Digest

of Russian judgments on recognition and enforcement or setting aside of international arbitral awards rendered in 2008—2009

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THEME OF THE ISSUE:

High Arbitrazh Court of the Russian Federation speaks out against attempts to review arbitral awards on the merits and formalistic or wanton interpretation of arbitration agreements or rules on the proper notification of the party of the arbitral proceedings.

No. 1

June 2010

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Introductory notes

1. Competence of Russian courts to recognize and enforce international arbitral awards

In the Russian Federation all the competence to decide on requests for enforcement of international arbitral awards is vested only with the state courts. There are two principal types of courts to decide on such requests.

The first is the system of arbitrazh (i.e. state commercial) courts. They are competent to decide on requests for enforcement of the awards made in disputes of commercial or other economic nature. It should be mentioned that the arbitrazh courts have nothing in common with arbitral (non-state) tribunals, whether domestic or international. So the term "arbitrazh" ("arbitral" in the Russian language) as used in the modern Russian law has two meanings: the first stands for arbitral (non-state) tribunals while the second implies the state commercial courts. This is a particular heritage of the Soviet times, caused by historic peculiarities of domestic regulations.

The second type of courts to decide on requests for enforcement is the courts of general jurisdiction. They are competent to hear civil (non-commercial) and criminal cases, as well as some other disputes and matters. However, since this bulletin highlights cases relating to international arbitral awards in commercial matters, only the procedure followed by arbitrazh (commercial) courts is explained further.

2. Procedure of the recognition and enforcement of the arbitral awards

A request for recognition and enforcement of an arbitral award is submitted to an arbitrazh court of a constituent of the Russian Federation. These are the courts of the first instance. There are 83 constituents of the Russian Federation, but since two arbitrazh courts have jurisdiction over two constituents, there are 81 arbitrazh courts of the first instance in Russia. Competence to decide on request for enforcement is vested with an arbitrazh court of the first instance at the place where a debtor resides (is registered) or, if the debtor's place of residence (registration) in Russia is unknown,

where his assets are located. The courts of the first instance make their decisions on the matter in question in the procedural form of a ruling (*opredelenie*).

The second (appellate) instance is represented by 20 arbitrazh courts of appeal with jurisdiction over 20 special court circuits. However, the Russian law does not provide for the opportunity to have the ruling of a court of the first instance to be reviewed by these courts. A party may appeal to one of the 10 federal arbirazh courts constituting the third (cassation) instance. These courts have jurisdiction over 10 special court circuits and make decisions in the procedural form of a decree (*postanovlenie*).

The last resort available to a party is to apply to the High Arbitrazh Court of the Russian Federation with the seat in Moscow. This Court may review the preceding judicial acts on the case in the order of supervision. A judicial act may be set aside in exceptional cases: if it goes against uniformity of interpretation and application of legal provisions by the arbitrazh courts, and/or infringes upon the rights and legitimate interests stipulated by the international treaties of the Russian Federation and by *jus cogens*, and/or violates public interests. The Court makes its decisions in the procedural form of a decree (*postanovlenie*).

The law applicable to the matter in Russia includes the "UN Convention on Recognition and Enforcement of Foreign Arbitral Awards" of 1958, the Civil Procedural Code of Russia, the Arbitrazh Procedural Code of Russia, and also the Federal Law "On International Commercial Arbitration". It is to be noted that the above-mentioned Russian laws implement many provisions set forth by the Convention.

The cases given below are set forth in the following way: first the gist of the most interesting problem regarding the modalities of recognition and enforcement or setting aside of an award is formulated, then the case numbers and the dates of the judgments are specified and finally the facts summary and the summary of court rationale are given.

The readers are encouraged to address us for further details, explanations and opinions.

1. Lower courts refused to recognize and enforce an arbitral award as the arbitration clause failed to accurately specify the arbitration court. High Arbitrazh Court disapproved such refusal as formalistic.

- *Ruling of the Arbitrazh Court of the Saratov Region of 18 May 2008, Case No. A57-8082/2008-116 (Определение Арбитражного суда Саратовской области от 18.08.2008, дело № А57-8082/2008-116).*

- *Ruling of the Federal Arbitrazh Court of the Povolzhsky Circuit of 15 December 2008 (Определение ФА С Поволжского округа от 15.12.2008).*

- *Decree of the Presidium of the High Arbitrazh Court of the Russian Federation of 22 September 2009 No. 5604/09 (Постановление Президиума ВАС РФ от 22.09.2009 г. № 5604/09).*

A German company applied to the Arbitrazh Court of the Saratov Region with a request for recognition and enforcement of the arbitral award rendered by the International Arbitral Centre of the Austrian Federal Economic Chamber on recovery of funds due for the delivered equipment, together with the interest, from a Russian company. The debtor objected to the recognition and enforcement of the award and argued that the arbitral tribunal lacked jurisdiction to resolve the dispute in question, because the agreement provided that all the disputes arising out of it shall be resolved "by the Chamber of Industry and Commerce in Vienna, Austria". Thus the International Arbitral Centre of the Austrian Federal Economic Chamber was not even mentioned in the Contract, therefore it did not have jurisdiction to settle the dispute in question. The court agreed and refused to recognize and enforce the award.

The award creditor appealed to the Federal Arbitrazh Court of the Povolzhsky Circuit which upheld the ruling. Then the award creditor appealed to the High Arbitrazh Court of the Russian Federation ("the HAC"). The HAC found that the lower courts refused to recognize and enforce the award merely for formal reasons. The HAC stated as follows:

> *"As it follows from the content of the arbitration agreement, the parties excluded resolution of the disputes arising between the parties out of the contract or in connection with it from the jurisdiction of state courts. The parties also indisputably und unambiguously agreed upon the seat of the future arbitration proceedings — Vienna, Austria. While assessing the provision contained in the arbitration agreement that the court is subject to the arbitration proceedings at the*

Chamber of Industry and Commerce in Vienna (Austria), the court of first instance should have taken into consideration that the Austrian Federal Economic Chamber located in Vienna is an organization similar to chambers of commerce and industry located in other countries, and the International Arbitral Centre of the Austrian Federal Economic Chamber is the only institutional (standing) international commercial arbitration court founded by that organization".

Therefore the HAC reversed the lower court's ruling and remanded it to the court of the first instance. Thus the HAC resolved the matter basing on the theory that a court cannot refuse to recognize and enforce an arbitral award only for formal reasons, for example, because of discrepancy between the names of the arbitration court that rendered the award and the arbitration court stated in the arbitration clause.

2. Lower courts found that information on the date, time and specific address of the arbitration hearing must be communicated to the parties in one single message to constitute due notice, not in several messages consequently. High Arbitrazh Court decided otherwise.

- *Ruling of the Arbitrazh Court of Moscow of 16 October 2007, Case No. A40-31695/07-13-318 (Определение Арбитражного суда г. Москвы от 16.10.2007 г., дело № А40-31695/07-13-318).*

- *Decree of the Federal Arbitrazh Court of the Moskovsky Circuit of 26 December 2007 No. A40-31695/07-13-318 (Постановление ФАС Московского округа от 26.12.2007 г. № А40-31695/07-13-318).*

- *Ruling of the Arbitrazh Court of Moscow of 17 March 2008 (Определение Арбитражного суда г. Москвы от 17.03.2008 г.).*

- *Decree of the Federal Arbitrazh Court of the Moskovsky Circuit of 15 May 2008 No. КГ-А40/3758-08-П (Постановление ФАС Московского округа от 15 мая 2008 г. № КГ-А40/3758-08-П).*

- *Decree of the Presidium of the High Arbitrazh Court of the Russian Federation of 20 January 2009 No. 10613/08 (Постановление Президиума ВАС РФ от 20 января 2009 г. № 10613/08).*

A large US satellite communication company applied to the Arbitrazh Court of Moscow with a request for recognition and enforcement of the arbitral award rendered by the London Court of International Arbitration (LCIA) on recovery from a Russian telecommunications subsidiary of Rostelecom OJSC (Russian long-distance telecom operator) of funds due under the loan agreement, the interest and the arbitration costs. The debtor gave a number of reasons for the award in question not to be recognized and enforced in Russia. Those reasons included violation of the procedure of the arbitration panel formation and of the evidence assessment, infringement of the Russian public policy; the award having not entered into force and not becoming final and binding on the parties. Besides, the debtor argued that the award creditor had

addressed the LCIA with a request to postpone the hearing. Therefore the debtor had not had enough grounds to apply for a UK visa. Yet it was found out that the LCIA had not granted this request, and the debtor had not reacted to it in any way. All those arguments were rejected by the court.

Also, the debtor objected to the recognition and enforcement on the ground that he was not given a proper notice of the arbitration proceedings, in particular, of the time and place of the hearing. The arbitral tribunal notified the parties of the hearing date in London more that two months in advance and suggested that the parties agree upon the address of the hearing themselves. Subsequently the tribunal confirmed that date in several communications. As the parties failed to agree upon the address of the hearing, the tribunal established it for them and communicated it to the parties twenty days prior to the hearing. Then, nine days before the hearing, the tribunal sent to the parties a message which contained the date, the time and the address of the hearing. The debtor alleged that only that last communication should be deemed a 'proper notice', as each of the rest lacked the whole necessary data, such as the specific address of the hearing. As that last notice was received too late to apply for the UK visa for his representative, the debtor argued that he was unable to present his case. He did not apply for the UK entry visa before because he believed that if he fails to specify the address of the hearing to the UK embassy he would be refused such visa in any case.

The Arbitrazh Court of Moscow agreed with such reasoning and refused to recognize and enforce the award on the grounds specified in the Article V(1)(b) and V(1)(d) of the New York Convention of 1958 on Recognition and Enforcement of Foreign Arbitral Awards.

The award creditor appealed to the Federal Arbitrazh Court of the Moskovsky Circuit which reversed the ruling of the court of the first instance having found that the messages successively informed the parties about the time and place of the hearing. The court remanded the case and instructed the court of the first instance to enquire whether the debtor's representative had actually applied for the UK visa and, if so, whether his application had been refused and for what reason. The court noted that those circumstances were important to decide whether the debtor had an opportunity to detach his representative to take part in the hearing or not.

In the course of the new trial the debtor presented an additional argument that a personalized invitation from the LCIA was needed to obtain the UK visa. He admitted

that he had not requested such invitation and had not even applied for the UK visa. He argued as well that the hearing took place despite his request to postpone it because he could not take part in it.

The Arbitrazh Court of Moscow stuck to its prior position and refused to recognize and enforce the award.

Again the award creditor appealed to the Federal Arbitrazh Court of the Moskovsky Circuit. Surprisingly, this time the court upheld the lower court ruling considering that it had made a thorough analysis of the circumstances of the case and made the right decision.

The award creditor then applied to the High Arbitrazh Court of the Russian Federation as a last resort with a request for supervisory review of the lower courts' acts. In particular, the award creditor stated that the above-mentioned judicial acts violated the public interests consisting in encouraging arbitration as means of international commercial disputes resolution.

The Court held that to assess whether there was a proper notice of the parties of the hearing regard to the rules of the respective arbitration institution should be given. Having considered the LCIA Rules, the Court noted as follows:

> *"The issue on the form of proper notification of the parties to the arbitration in the permanent arbitration institution must be considered with the account of the arbitration institution's rules.*
>
> *Under clause 14.2 of the Rules of London Court of International Arbitration (hereinafter — the Rules) unless otherwise agreed by the parties under Article 14.1, the Arbitral Tribunal shall have the widest discretion to discharge its duties allowed under such law(s) or rules of law as the Arbitral Tribunal may determine to be applicable; and at all times the parties shall do everything necessary for the fair, efficient and expeditious conduct of the arbitration.*
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> *Under clause 16.1 of the Rules the parties may agree in writing the seat (or legal place) of their arbitration. Failing such a choice, the seat of arbitration shall be London, unless and until the LCIA Court determines in view of all the circumstances, and after having given the parties an opportunity to make written comment, that another seat is more appropriate.*

That said according to clause 19.2 of the Rules the Arbitral Tribunal shall fix the date, time and physical place of any meetings and hearings in the arbitration, and shall give the parties reasonable notice thereof.

Thus the notification doesn't have to appear as the sole document. It can consist of several complementary documents, which are communicated as the details concerning place of the arbitration and place of the hearing, including the specific address of the hearing, are agreed upon, whether it be with the participation of the parties.

Therefore during the consideration of the fact of the GlobalTel notification on the arbitration hearing, the arbitrazh courts had to evaluate as a whole all the messages on this particular issue, directed by the arbitration tribunal, instead of considering as a notification only the last message, supplemented by the indication of the postal address of the building in London where the hearing would be held.

The company didn't deny the receipt of the messages.

The determination by the arbitration tribunal of the hearing date offering the parties to choose a place for its holding in London corresponds to the clause 16.1 of the Rules.

When considering the fact of notification, consisting of several documents, communicated at different time, it is necessary to establish how early the specific data, the delay of which the party invokes as the basis of its statement on improper notification on the arbitration, were sent to the party to the arbitration".

The HAC stated that arbitrazh courts should have considered as notice all the letters sent to the debtor by the LCIA. The last letter was, in fact, a kind of compilation containing all the details that had been communicated to the debtor earlier. The debtor had been informed about the hearing three month before it. This period had been quite enough to apply for the UK visa. The HAC stated that failure to include in the notifications the exact time of the hearing and the address where it was about to be held could not be considered a reason for a possible delay for issuing a visa for the debtor's representative. Therefore the HAC held that the debtor's arguments concerning failure by the LCIA to inform him about the time and place of the hearing were groundless.

For the reasons given, the High Arbitrazh Court of the Russian Federation set aside the lower courts' acts and granted recognition and enforcement of the LCIA award.

Thus the HAC confirmed that while deciding whether a party was duly notified of the time and place of the arbitral proceedings the court must consider all the correspondence between the arbitration court and a party as a whole, not every message separately, unless it follows otherwise from the arbitration rules.

3. Lower courts refused to enforce an ICAC award on a number of grounds referring to Russian public policy violations. High Arbitrazh Court found that this amounted to the award review on the merits.

- *Ruling of the Arbitrazh Court of the Irkutsk Region of 4 May 2008 No. A19-2579/08-31-10 (Определение Арбитражного суда Иркутской области от 04.05.2008 г. № А19-2579/08-31-10).*

- *Decree of the Federal Arbitrazh Court of the Vostochno-Sibirsky Circuit of 3 July 2008 No. A19-2579/08-Ф02-3028/08 (Постановление ФАС Восточно-Сибирского округа от 03.07.2008 г. № А19-2579/08-Ф02-3028/08).*

- *Ruling of the High Arbitrazh Court of the Russian Federation concerning transfer of the case to the Presidium of the High Arbitrazh Court of the Russian Federation of 30 October 2008 No. 10680/08 (Определение ВАС РФ о передаче дела в Президиум ВАС РФ от 30.10.2008 г. № 10680/08).*

- *Decree of the Presidium of the High Arbitrazh Court of the Russian Federation of 3 February 2009 No. 10680/08 (Постановление Президиума ВАС РФ от 03.02.2009 г. № 10680/08).*

A Liechtenstein company applied to the Arbitrazh Court of the Irkutsk Region with a request to issue a writ of execution of the award rendered by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation ("Arbitration Court") against a Russian municipal water and energy supply public utility on recovery of the principal and arbitration costs.

The debtor presented a number of objections. The court refused to recognize and enforce the award, in particular, on the following grounds.

1. The award violated the Russian public policy as the contract concerned maintenance of water supply for a municipality and thus the award was rendered against an entity of strategic importance to the whole region. The imposition of payments on the debtor would be harmful to a large number of people. Payment of debts by the debtor could

result in its insolvency, which could affect economic and social development of the municipality.

2. The Arbitration Court violated what the court formulated as "the principle of legality": as the contract contained elements of sale and purchase contracts, contracts for rendering services, and contract of work, the Arbitration Court should have taken into consideration the rules of law governing all the above-mentioned types of contracts. Since the Arbitration Court had failed to do so, this meant, as the court held, that the Russian public policy had been violated.

3. The contract was concluded on fundamentally unfair terms as it provided only rights for the award creditor and only obligations for the debtor. The court stated as follows:

> *"The principle of unity of rights and obligations precludes significant disproportions in the rights and obligations of the parties to a contract – the creditor and the debtor. However it follows from the debtor's explanations that the debtor had made itself totally dependent on the creditor, acting to prejudice of its own economic, financial and production interests. Violation of the principle of unity of rights and obligations results in infringement upon such a branch-wise principle of the civil legislation of the Russian Federation as equality of the participants of civil relations".*

4. The principles of good faith and justice had also been violated. Most of the payments stipulated in the contract in fact had some other unclear purpose rather than the contract fulfillment, which was mentioned by one of the arbitrators in his separate opinion. On this ground the court found the contract null and void.

5. The arbitral tribunal held that the execution should be carried out at the expense of the debtor's real property. Meanwhile the Russian law provides exclusive jurisdiction of the state courts to settle the real property disputes. Thus the Arbitration Court exceeded its powers.

On the said grounds the court refused to issue the writ of execution to the award creditor.

The latter appealed to the Federal Arbitrazh Court of the Vostochno-Sibirsky Circuit. However, the court upheld the ruling of the court of the first instance.

The award creditor then applied to the High Arbitrazh Court of the Russian Federation with a request for supervisory review of the lower courts' acts.

The HAC found no violation of public policy. It held that in fact lower courts reviewed the case on the merits which is inadmissible. Finding the contract null and void by the court was done in excess of its powers as neither of the parties requested it both within the arbitration hearing and in the judicial procedure.

The HAC also noted that the Arbitration Court had adjudicated and satisfied two separate claims: 1) the claim for the principal, penalty, damages and arbitral costs and 2) the claim to levy execution on the real property of the respondent to guarantee execution of the award. Therefore the courts of the lower instances should not have used the second part of the award as a ground for refusal to issue a writ of execution as requested by the award creditor. Instead, the courts should have considered partial enforcement of the award.

Thus the HAC set aside the lower courts' acts and ruled to issue a writ of execution as requested by the award creditor.

4. Lower courts refused to grant recognition and enforcement of an arbitral award on the ground that it would entail insolvency of the debtor which was a strategic entity. They also found that the contracts out of which the dispute arose did not enter into force. The HAC judicial collegium found this approach incorrect. The HAC Presidium suspended the case hearing until consideration of the pending case on setting the award aside by the foreign court.

- *Ruling of the Arbitrazh Court of Saint-Petersburg and Leningradskaya Region of 20 February 2009 No. A56-60007/2008 (Определение Арбитражного суда города Санкт-Петербурга и Ленинградской области от 20.02.2009 по делу № А56-60007/2008);*

- *Decree of Federal Arbitrazh Court of the Severo-Zapadny Circuit of 24 April 2009 No. A56-60007/2008 (Постановление ФАС Северо-Западного округа от 24.04.2009 по делу № А56-60007/2008);*

- *Ruling of the High Arbitrazh Court of the Russian Federation concerning transfer of the case to the Presidium of the High Arbitrazh Court of the Russian Federation of 11 September 2009 No. 9899/09 (Определение Высшего Арбитражного Суда Российской Федерации от 11.09.2009 № 9899/09).*

A Swedish company applied to the Arbitrazh Court of Saint-Petersburg and Leningradskaya Region to recognize and enforce an award rendered by an arbitral tribunal in Sweden under the rules of the Arbitration Institute of the Stockholm Chamber of Commerce against a Russian company on recovery of damages in the amount of 20,000,000 euro caused by breach of ship-construction contracts and an agreement on optional acquisition of two more vessels, interest on such amount and legal expenses.

The court ruled that the debtor was a strategic legal entity for Russian state security and that the award enforcement would entail its bankruptcy with adverse public consequences. Thus it would be against public policy. Federal Arbitrazh Court of the Severo-Zapadny Circuit (the court of cassation instance) rejected such reasoning but

found other grounds to refuse enforcement, also applying public policy concept. The court ruled that the award was against Russian public policy since it had been made without regard to the fact that the contracts and the agreement had not become binding on the parties as there had been no evidence that they had been approved by the board of directors of the Swedish company (as such contracts mandatorily demanded).

The HAC judicial collegium (board of 3 judges), which heard the case preliminarily, assumed that there were no grounds to invoke Russian public policy since the arbitral tribunal had already found the contracts valid, that the lower courts were not authorized to re-estimate its findings and that there was no evidence in the light of the applicable Swedish law that the contracts and the agreement had not become binding on the parties. The HAC board of 3 judges decided in September 2009 that the case was to be further heard by the HAC Presidium (consisting of 14 judges).

The HAC Presidium found out that the arbitral award was challenged by the debtor in the Svea Court of Appeal. The New York Convention (Article VI) and the Russian law "On International Commercial Arbitration" (Article 36(2)), based on the UNCITRAL Model Law, provide that the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award if an application for the setting aside of the award has been made to a competent authority of the country in which, or under the law of which, that award was made. Also, the Russian procedural law provides for Russian court's discretion to suspend a case if another case is pending with a foreign court whose judgment can be relevant for the case in a Russian court. The HAC took this into account and held to suspend the hearing until the case in Sweden on the Russian debtor's complaint would be over.

This is for the first time that a case on recognition and enforcement of a foreign arbitral award heard by the HAC is suspended until rendering a foreign judgment. It makes this case rather extraordinary.

Upon resuming the hearing in the HAC (awaited to take place in spring 2010) another key issue to be resolved by the HAC may be the applicability of the arbitration-related provisions in the bilateral Agreement on the Trade in Goods and Payments between the USSR and Sweden, concluded on September 7, 1940. The applicability of such provisions was confirmed by the Contracting Parties in 1976 and later by the special Protocol in 1993. The said provisions set out special rules on the constitution of the arbitral tribunal, the arbitral procedure and arbitral award. Moreover, there are also

special rules in such provisions on recognition and enforcement of arbitral awards made in both countries. Such rules are more favorable for the debtor than the provisions of the New York Convention. So it is possible that a very interesting issue on the applicability of a bilateral agreement, which is less favorable than the New York Convention, may arise in Russian court practice, again for the first time.

The final resolution of this case will be rather important for developing Russian case law on public policy concept, which is very often invoked in cases on recognition and enforcement of foreign arbitral awards.

5. Lower courts deemed enforcement of arbitral awards allowing interest on penalty and on legal expenses contrary to Russian public policy. The HAC found no such contrariety.

- *Ruling of the Arbitrazh Court of Ryazanskaya region (Определение Арбитражного суда Рязанской области от 02.02.2009 № А54-3028/2008-С10)*
- *Decree of Federal Arbitrazh Court of the Centralny Circuit ((Постановление Федерального Арбитражного Суда Центрального Округа от 09.04.2009 № Ф10-915/09)*
- *Ruling of the Arbitrazh Court of Ryazanskaya region (Определение Арбитражного суда Рязанской области от 24.06.2009 № А54-3028/2008-С10)*
- *Decree of Federal Arbitrazh Court of the Centralny Circuit (Постановление Федерального Арбитражного Суда Центрального Округа от 07.09.2009 № Ф10-915/09(2))*
- *Ruling of the High Arbitrazh Court of the Russian Federation of 12.11.2009 No. 13211/09 (Определение Высшего Арбитражного Суда Российской Федерации от 12.11.2009 № 13211/09)*

In 2005 an arbitral tribunal under the Arbitration Rules of the German Institution of Arbitration (*Deutsche Institution für Schiedsgerichtsbarkeit* — DIS) resolved a case No. DIS-SV-B-454/04 and awarded a leading Russian producer of electrovacuum equipment to pay a German company a penalty for breach of contract with interest charged on such penalty. Besides, the arbitral tribunal obliged the Russian debtor to provide to the German claimant information relating to all contracts entered into by the debtor with third parties since the conclusion of the exclusive distributorship agreement made in 2001, between the claimant and the debtor, and to supply to the claimant specified goods at a specified price. In separate awards the arbitral tribunal awarded the debtor to pay to the creditor legal expenses, including the arbitration fee and the attorney fees. The tribunal also awarded interest on the said legal expenses. In total the tribunal rendered three awards.

As the debtor failed to execute the awards voluntarily, the creditor applied to the competent Russian court in 2008, requesting, inter alia, to additionally recover interest on the penalty and on the legal expenses. The court of the first instance granted recognition and enforcement of the awards in part: it refused to recover interest on the penalty and on legal expenses on the ground that it was contrary to the Russian public policy, while it enforced the awards in the remaining part. The court of cassation instance cancelled the ruling in the part which recognized and enforced the awards, upheld the rest of the ruling, including the refusal to recover interest on the penalty and on legal expenses, and remanded the case to the same court.

The court of the first instance refused to grant the enforcement entirely for all awards. The court of the cassation instance upheld this ruling. Both courts found that the parties initially agreed to arbitrate their disputes in the "arbitration court in Stockholm", but subsequently the creditor by a letter (accompanied with draft statement of claim to the DIS) proposed to the debtor to amend the arbitration clauses in all agreements made between them so that the disputes were to be resolved in the DIS under its Arbitration Rules. The debtor in the reply letter proposed to word the arbitration clause differently. The courts concluded that the parties thus failed to reach the agreement to amend the arbitration clauses. Invoking Article V(1)(a) of the New York Convention the courts found that there was no arbitration agreement on submission of the dispute to the DIS even though the debtor's representative took part in the arbitration, submitted a written statement of defense and did not object to the competence of the arbitral tribunal. The awards creditor argued that the written statement of defense signed by the debtor's representative and other behavior of this representative evidenced the debtor's consent to the competence of the arbitral tribunal. However the courts rejected this argument on the ground that the absence of objections from the debtor did not constitute its consent to competence of the arbitral tribunal and also that no evidence of the authorities of the debtor's representative to sign the statement of defense was submitted to their review.

The awards creditor filed a complaint with HAC. The HAC board of 3 judges, which heard the case preliminarily, on November 12, 2009, decided that the case should be further heard by the HAC Presidium (consisting of 14 judges). The board noted that the debtor in his reply letter to the creditor's proposal to amend the arbitration clauses expressly agreed to refer the contracts disputes to DIS and then appointed his arbitrator. The debtor's representative took part in the arbitration, submitted a written statement of defense, gave objections on the merits and never denied the tribunal's

competence to hear the dispute. The HAC board of judges concluded that under Article V(1)(a) of the New York Convention the parties had reached an agreement to submit their disputes to DIS.

On February 2, 2010, the HAC Presidium by its decree No. BAC-13211/09 cancelled all judicial acts of the lower courts and granted recognition and enforcement of the awards in full. The rationale of the HAC Presidium decree will be made public later and we will report about it as soon as it becomes available. It any case it is evident that the HAC Presidium held that the arbitration agreement in this case had been reached by the parties and that compelling to payment of interest on penalty and on the arbitration expenses is not contrary to Russian public policy.

The enforceability in Russia of the arbitral awards allowing interest on the penalty and on legal costs has been acute in Russian practice. The HAC in the case in question apparently found that the enforcement of such awards does not contradict to Russian public policy. This makes this case noteworthy.

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THANK YOU!