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Belarus

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Alexander Korobeinikov[1]

A. Legislation and rules

A.1 Legislation

During the last 10 years, international arbitration in Belarus has continued to be governed by the Law on the International Arbitration Court[2] (the "International Arbitration Law"), which was enacted on 9 July 1999.

This law is based on the UNCITRAL Model Law, and since its enactment, no significant amendments have been made.

In addition, the Economic Procedural Code, adopted on 15 December 1998, contains provisions relating to challenging and enforcing local and foreign arbitral awards.

In December 2014, the Plenary Session of the Supreme Court of the Republic of Belarus issued Resolution No. 18 On Application by Courts of Legislation on Recognition and Enforcement of Foreign Judgments and Arbitral Awards[3] (the "Resolution").

Among other things, the Resolution provided guidelines for the enforcement of foreign arbitral awards by commercial courts and common courts.[4] In particular, it clarified that the three-year limitation

[1] Alexander Korobeinikov is a senior associate in Baker McKenzie's Almaty office and a member of Baker McKenzie's International Arbitration Practice Group.
[2] The Law of the Republic of Belarus on the International Arbitration Court No. 279-Z dated 9 July 1999 (as amended).
[3] Under Belarusian law, Resolutions of the Plenary Session of the Supreme Court are a part of local law and are mandatory for local courts.
[4] In Belarus, commercial courts act as courts of first instance and appellate courts for reviewing commercial disputes, and these proceedings are governed by the Commercial Procedural Code. Common courts review non-commercial civil cases and criminal cases, and their proceedings are regulated by the Civil Procedure Code or the Criminal Procedure Code accordingly.

period for the enforcement of foreign judgments or arbitral awards (which is set forth in the local Commercial Procedural and Civil Procedural Codes) does not apply to cases where parties seek enforcement of arbitral awards under the New York Convention, because this Convention does not provide any limitation period for enforcement.

In addition to local law, arbitration in Belarus is governed by international treaties.

In particular, while Belarus was a part of the Soviet Union until 1991, it has maintained a right to be a party to international treaties since the 1940s.

Belarus is a party to a number of international and regional treaties that relate to arbitration proceedings, including the New York Convention, the European Convention 1961, and several CIS treaties.

A.2 Institutions, rules and infrastructure

After the adoption of the Law On Domestic Arbitration Courts[5] in July 2011 and relevant sub-laws regulating the procedure of establishment and registration of arbitration institutions, the number of arbitration institutions registered in Belarus significantly increased. There are currently 25 arbitration institutions, the oldest and most popular of which is the International Arbitration Court at the Belarusian Chamber of Commerce and Industry (the IAC), which was established in 1994.

The IAC handles all types of commercial disputes between local and foreign companies, except disputes that are non-arbitrable under Belarusian law (eg, disputes relating to rights over immovable property located in Belarus, privatization contracts, IP rights, etc.). The IAC also reviews commercial disputes between local companies.

[5] The Law of the Republic of Belarus On Domestic Arbitration Courts N 301-Z dated 18.07.2011.

B. Cases

Belarusian court decisions are not usually publicly disclosed. However, Belarusian courts usually take an arbitration-friendly approach, though they have comparatively limited experience in dealing with arbitration-related cases, which may lead to controversial court practice.

B.1 Belarusian court refused to enforce an arbitral award against a bankrupt company

The Supreme Commercial Court refused to recognize and enforce an arbitral award issued by the International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry in favor of a US company ("T") against a Belarusian company ("B"), as the court found the arbitral award contradicted public policy. Subsequent to the issuing of the arbitral award, "B" initiated bankruptcy proceedings. The Supreme Commercial Court concluded that because the company was subject to bankruptcy proceedings, any recognition and enforcement of the arbitral award could violate the rights of other creditors of the company, including the state. Such a violation of the main principle of insolvency proceedings ("equal rights of all creditors") should be viewed as a violation of public policy.

Additionally, the court reasoned that "T" had a right to file its claims in the bankruptcy proceedings so that the issue regarding enforcement of the arbitral award may be reviewed by the court in conjunction with the claims of other creditors.

While this decision was appealed, the appeal was dismissed by the upper level courts.

It should be noted that this is one of the first court decisions where Belarusian courts addressed the issue of public policy and it shows that they may interpret it very broadly.

B.2 Arbitration clauses become unenforceable if one of the parties commences insolvency proceedings

A bankruptcy manager acting on behalf of a bankrupt company ("V") initiated a legal action against one of the company's debtors ("M") in the Minsk Regional Commercial Court.

During the first court hearing, the debtor challenged the jurisdiction of the court based on an arbitration agreement between the parties. However, the court rejected the debtor's objections based on the following arguments:

- In accordance with Belarusian legislation, bankrupt companies do not have to pay state duties to initiate legal actions in the courts. However, if a bankrupt company files a claim with the arbitration court, it is required to pay the arbitration fees and costs in accordance with the rules of the arbitration institution.

- As "V" did not have sufficient funds to pay the arbitration costs, the court concluded that the arbitration agreement between parties could not be invoked.

Therefore, the court accepted its jurisdiction to review the case and this position was upheld by the higher courts.

This decision illustrates that, in some cases, Belarusian courts may take a pro-arbitration position.

B.3 Belarusian courts did not support an alternative arbitration clause

In a recent case, Belarusian courts deemed an arbitration clause providing for disputes to be resolved by arbitration or by the state court to be ineffective.

A foreign company (the "Claimant") and a Belarusian company (the "Respondent") executed a contract that contained the following arbitration clause:

> "*... disputes will be referred for final settlement to the International Arbitration Court of the Belarusian Chamber of Industry and Commerce or the Supreme Commercial Court of the Republic of Belarus.*"

The Claimant filed a claim against the Respondent with the Minsk City Economic Court. However, the Respondent asked the court to dismiss the claim on the basis that the contract contained an arbitration clause. The Claimant objected, arguing that the jurisdiction clause did not confirm the parties' intention to solve disputes by arbitration only. The court of first instance dismissed the claim and referred the parties to arbitration. However, the Court of Appeal and the Supreme Commercial Court, acting as the cassation court, set aside the decision of the trial court and agreed with the position of the Claimant.

It should be noted that the decision of the Supreme Commercial Court in this case contradicts its own interpretation issued in 2008, whereby the court stated that there are no issues with the enforceability of optional arbitration clauses under Belarusian legislation.

This case illustrates that Belarusian court practice relating to arbitration is still contradictory.

B.4 Belarusian courts consider the *res judicata* effect of arbitral awards to be part of public policy

Recently, the Belarusian courts addressed issues regarding whether arbitral awards have a *res judicata* effect and whether the breach of the *res judicata* principle can be viewed as a ground for setting an award aside.

A Belarusian company commenced arbitration proceedings against its contractual counterparty, seeking collection of part of the contractual

debt.[6] The arbitral tribunal granted the claim and the claimant managed to enforce the award via the Belarusian state courts.

However, when the claimant tried to collect the outstanding part of the debt and commenced new arbitration proceedings, the new arbitral tribunal decided to dismiss the claim. The claimant filed an application with the state commercial court asking the court to set aside this new award.

Among other things, the claimant stated that the arbitral tribunal did not take into account the previous arbitral award and the relevant court decisions on the enforcement of this arbitral award, which were issued on the same claim, against the same party and were based on the same contract.

The commercial court upheld the application of the claimant, stating that the previous award and state court decisions have *res judicata* effect and its breach should be viewed as a breach of Belarusian public policy.

This position from the lower court was supported by the Supreme Court.

It was the first time that Belarusian courts addressed the issue of the *res judicata* effect of arbitral awards and took an approach that is in line with international practice.

C. Trends and observations

Over the past few years, arbitration and mediation have become increasingly popular as alternative methods of resolving commercial disputes. Additionally, state authorities are promoting arbitration and court-appointed meditation to reduce the number of claims filed with the state courts.

[6] It should be noted that it is not an uncommon practice in Belarus for companies to decide to claim debt by instalments due to the high amount of state duty or arbitration fees that need to be paid in advance.

For example, in 2011, approximately 50% of commercial disputes initiated in the Belarusian courts were resolved by court-appointed mediation. Furthermore, in the first half of 2011, all 16 claims relating to the enforcement of foreign arbitral awards filed with the economic courts were granted.

The process of court-appointed mediation is established by the Commercial Procedure Code and is used as a means of resolving commercial disputes once legal proceedings have been initiated before the state court. Mediation may be ordered by the judge upon the request of one of the parties, or by the court's own initiative at any stage of the proceedings, including the appellate and enforcement stages.

The mediator must have the required qualifications and can be selected either from the relevant court's staff or from the list of mediators approved by the Supreme Commercial Court. If mediation is successful, the parties must conclude a settlement agreement, which must be approved by the court.

In addition to court-appointed mediation, in July 2013 the Belarusian Parliament adopted the Law On Mediation,[7] which sets forth rules for out-of-court mediation. Among other things, this law sets out: (i) requirements that need to be met before being appointed as a mediator; (ii) mandatory terms of agreements to commence mediation proceedings; (iii) rules of registration for mediation institutions; and (iv) rules for enforcement of agreements concluded as a result of mediation. It also states that these agreements can be enforced in state courts. This law came into force in January 2014, and the application of its provisions will need to be clarified by subordinate legislation and relevant court practice.

In 2011, the Belarusian Parliament adopted a new Law on Domestic Arbitration Courts (the "Domestic Arbitration Law"), which came into

[7] The Law of the Republic of Belarus On Mediation N 58-Z dated 12.07.2013.

force in January 2012 and regulates domestic arbitration. While the main provisions of the Domestic Arbitration Law are based on UNCITRAL Model Law principles, as well as principles arising from the existing International Arbitration Law, there are some significant innovations. The key points are:

(i) The new law contains rules regarding the establishment and registration of domestic arbitration institutions and their arbitrators, as well as *ad hoc* arbitrators. Any violation of these rules will lead to the invalidation of an award.

(ii) An arbitration agreement that does not contain either the name of an arbitration institution or the procedure for composing an *ad hoc* arbitral tribunal will be considered null and void. Therefore, it seems likely that the Belarusian courts will take a very conservative approach when examining the validity of an arbitration agreement.

(iii) An arbitration clause will not survive in the case of accessioning obligations under the main contract. In addition, state authorities cannot be a party to an arbitration agreement.

(iv) The new law also places restrictions on the types of disputes that can be arbitrated. In particular, an institutional arbitration court cannot review disputes with its founder. Furthermore, disputes affecting the rights and obligations of third parties (who are not party to the arbitration clause) cannot be determined by arbitration.

(v) Lastly, the law allows state courts to set aside an arbitral award if facts come to light that would have been important for a proper review of the case and which were, at the time, unknown to the arbitral tribunal and one of the parties. Although such a provision is unusual in arbitration legislation, it may have been adopted under the influence of the state courts, which enjoy the same power under Belarusian procedural legislation.

In 2011 to 2012, with assistance from the state authorities, state commercial courts and the Belarusian Union of Lawyers, domestic arbitration courts were established in each region (*oblast*) of Belarus and in Minsk (the capital of Belarus).

In addition to these arbitration institutions, in 2012 the Belarusian Union of Lawyers established the Sport Arbitration Court. As stated in its statutory documents, the Sport Arbitration Court specializes in disputes between sports people, coaches, sports federations and the National Olympic Committee.

As a result of the reform of the Belarusian judicial system, which began in November 2013, two separate court systems were consolidated: the economic courts, which previously reviewed commercial cases, and the courts of general jurisdiction, which previously reviewed other civil cases, as well as criminal and administrative cases. Pursuant to amendments adopted in July 2014, cases involving challenges to local arbitral awards are reviewed by regional economic courts and the court decisions on these cases can be appealed to the Court of Appeal. Previously, these cases were only reviewed by the Supreme Commercial Court (which was liquidated as a result of the consolidation of two court systems), whose decisions came into force immediately and could only be appealed to the cassation panel of the Supreme Commercial Court.

The government continues to take measures to attract foreign investors to Belarus. In this regard, the Belarusian Parliament has recently posed a Law on Public-Private Partnership, which will set forth rules for cooperation between investors and the state with regard to infrastructure projects.

Among other guarantees provided in this law for investors, it will allow foreign investors to settle their disputes with their state partners in arbitration under UNCITRAL Arbitration Rules or the ICSID Convention unless: (i) otherwise agreed by foreign investors and their state partners; or (ii) disputes are covered by the exclusive jurisdiction of the Belarusian state courts.

This law came into force in July 2016. It should noted that while there are currently no pending investment arbitration proceedings against Belarus, a number of investors declared their intention to commence investment arbitration. Therefore, it is likely that Belarus will be involved in such proceedings in the near future.