in business dealings have grown in Russia, so have the disputes relating to such Internet abuse.[17] Russian arbitration courts have begun to tackle these domain-name disputes with greater frequently. For example, the American company, Eastman Kodak, brought an action in Russia against a businessman using the Kodak name on a Russian website.[18] The higher Russian arbitration court reversed the dismissal of the suit by the lower courts and allowed Kodak's action to proceed. As foreign companies gain more confidence in Russian arbitration and in the enforceability of those awards, arbitration in Russia with foreign litigants will likely continue its growth.

6. Swedish Arbitration

Several published decisions by the U.S. federal courts have expressed deference to and recognition of SCC arbitration. In one case, a Russian corporation sued a New York company and a shareholder in a U.S. court in New York.[19] The court confirmed that the U.S. and Russia are signatories to the New York Convention. As a result, it applied that Convention to the SCC arbitration clause in the contract from which the parties' dispute arose. In upholding the SCC arbitration clause, the court dismissed the lawsuit and referred the parties to SCC arbitration.[20]

A Ukrainian-Spanish joint venture sued an American company in the U.S. court in Chicago.[21] The American defendants asked the court to dismiss the suit or, alternatively, to stay the action pending arbitration before the SCC. The U.S. court confirmed the national policy "strongly favoring arbitration" under the New York Convention, and it acknowledged that arbitration clauses are "afforded special deference in light of the federal policy favoring arbitration."[22] The U.S. court stayed the suit until after arbitration had first been conducted in the SCC. The U.S. court advised the parties to initiate promptly arbitration proceedings before the SCC.

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[17] *V. Starzhenetsky*, 2001 WL 24547330, July 10, 2001, World News Connection.

[18] *Id.*

[19] *A.O. Russky Les v. Inservice, Inc.*, 1995 WL *87262 (E.D.N.Y. 1995).

[20] *Id*. at *1-2.

[21] *Joint Ukrainian-Spanish Venture Inus v. United Industries Int'l Inc.*, 1994 WL 571662 (N.D.IL 1994).

[22] *Id.* at *2.

Enforcement of SCC arbitration awards by U.S. courts is not automatic or *pro forma*. The most striking example of this is reflected in a decision in 2001 by a U.S. court in New York.[23] In that case, the SCC arbitration, in a breach of contract claim, resulted in two awards in favor of *Dardana Limited* against two corporate, non-U.S. defendants. *Dardana* sought to enforce the awards in the U.S. court in New York against those defendants. However, because the U.S. court found insufficient personal or business contacts to its territorial jurisdiction by the defendants, the court decided that it lacked "personal jurisdiction" over the defendants.[24] For that reason alone, the U.S. court refused to enforce the SCC arbitration awards against the non-U.S. defendants.

In a U.S. bankruptcy court in Ohio, an American debtor sued an American subsidiary of Sweden's Volvo and another Swedish company.[25] Both Volvo and the Swedish defendant asked the court to stay the suit pending SCC arbitration. The U.S. Court refused to stay the suit or to direct the parties to SCC arbitration for three reasons. First, the parties had not already commenced arbitration of their dispute in Sweden. Second, the U.S. bankruptcy courts have the discretion not to enforce arbitration clauses where "core" bankruptcy issues are involved. Third, the debtor bringing the suit was not a party to the contract with the SCC arbitration clause.

In a different context, a California company was arbitrating its dispute with the Republic of Kazakhstan before the SCC in Stockholm. Kazakhstan sought the assistance of the U.S. court in Texas to obtain documents and a deposition from a non-party American individual.[26] In interpreting the U.S. statute allowing U.S. courts to assist foreign tribunals with discovery of evidence, the U.S. court did not compel the American individual to comply with the request by Kazakhstan, because it held that the SCC arbitration body was not a "foreign or international tribunal" under the statute.[27]

7. Defenses to Enforcement of a Foreign Arbitral Award

In addition to the two major reservations discussed above, an American party could possibly attempt to invoke one or more of the seven narrow

[23] *Dardana Limited v. A.O. Yuganskneftegaz*, 2001 WL *1131987 (S.D.N.Y. Sept. 24, 2001).

[24] *Id*. at *4-5.

[25] *EWI Inc. v. Volvo GM Heavy Truck Corp.*, 1997 WL *811693 (Bankr. N.D. Ohio Dec. 5, 1997).

[26] *Republic of Kazakhstan v. Biedermann International*, 168 F.3d 880 (5th Cir. 1999).

[27] *Id*. at 882-883.

defenses to the confirmation of a foreign arbitral award against it in a U.S. court. Any party seeking to avoid enforcement of an SCC or Russian award in a U.S. court under the New York Convention can raise any of those seven defenses. However, the party raising the defense has the burden to prove its applicability, and also faces a very limited standard of review of an arbitrator's decision by the U.S. court.[28] Further, there is a deeply entrenched view that the seven defenses must be very narrowly construed; this practically makes the task of the party seeking to block enforcement almost impossible.[29]

The first defense is the absence of a valid arbitration agreement. In most cases, however, a valid arbitration agreement is part of the Agreement between the parties. Moreover, the SCC and Russian arbitration are recognized and legitimate forums for the arbitration of disputes.

The second defense may be invoked if there were procedural defects in the SCC or Russian arbitration. This defense can be averted as long as the parties followed the rules in the arbitration proceedings. In particular, each party much have been given proper notice of the SCC or Russian proceeding, and each must have had an opportunity to be heard.[30]

The third defense applies to an award on a dispute that does not fall within the scope of the arbitration agreement. The standard arbitration clause in an agreement is quite broad, and it appears clear that most disputes would certainly fall within the scope of that clause. That is, if the parties provide that "all disputes arising out of or in connection with this Agreement" shall be settled by arbitration, the scope of arbitrable disputes is very broad.

The fourth defense arises from an arbitrator's bias or from the impropriety in the selection. Parties asserting this defense in the U.S. have met with little success. Generally, the parties are careful to select arbitrators and to adhere to the applicable procedures for selection of a panel. Neutral arbitrators are also asked to disclose any potential or actual conflicts of interest.

The fifth defense is that the arbitral award itself is ineffective because it has not yet become binding, or because it has been set aside or suspended in the country of the award (Sweden or Russia). So long as an arbitral award is made pursuant to SCC or Russian Rules of Procedure, and as long as the

[28] Md. J. of Int'l L. & Trade, *supra*, at 25.

[29] *Id.* at 25, n.78.

[30] *Id*. at 29-30.

amount of the award is determined, then this defense is not likely to prevail.[31]

Article V of the New York Convention enumerates two additional defenses that could possibly bar enforcement of an arbitral award. Under the sixth defense, a party opposing enforcement of the award must prove that the country of enforcement (the U.S.) held a special interest to the dispute which rendered the dispute nonarbitrable. In rejecting this defense to enforcement of an arbitral award, a U.S. federal court stated: "There is no special national interest in judicial, rather than arbitral, resolution of the breach of contract claim underlying the award in this case."[32] In an antitrust context, the U.S. Supreme Court held that such disputes raise proper issues for arbitration, and that no special judicial or other interest should prevent enforcement of an arbitration award on antitrust issues.[33]

The seventh defense (and the second enumerated in Article V of the Convention) depends upon the public policy of the forum country. Article V(2)(b) of the New York Convention states that recognition and enforcement of an arbitral award may be refused if such enforcement would be "contrary to the public policy … [the enforcing] country."[34] The U.S. federal courts have construed this defense very narrowly, allowing its success in only about three of one hundred reported cases.[35] One U.S. federal court concluded that "enforcement of foreign arbitral awards may be denied on [a public policy] basis only where enforcement would violate the forum state's most basic notions of morality and justice."[36] It is difficult to conceive of any scenario in which the SCC's arbitration award in a commercial case would violate the public policy of a state or federal government in the United States. In at least one case, a U.S. court rejected the "public policy" objection to the validity of Russian arbitration proceedings.[37]

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[31] Md. J. Int'l Law, *supra*, at 33.

[32] *Parsons & Whitmore Overseas v. Societe Generale De L'Industrie Du Papier*, 508 F.2d 969, 975 (2d Cir. 1974).

[33] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 105 S.Ct. 3346, 3357-61 (1985).

[34] Convention, 330 U.N.T.S. 38, No. 4739.

[35] Md. J. Int'l Law, *supra*, at 42.

[36] *Parsons*, 508 F.2d at 974.

[37] *AAOT*, 139 F.3d at 981-982.

8. Conclusion

In SCC or Russian arbitration proceedings between a U.S. and a non-U.S. party, a prevailing non-U.S. party would likely succeed in its attempt to enforce in the U.S. court an award rendered under SCC or Russian arbitration rules. The New York Convention would apply to such enforcement, and such enforcement would almost certainly succeed in a U.S. court. This conclusion, of course, presumes that the arbitration was conducted in full accord with the procedures and rules of the Arbitration Institute at the Stockholm Chamber of Commerce or with the Russian arbitration and civil code.

There are a few important exceptions to any enforcement of SCC or Russian arbitration awards in the U.S. courts. First, the U.S. court must have personal jurisdiction over the party against whom the enforcement of the arbitral award is sought. Under U.S. law, the court must determine that the defendant party has sufficient business or personal contacts with the territorial district where the U.S. court resides. Second, a U.S. bankruptcy court is not obliged to give the same deference to arbitration clauses where the dispute principally relates to U.S. bankruptcy law.

In the usual circumstances, however, U.S. law strongly favors the enforcement and recognition of foreign arbitration awards and clauses, particularly where the arbitration is conducted in a country that signed the New York Convention. Because both Sweden and Russia are recognized signatories of the New York Convention, U.S. courts will defer to, and very likely enforce, Swedish or Russian arbitration awards.



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