

Insight

April 2013

Special Alert

Russian Federation Supreme Commercial Court's Review of the Application by the Russian Courts of the Public Policy Defense

This alert analyzes the legal positions taken by the Presidium of the Russian Federation Supreme Commercial Court ("SCC") in its recently published review of commercial court practice in cases concerning the application of public policy as a ground to refuse to recognize and enforce foreign court decisions and foreign arbitral awards (the "Review")¹

Russian court practice in applying the public policy concept has periodically led to contradictory positions being taken and the courts tend to interpret the scope of this defense broadly. It is therefore, the SCC summarized a number of typical situations in which issues of public policy may arise and examined situations in which the enforcement of arbitral awards may be considered contrary to Russian public policy.

We hope this alert will prove useful to you in identifying situations where the Russian courts do not have the right to refuse to recognize and enforce foreign arbitral awards.



For more information, please contact:

Grigory Chernyshov
Partner
+ 7 495 787 3045
gchernyshov@whitecase.com

Julia Zagonek
Partner
+ 7 495 645 4931
jzagonek@whitecase.com

Pavel Boulatov
Counsel
+ 7 495 787 3080
pboulatov@whitecase.com

¹ This Review is contained in Information Letter No. 156 of the SCC Presidium dated 26 February 2013.

This update is a general summary of recent developments in Russian legislation and should not be treated as legal advice. Readers should seek the advice of legal counsel on any specific question. All translations of terminology in this update are unofficial.

ATTORNEY ADVERTISING. Prior results do not guarantee a similar outcome.

Legal positions set forth in the Review

The following factual scenarios themselves do not constitute a breach of public policy (and therefore the Russian courts should not refuse to recognize and enforce international arbitral awards on these bases):

- the respondent contests the recognition and enforcement of an award based exclusively on the absence of Russian law rules similar to those of the applicable foreign law;
- the debtor fails to produce evidence that the measures applied by the arbitral tribunal (e.g. agreed damages not typical of Russian law) are of a punitive nature;
- the foreign court has required the Russian party to the proceedings to pay a deposit to it as a condition of appealing the award;
- the foreign counterparty (which is a party to arbitral award) has breached the procedure for the approval of substantive transactions provided for under its domestic law;
- enforcement is sought against the property jointly owned by spouses, without the debtor's spouse having participated in the arbitration proceedings;
- the foreign arbitral award contains a typographical error which does not affect its content or meaning;
- the arbitration proceedings ensured compliance with the principle that the arbitrators should be independent and impartial; in particular, where the arbitrator advised the parties of circumstances that could affect his/her impartiality but neither party exercised its right to challenge the arbitrator.

Recognition and enforcement in Russia of a foreign arbitral award may be deemed contrary to public policy if:

- the arbitral award was rendered in breach of the principle that arbitrators should be independent and impartial, for example if the arbitrator was an employee of the parent company of one of the parties; or
- the arbitral award was rendered based on an agreement made as a result of corruption (e.g. through commercial bribery).

A number of provisions of the Review relate to general matters of the application of the public policy ground. In particular:

- the party claiming that the recognition and enforcement of a foreign arbitral award is contrary to public policy must prove this is the case;
- the commercial court may not revise the arbitral award on the merits of the case when considering the effects of the enforcement of such award;
- Russian courts should not invoke the public policy ground if there are other grounds for refusing to recognize and enforce a foreign arbitral award.

Significance of the Review

The SCC summarized a number of situations in which Russian public policy is not breached – this should lead to increased stability of court practice and an improvement in the proper resolution of disputes. Thus, for example, the SCC confirmed that a contract may specify certain liability measures (i.e. agreed damages) which are not typically found in Russian law and such measures should be applied unless they are of a punitive nature.

Another positive outcome of the Review is that the public policy defense shall be interpreted narrowly; the SCC took the view that refusing to recognize and enforce a foreign arbitral award for reasons of public policy is an extraordinary measure.