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## Recognition and Enforcement of Foreign Arbitral Awards in Belarus: Is It Really a Problem?

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# Recognition and enforcement of foreign arbitral awards in Belarus: is it really a problem?

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Belarus is often perceived as “unfriendly” jurisdiction to arbitration in general and to recognition of foreign arbitral awards in particular. A few years ago that was true to a large extent. However recent statistics shows the opposite. According to the available data published by the Supreme Commercial Court of the Republic of Belarus (hereinafter – **Supreme Commercial Court**) there was no single refusal to recognise or enforce a foreign arbitral award during past three years. By way of example 24 applications on recognition and enforcement of foreign arbitral awards rendered in Ukraine (18), Russia (5)<sup>1</sup> and Poland (1) were filed with Belarusian commercial courts during 2011 and in absolutely all case recognition and enforcement were granted<sup>2</sup>.

However, certain number of applications for recognition and enforcement are still being returned but merely for different procedural 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. In order to help potential applicants to avoid such mistakes this article intends to describe briefly the legal framework and procedure established for recognition and enforcement of foreign arbitral awards in Belarus and to identify the main traps that may impede successful recognition and enforcement.

## Legal Framework

On the national level the provisions regarding the recognition and enforcement of foreign awards are contained in the Law of the Republic of Belarus dated 09 July 1999 No. 279-Z On International Arbitration Court (as amended, hereinafter – **Arbitration Law**), Commercial Procedural Code of the Republic of Belarus dated 15 December 1998 (as amended, hereinafter – **ComPC**) and Civil Procedural Code of the Republic of Belarus dated 11 January 1999 (as amended, hereinafter – **CivPC**). There is one substantial difference between the latter two: the ComPC allows recognition and enforcement either if it is provided by international treaty or on the basis of reciprocity, whereas CivPC does not consider reciprocity as a ground for recognition and enforcement. However, this may be of a little practical importance for recognition and enforcement of foreign arbitral awards since (a) Belarus is anyway a party to the 1958 UN Convention on Recognition and Enforcement of Foreign Arbitration Awards (hereinafter – **New York Convention**), (b) there were only few reported cases on successful application of reciprocity principle (i.e. in relation to German, Estonian and French court judgements) in Belarus and (c) in 1999 article 45 of the Arbitration Law was amended so that it is now stipulates that recognition and enforcement of foreign arbitral awards shall be made according to the rules of ComPC and international treaties of the Republic of Belarus (most of commentators support the view that thereby all foreign awards (whether rendered in commercial or purely civil disputes between individuals) shall be submitted for recognition and enforcement to competent commercial courts in Belarus. Moreover, so far there has not been a single reported case involving recognition and enforcement of foreign award by common courts.

On the international scale, the primary legal basis for recognition and enforcement of foreign arbitral awards in Belarus is naturally the New York Convention. It should be noted here, that Belarus made a reservation under article I (3) and applies the New York Convention only to foreign awards made on the territory of states which have adhered to the New York Convention. With regard to foreign awards

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<sup>1</sup> That only refers to arbitral awards as according to the Agreement between the Republic of Belarus and the Russian Federation on Mutual Execution of Court Acts of 17 January 2001 judgments of Russian arbitration (state) courts are directly enforceable in Belarus in the same way and under the same procedure as judgments of Belarusian commercial (state) courts. No separate recognition or enforcement procedure is needed in such case.

<sup>2</sup> Statistics is available (only in Russian) on the web portal of the Supreme Commercial Court at [www.court.by](http://www.court.by).

made on the territory of other states, Belarus may apply the New York Convention on the basis of the reciprocity principle. At the same time, Belarus did not make the reservation regarding commercial relationships. Therefore the scope of New York Convention for Belarus is, in principle, not limited to the commercial disputes.

### **Procedural issues**

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 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 arbitration 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. Such approach is consistently followed by Belarusian courts that can be illustrated by case No. 2-4/Их/2006/1226K where Cassation Instance of the Supreme Commercial Court (hereinafter – **Cassation Instance**) supported positive ruling of the lower court allowing recognition and enforcement of the arbitral award rendered by the panel, established under the Arbitration Rules of the Stockholm Chamber of Commerce. The appellant was invoking a number of arguments to substantiate its position, and among other things was claiming that tribunal was manifestly wrong to award interest under respective provisions of Swedish law. Those arguments were fully rejected by the Cassation Instance and the ruling of the court of first instance remained unchanged<sup>3</sup>.

There are no major procedural differences between procedures at civil and commercial courts thus further in this article only recognition and enforcement of foreign arbitral awards rendered in commercial matters will be addressed.

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. According to article 250 of ComPC an application for the recognition and enforcement of foreign award should be filed no later than 3 years after the foreign award came into force. Upon motion of the applicant, the court may restore the term for enforcement if it finds that the reasons for missing this term are justifiable.

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

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

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

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<sup>3</sup> In this case the Cassation Instance also confirmed, that parties to the arbitration agreement are strictly bound by the arbitration rules they have chosen. Art. 29 of 1999 SCC Rules providing for an implied waiver of objections to the composition of the tribunal and procedure if such objections were not raised within a reasonable time was an issue debated. Taken into account that respondent never objected to any procedural issues during arbitration, the Cassation Instance concluded that no ground to refuse recognition and enforcement under art. V of the New York Convention exists, even though there is no concept of waiver or similar doctrine in Belarusian law.

The meaning of the word “certified” in regard to the foreign award depends upon the state in which the award is made: it could be consular legalization, apostille or simple notarization.

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 1 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 duly notified party fails to appear in a court hearing the court is free to consider the application and render its ruling.

ComPC contemplates that, unless otherwise provided for in an international treaty, the commercial court may refuse in recognition and enforcement of foreign arbitral award only if the enforcement of the foreign arbitral award would contradict to public policy of the Republic of Belarus. Given literal reading of respective provisions of ComPC one could argue that foreign awards taking advantage of the reciprocity principle may appear in more beneficial situation as in such a case they can only be neglected on a public policy ground. From practical point of view (a) so far there were no examples of recognition and enforcement of foreign arbitral awards on the basis of reciprocity principle and (b) there is high probability that any foreign award which does not fulfil the New-York Convention requirements may be found to contradict Belarusian public policy<sup>4</sup>.

The ruling of commercial court of the first instance on recognition and enforcement (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.

The appeal to the Cassation Instance of the Supreme Commercial Court can be filed within 1 month from the date of the ruling granting or declining enforcement. The Cassation Instance shall make the decision on the appeal within 1 month from the date the materials of the case are transferred to it. While appeal is pending in the cassation body the applicant may file a motion for the stay of the execution of the court’s ruling granting enforcement.

The decision of the Cassation Instance is not ultimately final and is still subject to supervisory appeal. However, the procedure of the supervisory review is two-fold and quite cumbersome. Supervisory appeal is first brought (within one year from the date of the appealed decision) to the persons authorised to make a protest to the Supervisory Instance of the Supreme Commercial Court (hereinafter – **Supervisory Instance**). Such persons include Chairman/Deputy Chairmen of the Supreme Commercial Court as well as General Prosecutor and his Deputies. Such a protest will only be filed to the Supervisory Instance if there is a justifiable ground found by the said authorized person. The whole supervisory procedure may take up to 4 months from the date of thereof filling and could be repeated several times, but that very rarely happens in real life. There is no single reported case when a ruling on recognition and enforcement of foreign arbitral award was ever successfully appealed and considered by either Presidium or Plenum of the Supreme Commercial Court, which act as a Supervisory Instance.

If recognition and enforcement were finally granted, the applicant receives an enforcement court order that has the same legal effect and shall be executed under the same procedure as enforcement court orders issued on the basis of domestic court judgments.

### **Potential Pitfalls**

Even though the procedure described in the preceding section appears to be plain and straightforward there is a number of local specifics that may impede successful recognition. They shall be taken into account by foreign parties when having or contemplating resolution of a dispute that may end up in the need of recognition and enforcement of respective arbitral award in Belarus.

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<sup>4</sup> E.g. in Case No. 233/55-99-524 the Supreme Commercial Court came to the conclusion that the tribunal [in a purely domestic arbitration] breached the equality principle by accepting the statement a claim, signed by the non-authorized person (though the authorities were confirmed further by the claimant), and thereby vesting the claimant with illegal procedural rights alongside with the lawful rights of the representative of the respondent and concluded that recognition and enforcement of such an award would contradict to Belarusian public policy.

First of all, one should know that Belarus recognises and enforces only final awards. Interim awards granting interlocutory measures are not likely to be recognised and enforced. Recently the Cassation Instance even 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 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 similar circumstances may recognise Belarusian court rulings on interim measures of protection. Same approach is likely to be followed in relation to interim arbitral awards as according to par. 9 of the Resolution of the Plenum of the Supreme Commercial Court No. 10 dated 29.06.2006 “*Belarusian legislation does not provide for recognition and enforcement of any acts of foreign courts other than final decisions rendered on the substance of the dispute*”.

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 tribunal that rendered the award to confirm procedural substitution.

It is even more important to know 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 an extreme risk that Belarusian court will refuse recognition and enforcement as contradicting to Belarusian public policy. There was no acknowledged court practice on that issue, but clear guidance on that regard is currently provided by Resolution of the Plenum of the Supreme Commercial Court No. 34 dated 23.12.2005. According to par. 5 of the said Resolution jurisdiction of the arbitral tribunal arising out of the arbitration clause in the contract will only cover assignees to the contractual obligations if they will specifically agree to that and separate arbitration agreement will be thereby concluded. Otherwise the jurisdiction will be determined by Belarusian courts in accordance with general rules of procedure. This particular feature of Belarusian legislation, as well as another rule established by the said Resolution providing that purely domestic disputes shall not be submitted to arbitration abroad, is often used by foreign debtors to circumvent arbitration clause in the contract when they want to get direct recourse to cheaper and less expensive commercial court at the place of Belarusian debtor. It may as well be invoked as a potential ground for refusal of recognition and enforcement of foreign arbitral award in particular circumstances. By way of example in the case No. 5-6Ип/2004/106K considered by the Cassation Instance the appellant (respondent in the underlying dispute) was trying to challenge lower court’s ruling allowing recognition and enforcement of the arbitral award, rendered by the International Commercial Arbitration Court of the Russian Chamber of Commerce and Industry, *inter alia* on the ground, that two parties to the agreement were of Belarusian origin. The Cassation Instance however established that the agreement was in fact tripartite; the claim was brought by Belarusian claimant against Belarusian and Russian companies as joint debtors and consequently upheld the ruling of the court of the first instance.

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 in the past when commercial courts used those concepts to deny recognition and enforcement of foreign arbitral awards. For example, in 2005 the Supreme Commercial Court refused recognition and enforcement of several arbitral awards rendered by the International Commercial Arbitration Court of the Russian Chamber of Commerce and Industry against a state-owned company on the ground that their recognition and enforcement would be contrary to the interests of the state and other creditors in pending insolvency proceedings and therefore it is against Belarusian public policy.

Needless to say, the most natural way to minimise the indicated and other possible risks is to consult with a local legal advisor well in advance, not only just before filing an application for recognition and enforcement of the given arbitral award, but rather earlier when jurisdiction clause is being negotiated by the parties to a cross-border deal.