Client Update

English High Court Reiterates High Hurdle to Enforce Foreign Arbitral Award Annulled by the Court of the Seat

On 27 July 2017, the English High Court handed down judgment in *Nikolay Viktorovich Maximov v. Open Joint Stock Company "Novolipetsky Metallurgichesky Kombinat"*.[1] It dismissed an application to enforce a Russian arbitral award that was set aside by the Russian courts. The claimant maintained that the decisions of the Russian courts were perverse, and invited the Court to infer that those decisions were therefore procured by bias and should not be recognised by the English Court.

In dismissing the application to enforce the award, the Court held that it was not enough to show that the Russian courts' decisions were manifestly wrong, or even perverse. The Court would have to be able to infer that the Russian courts were actually biased against the claimant. In the absence of other evidence of bias, this would require the decision to have been so extreme and incorrect that no court acting in good faith could have arrived at it other than by bias. The Court held that on the facts of the case, the claimant had failed to discharge this heavy burden.

The decision is a stark reminder of the difficulties a party will face in seeking to enforce an award in England if it has been annulled by the court of the seat.

THE AWARD

The International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation ("ICAC") issued an award in favour of the claimant in the sum of RUB 8.9bn (over £100 million). The award arose out of a dispute between the defendant, one of Russia's largest steel companies, and the claimant, a prominent Russian businessman, concerning the calculation of the purchase price of shares in OJSC Maxi-Group pursuant to a share purchase agreement (the "SPA").

[1] [2017] EWHC 1911 (Comm).

The award was set aside in a decision of the Moscow Arbitrazh Court, upheld on appeal by the Federal Arbitrazh Appeal Court, and again on a final appeal by the Supreme Arbitrazh Court. Having exhausted all legal options in Russia, the claimant sought to enforce the award abroad, in France, the Netherlands and England. The French court (which gives no weight to the fact that an award has been annulled at the seat) concluded that the award was enforceable. The Dutch court (following a detailed enquiry before the Amsterdam Court of Appeal) refused to enforce the award. A cassation appeal to the Supreme Court of the Netherlands remains pending.

THE ENGLISH LITIGATION

The claimant maintained that the decisions of the Russian courts annulling the award (the "Set Aside Decisions") should not be recognised because they were rendered contrary to natural justice and violated Article 6(1) of the European Convention on Human Rights on the right to a fair trial.

There was no evidence of corruption or direct evidence of actual bias, so the claimant's case[2] focused on the terms of the Set Aside Decisions and the English Court was asked to infer bias from the perverse nature of the Russian court's conclusions

The award was annulled by the first instance judge in Russia (Judge Shumilina) on three grounds (two of which the judge raised of her own volition without hearing argument from the parties):

- First, two of the three ICAC arbitrators were found to have breached an obligation to disclose their employment links with two of the claimant's expert witnesses in the case (including the fact that they were subordinate to the experts in their respective academic institutions), and that this breach had not been waived by the defendant;
- Second, the arbitrators, in assessing the purchase price payable for the Maxi-Group shares, did not follow the price formula specified in the SPA but determined the price in a manner of their own devising, thereby breaching a fundamental principle of Russian law with the result that the award was contrary to Russian public policy; and
- Third, the dispute between the parties was of a corporate nature, and was therefore not arbitrable under Russian law.

Based on the Russian law expert evidence which it heard, the English Court found that the Russian courts' reasoning in respect of the first two grounds was wrong as a matter of Russian law (although the conclusion on the first ground might have been available on different reasoning).

[2] The claimant initially relied upon various allegations of procedural irregularities and bias said to arise out of the supposed "influence" of the defendant. However, those allegations were not ultimately pursued at trial as free-standing grounds for non-recognition.

The English Court was less critical of the Russian courts' reasoning on the third ground, which it considered was arguable (and noted that the approach of the first instance judge had been followed in Russia in a number of cases since the Set Aside Decisions).

Despite raising considerable criticism of the Set Aside Decisions, the English Court emphasised the heavy burden faced by the claimant. This was even more so when the decisions of three courts, including the Russian Supreme Court, were being challenged.

The English Court was ultimately not persuaded that the errors of Russian law in the Set Aside Decisions were so extreme and perverse that they could only be ascribed to bias against the claimant.

In light of its findings, the English Court determined that it was not necessary to consider two other issues raised by the defendant:

- The defendant relied on the principle of *ex nihilo nihil fit* whereby if an award has been annulled there is nothing to enforce. Whilst not addressing that issue in any detail, the Court expressed the view that the English Court should not simply accept the decision of a foreign court setting aside an award if there was at least an arguable case that the set aside decision had been reached in breach of natural justice.
- The defendant relied upon a series of issue estoppels arising from the decision of the Amsterdam Court of Appeal. There was a debate about whether the decision of the Amsterdam Court of Appeal was final and binding as a matter of Dutch law such that it could form the basis of an issue estoppel in England. The English Court did not resolve that issue, leaving open the interesting question of English law as to whether, had there been an issue estoppel, the English Court nonetheless had (and should have exercised) a discretion not to give effect to the estoppel given that it involved an attack on a foreign judgment.

TAKEAWAYS

The decision should be of interest to international businesses resolving disputes in foreign seats and emphasises the need to carefully select your seat. Whilst English courts are willing to review decisions of a foreign court annulling an award, this case is a clear reminder of the challenges in seeking to enforce an award in England if it has been annulled by the court of the seat.

In the absence of other grounds for denying recognition to the set aside decision, there is a heavy burden to establish that the court's decision was so extreme and incorrect that no court acting in good faith could have arrived at it other than by bias.

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Debevoise & Plimpton LLP acted for the defendant in the case.

Please do not hesitate to contact us with any questions.

LONDON

Tony Dymond
tdymond@debevoise.com

Lord Goldsmith QC
phgoldsmith@debevoise.com

Richard Lawton
rlawton@debevoise.com

Kevin Lloyd
klloyd@debevoise.com

Wendy J Miles QC
wjmiles@debevoise.com

Patrick Taylor
ptaylor@debevoise.com

Christopher Boyne
cboyne@debevoise.com