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NON-RECOGNITION OF FOREIGN JUDGMENTS VACATING ARBITRAL AWARDS

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In my presentation, I will discuss the most debatable and conceptual theme in international commercial arbitration – the legal effect of vacated foreign arbitral award in the event that a motion is made to enforce it. Dear audience, let me remind you that two radically different legal opinions exist on this matter, having their grounds in both international legal regulation and doctrine, and there are virtually no compromise suggestions.

Interpreted literally, while the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**") establishes a principle that any vacation by a national court of an arbitral award shall constitute a ground for denying any request for enforcing such award, the European Convention on International Commercial Arbitration (the "**European Convention**") says that only annulment caused by a violation of the applicable arbitration procedures may constitute such ground.

In theory, advocates of the procedural or jurisdictional nature of arbitration stand for the non-recognition of those arbitral awards as a basic rule. Adherents of the contractual nature of arbitration and authoritative scholars from various developed jurisdictions say a focus should be made on the recognition of such awards and their dismissal should have a strictly local effect. The second opinion is actively supported by a group of European and U.S. authors – perhaps, because standing behind it are the interests of those large-scale investing corporations who are concerned about protecting themselves against local legal arbitrariness or lawlessness where national courts use various unlawful pretexts to abolish arbitral awards made in favour of foreign entities. However, such polarity of approaches is not a positive factor for international arbitration in general. Just on the contrary, unification and uniform understanding of the arbitration legal instruments prescribed by the above Conventions should be a key development trend in international arbitration.

The concept of the dominant role of arbitration is unacceptable in some jurisdictions where a stricter judicial control is traditional or arbitration courts are immature and sometimes used as an instrument for fight in commercial conflicts rather than a forum for settlement of disputes.

The economic reality is characterised by the presence of large-scale companies in many countries in addition to their principal domiciles.

A duly executed arbitral award may be enforced at the place where the respondent's operations and properties are located, so that a foreign court will become a tool authorising such still persistent disgraceful practices. In some countries, including the CIS ones, the national

international commercial arbitration laws allow any arbitration court to resolve disputes in accordance with the above Conventions, unless its rules imposes any self-limitations.( )

In order to somehow smooth the existing contradictions, I would suggest that we should try to answer the following two questions: (1) Does the New York Convention allow recognising related arbitral awards in general, or shall be think it was not designed to do so? and (2) Can a judgment annulling a foreign arbitral award be ignored, and if yes, on which legal grounds it can be neglected? Looking ahead, one such ground is expressly stated in Article IX(1) of the European Convention: a judgment vacating an arbitral award should not be recognized, unless it is based on a violation of the arbitration procedures.

ENFORCEABILITY OF FOREIGN ARBITRAL AWARDS ANNULLED UNDER THE NEW YORK CONVENTION

The capacity to "revive" an arbitral award which was vacated is derived from Article V point 1 E of the New York Convention, more specifically from the words "may be refused," by using a doubtful interpretation by contradiction and stressing the fact that the texts in various European languages differ dramatically from one another. While both the Russian and English versions use the word "may," the French one says "will." Ladies and gentlemen, I cannot believe such discrepancy occurred through an oversight. Both the French delegation and those experts who drafted that very concise yet semantically capacious document should have seen that difference. Perhaps, the thing is that, when linked with the word "proof," the term "may" actually means a possibility due to the circumstances, i.e. the capacity of a court if such proof of violation is convincing, rather than a discretion or, say, an authority. In other words, a court should only ignore an annulled arbitral award if a party proves that it has been abolished, etc.

More frequently, Article VII of the New York Convention is referred to as a ground for treating a non-existent arbitral award as a valid one. Said Article says that an interested party "may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon." Many experts in the United Kingdom, Sweden and France say the above provision covers previously effective arbitral awards too, and a national arbitration law will be sufficient to enforce them even if they have been reversed. They stress said provision not only establishes a procedure for recognition and enforcement, which is regulated specially and may be new to a party not aware of the local law, but also deals with annulled arbitral awards. Such interpretation contradicts the key idea of the New York Convention since any party thereto may set any liberal rules concerning the recognition of an arbitral award without calling or notifying the parties concerned, and such award will have to be carried into effect. The New York Convention was hardly designed to achieve that goal.

The New York Convention will be easier to interpret if we clearly understand its key goals. However, even now, more than 50 years from its effective date, some mysteries of purely professional nature remain. One such mystery directly relates to the theme of my presentation. Please note the lack of comma after the word «отменено» (set aside) in Article V(1)(e). At a glance, it lists equally ranking terms related to legal effect such as lack of effect, termination and suspension. While the English text misses such comma as well, it was inserted before the word "or," thereby equalling the meanings of "binding" on one side and "set aside or suspended" on the other. The second phrase is translated into Russian to mean not only «отменено» (set aside) but also «отсрочено» (delayed). If that is what was originally meant, the lack of comma appears to be quite as it signifies the temporary lack of legal effect due to a suspension or delay. But if that is true, then Article V 1 (e) says nothing about vacation as a reason for non-recognition at all. Why? Because there was no need to mention that. An annulled award is an act that is binding

upon any private party under criminal penalties. Those people who drafted the New York Convention in the 1950s hardly meant that a judgment should constitute no obstacle to make a further motion for the recognition of a private arbitral award. However, the Russian text uses the word "отмена" (setting aside) rather than "отсрочка" ("postponement"), and the term "set aside" as used in numerous comments and the European Convention itself means "annul," so the lack of comma remains a mystery.

It is worth noting that the equivalent phrase in the Statute on International Commercial Arbitration of RF of 1993 contains all commas. See this on the screen.

NON-RECOGNITION OF JUDGMENTS REVERSING ARBITRAL AWARDS

In my opinion, it would neither be in the spirit of the New York Convention nor desirable for the rule of international commercial arbitration to raise the question of enforcement of annulled arbitral awards. Such practice will only make national authorities hostile towards international commercial arbitration and cause legal uncertainty, lack of uniformity in dispute resolution practices and damage to international economical relations. Judicial authorities may respond to the *a priori* negative attitude to annulment of arbitral awards by, say, suspending such awards, i.e. conditioning them on the occurrence of certain conditions rather than invalidating them in full for the future or by using any other inventions such as declaring "the arbitration court under the Chamber of Commerce and Industry non-constitutional," which was the case in one of the Middle Asian countries.

The Russian Federation is interested in giving exterritorial effect to its judgments vacating foreign arbitral awards since its law provides for two instruments of procedural protection against the effects of arbitral awards (§§1, 2 chapter 30, Arbitration Procedure Code of the Russian Federation): refusal to issue a writ of execution, which refusal should, of course, have a local effect, and vacation of an arbitral award as an act of transnational effect.

Some experts believe the non-recognition of judgments abolishing foreign arbitral awards may be conditioned on the lack of mutuality or sufficient ground for showing international comity and that is the only condition that makes it possible to enforce annulled arbitral awards. Such an approach looks unnecessarily radical to me as it creates undesirable extremes. The thing is that under Article V(e)(1) of the New York Convention, courts are obligated to recognise any judgment of a competent authority vacating a foreign arbitral award as a rule that may only have local and serious exceptions.

It will hardly be possible to make enforceable any abolished arbitral award. Any effort to do so without taking into account the peculiarities of various jurisdictions would only split the arbitration community and cause mutual lack of understanding among its members.

Despite the unification of arbitration rules in various international documents and model laws, the various jurisdictions differ in the extent of judicial control over institutes of alternative dispute resolution provided by their laws and judicial practices. Acts of judicial supervision should have exterritorial effect, i.e. any vacation of arbitral award should be upheld in every country under Article V of the New York Convention and Article IX of the European Convention. It is unclear whether the procedure for non-recognition of foreign judgments should be followed in the Russian Federation upon request of the interested parties or *ex officio*. In my opinion, the second approach is more logical.

A national court in a country of high arbitration standards may only "revive" a foreign arbitral award through non-recognition of a judgment neutralizing such award; provided, however, that the logics of the foreign court should be analysed on the basis of *lex arbitri*, i.e. under the law of the place where such judgment was handed down rather than under the national law, to check if those foreign standards which may be deemed lawful at the place where such judgment was handed down are observed. Then a *lex fori* review of the legal effects should be conducted. A national court may always non-recognise a judgment vacating a foreign arbitral award for violation of the judicial procedure or, importantly, a negative impact on public policy. In other words, a national court will have to do some work in that case. But this is the only way to harmonise the various approaches to vacated arbitral awards and the rule of international commercial arbitration in general.