

Russian courts recognized and enforced a judgment of a Dutch court on the basis of the principles of reciprocity and comity of nations as well as the Agreement on Partnership and Cooperation Establishing a Partnership between the EU Member States and Russia of 1994

(case No. A41-9613/09 of Arbitrazh court of Moscow region)

The Russian courts are used to refusing recognition and enforcement of foreign judgments on economic disputes referring to the fact that there is no international treaty providing for such possibility. The thing is that in accordance with part 1 Article 241 of the Arbitrazh (Commercial) Procedure Code of the Russian Federation “the foreign judgments adopted on disputes and other matters arising out of commercial or other economic activity (foreign courts) ... shall be recognized and enforced in the Russian Federation by the arbitrazh (commercial) courts, if the recognition and enforcement of such judgments is stipulated by an international treaty of the Russian Federation and the federal law.” Quite often the Russian courts interpret this provision in such a way as if there were an international treaty of Russia with a relevant state expressly providing for recognition and enforcement of foreign judgments so as to recognize and enforce a foreign judgment in Russia. But June and July 2009 witnessed a rare case of precedent significance: the Russian courts recognized and enforced the judgment of a Dutch court in a commercial case in absence of a bilateral treaty between Russia and the Netherlands regulating this issue.

The aforesaid case was as follows. On April 6, 2006 a Russian economic entity took on lease hoisting devices and other equipment from a Dutch company. The parties stipulated in the agreement that any disputes between them shall be referred to the District court of the city of Dordrecht (the Netherlands), and that the agreement shall be governed by the legislation of the Netherlands.

Due to the fact that the lessee did not completely fulfill its obligation to pay for the leased equipment despite the lessor’s written demands, the latter applied to the court with a claim to recover the outstanding amount under the agreement from the lessee and to return the equipment.

On December 18, 2008 the District court of Dordrecht passed the judgment in this case through a summary procedure. In accordance with that judgment, the defendant was obliged to inform the claimant of the location of the leased equipment within five days, to return that equipment within three weeks and to refund the expenses incurred by the claimant during the consideration of that dispute. In the event of failure to comply with the first two demands, the penalty amounting to

10,000.00 Euro per day, with the maximum sum amounting to 10,000,000.00 Euro, was to be imposed on the defendant. In accordance with the procedural legislation of the Netherlands, that judgment was subject to immediate enforcement.

Afterwards the claimant applied to the Russian court at the location of the defendant demanding to recognize and enforce that judgment in the territory of Russia. The debtor's representatives objected to the filed claims referring, inter alia, to the absence of an international treaty on recognition and enforcement of foreign judgments between Russia and the Netherlands.

On June 5, 2009 the court passed a ruling on recognition and enforcement of the judgment. As to the debtor's objection about it being impossible to recognize and enforce a foreign judgment in Russia in absence of an international treaty to this effect, the court determined as follows:

“Paragraph 4 Article 15 of the Constitution of the Russian Federation provides that “The generally acknowledged principles and rules of the international law and the international treaties of the Russian Federation constitute an integral part of its legal system”. One of the generally acknowledged principles of the international law is the comity of nations principle (Lat. *comitas gentium*) instructing all states to treat a foreign state's law with courtesy and respect.

There are some other generally accepted principles of international law among which the principle of reciprocity, originating in the comity of nations principle, stands out. The principle of reciprocity is reflected in the norms of the Russian substantive law in Article 1189 of the Civil Code of the Russian Federation. In terms of the substantive law, the principle of reciprocity shall mean the rule stipulating that a foreign law shall be mutually applied for the sake of development of the cooperation between the states. However, if one state refuses to apply the rules of law of another state in the relevant cases, such another state shall refuse to apply the first state's law in its territory as well.

At the same time the principle of reciprocity was not expressly provided for in the Russian procedural legislation. Yet it may not prevent this principle from being applied in respect of the procedural law due to the following. In the first place, the generally acknowledged principle of the international law has a “customary origin”, i.e. it originates from an international custom and thereby it is a mandatory rule that does not need to be expressly specified in the legislation. In the second place, this principle involves mutual cooperation of the states for acknowledgement of the rights and interests of private persons, while the rights of such persons may be determined not only by the foreign law but also by the foreign judgment (which corresponds to paragraph 1 Article 46 of the RF

Constitution: each person is guaranteed the legal protection of his/her rights and freedoms).

Paragraph 1 Article 241 of the Arbitrazh (Commercial) Procedure Code of the Russian Federation specifies that a foreign judgment shall be recognized and enforced in the Russian Federation by arbitrazh courts if recognition and enforcement of such judgments is provided for by the international treaty of the Russian Federation and the federal law.

There is no separate international treaty on legal assistance covering the issues of recognition and enforcement of the judgments of the Kingdom of the Netherlands in the Russian Federation, and vice versa. But the Russian Federation is a party to a number of international conventions and treaties stipulating a person's right for a fair and public consideration of his/her case by an independent and unprejudiced court. For example, on the basis of Paragraph 1 Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950, enforcement of a judgment passed by any court of the State-Member of the Convention shall be considered by the Russian court as a proper observance of a person's right for a fair court proceeding. Moreover, on June 24, 1994 the Russian Federation entered into "the Agreement on Partnership and Cooperation Establishing a Partnership between the Russian Federation, on the one part, and the European Communities and their Member States, on the other part" (hereinafter referred to as "The Agreement on Partnership") with several European countries, including the Kingdom of the Netherlands. Under that agreement, each party undertook to provide the access of the other party's individuals and legal entities to the competent courts in the manner free from discrimination as compared to the nationals of such party.

According to the legal position of the Federal Arbitrazh (Commercial) Court of the Moscow region, specified in the Ruling of February 22, 2006 in the case No. КГ-А40/698-06-II, the Agreement on Partnership is the international treaty within the framework of which the recognition and enforcement of foreign judgments is carried out in the Russian Federation.

Even if the Agreement on Partnership is not considered as an international treaty within the meaning of paragraph 1 Article 241 of the RF Arbitrazh Procedure Code, one should take into account that the Arbitrazh Procedure Code does not make recognition and enforcement of a foreign judgment dependent solely on an international treaty and/or a federal law.

For example, Paragraph 1 Article 241 of the RF Arbitrazh Procedure Code does not contain any instructions about the international treaties of the Russian Federation and/or the federal laws being the exclusive bases for recognition and enforcement of foreign judgments.

In the event the legislator implied the exclusive nature of the bases specified in Paragraph 1 Article 241 of the RF Arbitrazh Procedure Code, that Article would contain the instructions to this effect.

Besides, Paragraph 1 Article 244 of the RF Arbitrazh Procedure Code enumerates the bases for refusal to recognize and enforce a foreign judgment, with the absence of an international treaty and/or a federal law never being included in such bases. At the same time the list of such bases given in paragraph 1 Article 244 of the RF Arbitrazh Procedure Code, is an exhaustive one and may not be interpreted broadly.

In view of the aforesaid, a foreign judgment may be recognized and enforced in the territory of the Russian Federation on the basis of the international treaty – the Agreement on Partnership.

And what is more, irrespective of the presence of any international treaties and federal laws, a foreign judgment may be recognized and enforced in the territory of the Russian Federation on the basis of the generally acknowledged principles of the international law — the principles of reciprocity and comity of nations.

An official refusal to recognize and/or enforce a foreign judgment in the Russian Federation with reference to absence of the bases given in paragraph 1 Article 241 of the RF Arbitrazh Procedure Code shall constitute an immediate breach of paragraph 4 Article 15 of the RF Constitution, paragraph 1 Article 46 of the RF Constitution as well as a number of international conventions and treaties to which the Russian Federation is a party”.

The claimant submitted to the court a legal opinion prepared by Dutch lawyers where certain examples of recognition of the Russian judgments by the Dutch courts were given. In view of this fact, the court drew a conclusion that all the bases for recognition and enforcement of the judgment of the District court of Dordrecht were complied with.

The court ruled that there were no bases for refusal to recognize and enforce the judgment of the Dutch court stipulated in the Russian procedural legislation.

In view of the aforesaid, the court sustained the Dutch claimant’s demand for recognition and enforcement of the judgment of the District court of the city of Dordrecht.

The debtor filed an appeal into the court of cassation against the ruling passed by the abovementioned court. In particular, the debtor disagreed with the possibility of recognition and enforcement of the foreign judgment on the basis of either the principles of reciprocity and comity of nations or the Agreement on Partnership and Cooperation.

But the court of cassation supported all the arguments specified in the trial court ruling and upheld it, having found that the bases for recognition and enforcement of the foreign judgment had been determined correctly.

The Supreme Arbitrazh Court by its ruling No. BAC-13688/09 of 7 December 2009 upheld these judgments.

Therefore, the Russian arbitrazh (commercial) courts of the first and cassation tiers as well as the Supreme Arbitrazh Court confirmed that a foreign judgment must be recognized and enforced in Russia purely on the basis of international comity and reciprocity, even if there is no international treaty expressly providing for such recognition and enforcement.