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International Commercial Arbitration in Belarus

BY ALEXEY ANISCHENKO | SORAINEN

Until recently, arbitration was not perceived by commercial people and business lawyers in Belarus as a real alternative to resolution of commercial disputes in state courts. Presently, the International Arbitration Court of the Belarusian Chamber of Commerce and Industry (BelCCI; hereinafter the "IAC") remains the only permanent arbitration institution operating in Belarus authorised to consider commercial disputes involving both national and foreign parties.

There were a few reasons for the relative unpopularity of arbitration in Belarus. First of all, Belarus does not have a long-lasting legal tradition of effective use of alternative dispute resolution. Due to the state-dominated economy, most commercial (or, as they are called in the legislation, "economical") disputes were naturally "kept" within the state system.

Second, and most importantly from a practical perspective, resolving commercial dispute in Belarusian commercial courts is cheap and quick. In that respect Belarus is unique. While dispute resolution lawyers in the rest of the world are arguing whether arbitration is still a better alternative to litigation as regarding cost and timing, their Belarusian colleagues never had such a dilemma. Under existing commercial procedural legislation and established practice the decision on commercial dispute is normally rendered within 1.5 months upon submission of the claim, with a very limited number of exceptions. All four instances, including supervisory instance of the Supreme Commercial Court, could be passed through within half a year. The costs of commercial litigation in most cases are lower than arbitration costs.

Third, there was a certain information vacuum on ADR in general and particularly on international arbitration. The IAC is weak in marketing and promoting its activity and did a little to change the situation and to promote itself on either a national or international scale. There is still no effective website of the IAC (there is only a webpage on the website of the Belarusian Chamber of Commerce and Industry). One can find very limited information on the IAC, especially in foreign languages. Until recently the IAC was not active enough in conducting seminars and conferences to promote itself and arbitration in general among the Belarusian and the foreign legal and business community. The IAC has also been criticised for lack of transparency to the public that certainly did not build up enough confidence in the institution among its existing and prospective users.

Nonetheless, according to unofficial sources (the IAC does not publish statistics) the IAC considers roughly 70-80 cases per year, which is a relatively significant number when compared with arbitration institutions in CIS and Baltic States. It is strongly believed by the local professional community that in coming years the caseload will grow and the IAC will increase its adjudicatory role on both a national and international scale. Why is that?

On the national level the key driver could be the overload of the state commercial courts due to the economic downturn (up to 150% increase of the caseload has been reported) and the extreme need to develop alternative dispute resolution means. It is expected that a new law on arbitration may be introduced to facilitate arbitration of domestic disputes. In addition, there is a growing interest in arbitration among public and practicing lawyers in particular. It was a very progressive step for the IAC to start publication of its awards, in particular through a major provider of legal databases.

Most of the potential is on the international front. The vast majority of cases settled by the IAC (up to 90%) are of an international nature; domestic disputes traditionally form only a minor part of the caseload. Nationality of the parties varies considerably but most represented are parties from Russia, Ukraine, Poland, Kazakhstan and the Baltic States. And in the current difficult times there is certainly a great chance to promote the IAC for the settlement of middle and small-sized disputes between eastern and western businesses.

Several factors shall be taken into account by foreign and local legal counsels when choosing Belarus as an arbitration forum.

First and foremost it is the arbitration friendly environment. The basement is the Law of the Republic of Belarus No 279 dated 9 July 1999 "On International Arbitration Court (Tribunal)" that follows rather closely the 1985 UNCITRAL Model Law. The actual version of the Rules of the IAC adopted in 2000 and last amended in 2009, although not being perfect, provide all necessary means for experienced arbitration counsel to defend its case before the arbitration tribunal established under the auspices of the IAC. Yet there is an ongoing work carried out with joint efforts of local and foreign professionals to ensure the Rules meet modern arbitration standards.

As Belarus is a party to the New York Convention on Recognition and Enforcement of Foreign Arbitration Awards and the European Convention on International Commercial Arbitration, no major traps and problems with enforcement shall be expected. The only two important issues to be carefully considered when entering into a commercial relationship with the state or state-owned companies are the concepts of public policy and sovereign immunity that are not well-established and construed rather broadly by the state courts.

Secondly, it is again the issue of costs and timing. Contrary to comparison with local commercial courts the IAC will certainly be cheaper and more expedite than any of its potential rivals in Russia, Ukraine, Poland and the Baltic States. The difference is much higher when compared with leading European institutions. By way of example arbitration costs of handling a MEUR 1 case in Minsk by a panel of three arbitrators established under the IAC Rules will cost roughly 4 times less than in Stockholm under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce that was historically considered the best foreign venue on post-soviet territory.

The Rules are not only modest with the scale of fees; they also provide a great degree of flexibility on costs. According to the Rules all expenses incurred during the arbitration proceeding are divided into :(i) arbitration fee (including registration fee); and (ii) costs related to arbitration proceedings. The registration fee, which is an integral part of the arbitration fee, amounts to €150. It is fixed and non-refundable. The rest of the arbitration fee depends progressively on the claimed amount. The costs related to arbitration proceedings include travel and other expenses, incurred by arbitrators; payments to witnesses, experts and specialists and other expenses of the arbitral tribunal. It shall be also noted that VAT (now 20%) shall be levied on all payments due to the IAC.

All decisions on costs and their allocation between the parties are left to the tribunal. By general rule the tribunal awards the winning party the reimbursement of all arbitral expenses incurred from the party that lost

the dispute or divides them between the parties proportionally if the claim was upheld in part. Compensation of legal costs could also be awarded. If one of the parties acted in bad faith the tribunal may oblige to compensate additional expenses of the other party caused by misconduct. The arbitral tribunal can also refuse reimbursement of costs related to arbitral proceedings if it decides that they were unreasonable or excessive.

As a general rule the arbitration proceedings may only be commenced upon the receipt of the arbitration fee by the IAC, but the claimant may apply to the Chairman of the IAC for the permission to pay down to 50% of the arbitration fee first and if such permission is granted, to pay the rest before the first hearing takes place.

According to the Rules, the amount of the arbitration shall be decreased by 30% if the dispute is settled by a sole arbitrator, provided that in all cases the arbitration fee shall be not less than €700. If the same dispute shall be reconsidered by the IAC in case of setting aside or refusal in recognition and enforcement of the initial arbitral award, the amount of the arbitration fee is decreased by 50%.

If arbitration proceedings were terminated after payment of the arbitration fee, 75% of the paid amount of the arbitration fee shall be refunded if that happened before the establishment of the tribunal or 50% after the establishment of the tribunal but before the first arbitration hearing has taken place.

The Rules require the tribunal to consider the dispute and render the award within not more than 6 months from the time of its formation. In practice, the IAC endeavours to ensure observation of this time-limit, but not always successfully. It is seldom that the IAC is able to deliver an award earlier. If the case is complicated the award is sometimes rendered and released to the parties sometimes in about a year from the commencement of arbitration. Still, that is not the worst case scenario when compared with other institutions.

The scrutiny of the award by the Chairman of the IAC could be one of the reasons for possible delays but the IAC affirms that usually it takes no more than one week for the Chairman of the IAC to accomplish the scrutiny procedure and certify the award as stipulated in the Rules. But on the other hand such a scrutiny may be considered as an institutional advantage ensuring the quality of the awards. It shall be noted here that the IAC awards are set aside in Belarus only on very rare occasions. There are no available statistics on recognition and enforcement of the IAC awards abroad, but no major problems have ever been reported.

Finally, such factors as overall liberalisation of the economy and legal regime for doing business, substantial increase of the private sector, improved infrastructure (airport, hotels, translation services), should not be underestimated. In that regard, existing visa requirements remain the only "technical" impediment for foreign parties to welcome the choice of the IAC from a pure "logistic" perspective.

It is, of course, time and practice which will have the final word on perspectives of international arbitration in Belarus. Much will depend on if the approach of the Belarusian commercial courts remains "arbitration-friendly", particularly in relation to interim measures of protection, recognition and enforcement. But if the current positive trend does not change, Minsk will certainly become a visible spot on the global international arbitration map in the very near future.

Alexey Anischenko is a Partner at SORAINEN.

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Enforcement of Foreign Judgments and Arbitral Awards in Belarus

BY ALEXEY ANISCHENKO AND MARIA YURIEVA | SORAINEN

Belarus is often perceived as a "closed" or "unfriendly" jurisdiction to foreign judgments and arbitral awards. However available statistics shows the opposite. According to the Supreme Commercial Court of the Republic of Belarus, there was no single refusal to recognise or enforce a foreign arbitral award or foreign judgement in 2008-09. At the same time, a considerable number of application were returned to the applicants for mere procedural technical reasons: failure to submit all documents, required by law and/or lack of proper certification and/or translation of documents, non-payment or improper payment of state fee, etc. Particularly in 2008, 31 applications on recognition and enforcement of foreign judgements and arbitral awards rendered in Ukraine, Russia, Moldova, Sweden, Poland, Latvia, Lithuania, Austria and other European countries, as well as the US, were filed with commercial courts in Belarus. Sixteen of them were satisfied whereas the other fifteen were returned because of the aforesaid procedural defects. In order to help potential applicants to avoid such mistakes, this article will briefly describe the legal framework and procedure of recognition and enforcement of foreign judgements and arbitral awards in Belarus and will identify the main traps that may impede successful enforcement.

Legal Framework

Rules on enforcement of foreign judgments and arbitral awards in Belarus are determined at both national and international level since Belarus is party to a number of bilateral and multilateral international treaties dealing with recognition and enforcement issues. There is also a dual system on the national scale:

- Foreign judgments and arbitral awards arising out of commercial (economic) disputes and insolvency cases are recognised and enforced in Belarus in commercial courts according to the procedures set by the Commercial Procedural Code of the Republic of Belarus dated 15 December 1998 (as amended; the "ComPC").
- Foreign judgments arising out of other civil disputes involving individuals, family or labour cases are recognised and enforced in Belarus in civil courts according to the procedures set by the Civil Procedural Code of the Republic of Belarus dated 11 January 1999 (as amended; the "CivPC").

There is an important difference between the two: the ComPC stipulates that recognition and enforcement of a foreign judgement or arbitral award could be granted on two grounds, namely if it is provided by an *international treaty* to which Belarus is a party or on the basis of *reciprocity principle*. So far, the latter principle was rarely used in practice and there were only few reported cases on successful recognition of German, Estonian and French court decisions in Belarus on the basis of reciprocity. CivPC, however, does not consider reciprocity as a ground for recognition and enforcement. In the absence of a respective international treaty, recognition and enforcement of such a foreign judgment or arbitral award that relates to civil (non-commercial), labour or family disputes in Belarus shall not be possible. Still, foreign judgments and arbitral awards that do not require enforcement are in principle recognised in Belarus if no objections are raised by the counterparty. Such objections are to be submitted with the court within a month from the date the counterparty knew that the application for recognition was filed with the court.

Belarus is a party to a number of international treaties that provide for mutual recognition and enforcement of foreign judgements. There are several regional conventions involving CIS countries:

- Convention for Settlement of Disputes Connected with Commercial Activities (Kiev Convention) of 20 March 1992;
- Convention on Legal Assistance and Legal Relations on Civil, Family and Criminal Matters (Kishinev Convention) of 7 October 2002;
- Convention on Legal Assistance and Legal Relations on Civil, Family and Criminal Matters (Minsk Convention) of 22 January 1993.

Besides that, Belarus has ratified bilateral agreements for legal assistance on civil matters with 11 countries, namely with China, Cuba, Czech Republic, Finland, Hungary, Iran, Italy, Latvia, Lithuania, Poland and Vietnam.

With regard to foreign arbitral awards provisions of the 1958 UN Convention on Recognition and Enforcement of Foreign Arbitration Awards (New York Convention) are applicable.

Procedure

Both in commercial and in civil courts, recognition and enforcement shall be granted upon examination of a written application for recognition filed with the court. Foreign judgments and arbitral awards are not to be reviewed *per se* by Belarusian courts provided that all of the procedural requirements have been met. Belarusian courts would accept jurisdiction of the foreign court provided that the case is not within the exclusive competence of Belarusian courts under Belarusian legislation or the international treaty to which Belarus is a party. There are no major procedural differences between procedures at civil and commercial courts.

Applications for recognition and enforcement shall be submitted to a commercial court of first instance at the place where the debtor resides or, if such place is not known, at the place where the debtor's property is located.

The application for recognition and enforcement of a foreign judgment or arbitral award shall indicate the name and place of residence of the foreign court or arbitral tribunal (in the latter case composition of the panel shall also be indicated); names and places of residence of the applicant and the debtor; information about the foreign judgement or arbitral award and a precise request for its recognition and enforcement. There are no legal requirements for special allegations (e.g., that the judgment is not against public morality, that the judgment is no longer appealable, etc.) to be included in the application.

The set of documents to be attached to the application slightly differs depending on whether recognition and enforcement of foreign judgement or arbitral award is being sought. The application for recognition and enforcement of foreign judgement shall be accompanied with the following documents:

- certified copy of the foreign judgment;
- certified copy of the document confirming the judgment came into force or that it is subject to be performed prior to it comes into force unless this information is given in the body of the judgment;
- certified document confirming the debtor was timely and properly notified on the litigation in a foreign court;

- certified document confirming the authorities of the signatory (power of attorney, etc.);
- document confirming the copy of the application was forwarded to the debtor;
- certified translation of the documents listed above into Belarusian or Russian language; and
- document, verifying payment of state fee (that currently amounts to approximately €85).

The application for recognition and enforcement of a foreign arbitral award is to be submitted along with:

- certified original or copy of the foreign arbitral award;
- original arbitration agreement (or its properly certified copy);
- certified translation of the documents listed above into Belarusian or Russian language; and
- documentary proof of payment of state fee.

In case the application is submitted by a foreign company, an extract from trade register and/or official document confirming its legal status and capacity should also be submitted.

The commercial court must consider the application and render its ruling no later than within one month from the date of filing the application, regardless of whether it is opposed or unopposed. The application is considered in an open court hearing with both parties being notified. If a party fails to appear in a court hearing that will not prevent the court from considering the application and rendering its ruling.

Belarusian legislation does not permit to refuse recognition or enforcement on the merits. The ComPC essentially follows article V of the New York Convention also in regard to foreign judgements of state courts. Thereby Belarusian commercial court may refuse recognition and enforcement of a foreign judgment or arbitral award only if:

- the judgment (arbitral award) has not come into force;
- the party against which the judgment (arbitral award) was rendered had not been timely and properly notified on place and time of the court hearing or was not able to present its case for other reasons;
- the dispute falls within the exclusive jurisdiction of Belarusian courts;
- there is a valid decision of a Belarusian court on the same dispute between the same parties regarding the same subject and on the same grounds;
- a Belarusian court considers the same dispute between the same parties regarding the same subject and on the same grounds and respective proceedings commenced at the Belarusian court earlier;
- the limitation period for enforcement has expired and was not restored; and
- the enforcement would contradict public policy of the Republic of Belarus.

The ruling of a commercial court of the first instance (whether positive or negative) enters into force immediately upon being declared but can be appealed to the cassation and/or supervisory instances of the Supreme Commercial Court of the Republic of Belarus.

If recognition and enforcement were finally granted, the applicant receives an enforcement court order that will have the same legal effect and will be executed under the same execution procedure as enforcement court orders issued following domestic judgments.

Finally it shall be noted that if the applicable international treaty contains different procedural provisions it shall prevail over national procedural legislation.

Potential Pitfalls

Yet there are number of local specifics that shall be taken into account by foreign parties when having a dispute that may end up in the need of recognition and enforcement in Belarus.

First of all, one should know that Belarus recognises and enforces only final foreign judgements and arbitral awards. Interlocutory decisions or court rulings granting interim measures will not be recognised and enforced. Very recently the Cassation Instance of the Supreme Commercial Court of the Republic of Belarus overturned the ruling of Minsk Commercial Court whereby it granted recognition and enforcement of the ruling of Vilnius Commercial Court on granting interim measures against a Belarusian respondent based on certain provisions of the bilateral treaty on mutual legal assistance between Belarus and Lithuania. The higher instance decided to opt for narrow interpretation of the treaty and essentially ignored reciprocity principle as Lithuanian courts in the same situation will recognise Belarusian court rulings on interim measures of protection.

Second of all, according to the ComPC only the party to original proceedings can file application for recognition and enforcement. Therefore if there is a cession the assignee might need a separate ruling from the court (tribunal) that rendered the judgement (award) to confirm procedural substitution. It is even more important to know when there is an arbitration agreement in place, that Belarusian law does not recognise cession of arbitration agreement in principle. Therefore if the arbitral award was rendered in a dispute between the parties different from the parties to the original arbitration agreement and the subsequent cession was not accompanied by a new arbitration agreement than there is a high risk that Belarusian commercial court will refuse recognition and enforcement as contradicting to public order.

Finally, in each particular case, especially those involving state and state companies, the issues of exclusive jurisdiction, state immunity and arbitrability shall be carefully analysed. There were several cases when commercial courts used those concepts to deny recognition and enforcement. For example, in 2005 the Supreme Commercial Court refused recognition and enforcement of several arbitral awards against a state-owned company on the ground that it may be contrary to the interests of the state and other creditors in pending insolvency proceedings and therefore it would be against public policy.

Apparently, the best way to minimise the indicated and other possible risks is to consult with a local adviser well in advance, not only just before filing an application for recognition and enforcement of the given judgement or arbitral award, but rather when jurisdiction clause is being negotiated by the parties.

Alexey Anischenko is Partner and Maria Yurieva is an Associate at SORAINEN.

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