

Insight

Commercial Litigation

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Russian Court Recognizes a Northern Ireland Court Decision in Order to Fulfil International Legal Obligations to Combat Corruption

This alert examines a recent resolution of the Presidium of the Supreme Commercial Court of the Russian Federation (“**SCC**”), No. 6004/13, dated 8 October 2013¹ (“**Resolution**”), which recognized in the Russian Federation the resolution² (“**Foreign Court Decision**”) of the High Court of Justice of Northern Ireland (“**Northern Ireland court**”) with respect to the claim brought by Demesne Investments Limited (“**Demesne**”) and the Quinn Group companies against Galfis Overseas Limited (“**Galfis**”). In this case, and for the first time, a foreign court decision was recognized in order to fulfil the international legal obligations of the Russian Federation to combat corruption in accordance with the United Nations Convention against Corruption, dated 31 October 2003 (“**Anti-Corruption Convention**” or “**Convention**”).

The Resolution resolves a number of matters and sets forth significant legal positions for recognizing and enforcing foreign court decisions, i.e.:

- establishing a ground for recognizing foreign court decisions in the context of combating corruption in accordance with the Convention;
- establishing that the SCC Presidium considers that the European Convention on Human Rights³ and other international treaties on cooperation⁴ may constitute sufficient grounds for recognizing and enforcing foreign court decisions, irrespective of compliance with the principle of reciprocity and international comity between the Russian Federation and such foreign country;
- clarifying the circumstances in which failure by a foreign court to ensure participation of Russian third parties in the case does not breach Russian public policy;
- limiting the possibility of refusing to recognize a foreign court decision on the grounds that it is in conflict with a Russian court act and, therefore, is contrary to public policy.

¹ Court of first instance, case number No. A40-56571/12-141-521.

² Related to the case No. McCL8465, dated 30 March 2012.

³ Convention on the Protection of Human Rights and Fundamental Freedoms, dated 4 April 1950.

⁴ In this case, such treaties are: (1) Partnership and Cooperation Agreement Establishing Partnership between the Russian Federation on the one hand and the European Communities and Their Member States on the other, dated 24 June 1994, and (2) Agreement between the Government of the Russian Federation and the Government of the United Kingdom and Northern Ireland on Economic Cooperation, dated 9 November 1992 (“**international treaties on cooperation**”).



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Facts of the case

Three foreign companies, including Demesne of Ireland, provided a loan to a number of Russian companies (the “**borrowers**”). Subsequently, all the rights to claim under the loan were transferred to Demesne.

A Northern Ireland court invalidated the assignment agreements under which the rights of Demesne to claim against the borrowers were transferred to an offshore company, Galfis, which subsequently reassigned them to other Russian companies (the “**new creditors**”).

The Northern Ireland court invalidated the agreements between Demesne and Galfis on the basis that they were made for the purpose of siphoning off assets from the control of legitimate creditors and/or to impose losses on the interests of such creditors. The court came to this conclusion based on the following circumstances, which indicated the suspicious nature of the transactions:

- the agreements were made on terms which were clearly unfavourable to one of the parties;
- Galfis and the borrowers executed a number of supplemental agreements which increased the interest rates under the loan agreement and extended the agreement in the absence of a rational business purpose, and
- the absence of any commercial transactions by Galfis prior to the making of the contested transaction demonstrated that Galfis was a shell company.

Demesne applied to a Russian court for recognition of the Foreign Court Decision.

The new creditors objected to such recognition asserting that it would be in breach of procedural and substantive public policy. According to their arguments, the Northern Ireland court had breached procedural public policy by rendering a decision relating to their rights without involving them as third parties to the proceedings, thereby infringing upon their right to court protection; the Northern Ireland court had breached substantive public policy by rendering a decision that was in conflict with adopted Russian court acts.

The courts of the lower instances accepted the above arguments of the new creditors and refused recognition of the Foreign Court Decision. The SCC Presidium revised the conclusions of the lower courts and resolved to recognize the Foreign Court Decision.

Legal Position of the SCC Presidium

Recognition of a Foreign Court Decision based on the Anti-Corruption Convention

The reference to the Anti-Corruption Convention is not new for the SCC Presidium.⁵ However, in this case, the Convention was applied for the first time as ground for recognizing a foreign court decision.

The applicability of the Convention in this case is due to its broad scope which includes, without limitation, the obligations of the Russian Federation to combat corruption in the private sector by invalidating agreements made under the influence of corruption-related factors.

As the SCC Presidium resolved, a foreign court decision invalidating transactions which were the product of corrupt actions may be recognized in the Russian Federation if by such recognition the Russian Federation reaches certain actual results with respect to fulfilment of its international legal obligations in accordance with the Convention.

Obviously, the broad interpretation of corruption-related factors used in the Convention will make it possible to apply it to more cases connected with the siphoning off of assets.

Recognition of a Foreign Court Decision based on the European Convention on Human Rights and Other International Treaties on Cooperation

By applying the Anti-Corruption Convention as a ground for recognizing a foreign court decision in the present case, the SCC Presidium noted that the European Convention on Human Rights and other international treaties on cooperation also support the right to enforce court acts.

Such an approach tallies with previously established practice according to which, in the absence of a special international treaty on legal assistance concerning matters of recognition and enforcement of court decisions, foreign court acts can be recognized by relying upon international treaties which give individuals the right to access justice including, without limitation, proceedings relating to the recognition of foreign decisions.⁶

However, unlike previously rendered court acts where the courts have recognized foreign court decisions by relying upon principles of reciprocity and international comity, these principles are not mentioned at all in the Resolution. This approach appears to be correct, as one should refer to international principles if there is no international treaty.

⁵ Previously, the Convention, as well as other international legal acts on the prevention and combating of corruption-related offenses, was mentioned in the SCC Presidium Information Letter № 156, dated 26 February 2013, in connection with the recognition of corruption-related actions as breaches of Russian public policy.

⁶ Resolution of the Federal Commercial Court for the Moscow Circuit (“**FCC MC**”) No. A40-119397/11-63-950, dated 19 April 2012 (Boegli-Gravures S.A. v A.I. Pyzhov and Darsail-ASP LLC); FCC MC resolution No. КГ-А41/6930-09, dated 29 July 2009 in the case No. A41-9613/09 (Rentpool B.V. v LLC Podyemnie Tekhnologii); FCC MC resolution No. A55-5718/2011, dated 23 January 2012 (Oceanic Sun Shipping N.V. v Investflot Insurance Company); FCC MC resolution No. КГ-А40/698-06-П, dated 22 February 2006, in the case No. A40-53839/05-8-388 (BNP Paribas S.A. et al v OJSC Yukos Oil Company).

Compliance with public policy in instances where a foreign court fails to ensure participation of Russian third parties

In considering the case, the Northern Ireland court resolved the matter affecting the rights of Russian third parties without ensuring their participation in the case.

However, as it assessed this circumstance, the SCC Presidium noted the fact that the laws of Northern Ireland provide for guarantees to be given to those parties whose rights and interests are affected by the court proceedings. Such parties may either petition for their involvement in the consideration of the case or contest the court act rendered on the results of such consideration by filing a claim on their own. In addition, the SCC Presidium noted that in the case in question, the rights of the new lenders were not affected directly by the rendered court act.

In view of the above, the court of the supervisory instance articulated a legal position pursuant to which failure by a foreign court to ensure participation of Russian third parties may not be regarded as a breach of Russian public policy provided that relevant foreign law has provisions for applicable remedies for third parties but such parties fail to make use of such remedies. The conformity of foreign procedural guarantees for third parties to the fundamentals of Russian public policy confirms the absence of grounds for the application of the public policy clause.

On the whole, this legal position of the SCC Presidium aims to restrict the number of individuals who need to be notified of foreign court proceedings and prevent possible actions against the recognition of foreign court acts being brought by third parties who may be artificially involved in the parties' relations (by way of assignment agreements or transactions aimed to encumber the disputed assets).

Restriction of Possible Refusal of Recognition of a Foreign Court Decision on the Grounds that it is in Conflict with a Previously Rendered Russian Decision

In the present case, the SCC Presidium has specified situations where certain contradictions between court acts do not mean that they are irreconcilable and do not prevent recognition of a foreign court decision in the Russian Federation.

In particular, a difference between the findings of a foreign court decision and the statement of reasons in a Russian decision does not make the two decisions irreconcilable or prevent recognition of the former decision. For example, a Russian court act on the inclusion of claims in the register of creditors and a foreign court act invalidating the transaction under which such claims were included in the register are not irreconcilable.

In addition, a foreign court decision may be recognized in the Russian Federation if it serves as a ground for revision of a previously rendered Russian court act and, in this way, is regarded as a new circumstance. This will resolve the contradiction between the two court acts in favour of the foreign court decision. This approach may also be applicable to foreign arbitral awards.⁷

The use of the above criteria by the SCC Presidium is designed to set clear limits to the application of the principle of the binding nature of Russian court acts and put an end to the practice of conducting Russian court proceedings alongside foreign court proceedings in order to prevent further recognition of a foreign court act in the Russian Federation.

⁷ Cases concerning recognition of foreign arbitral awards quite often involve refusals due to the inadmissibility of the existence, in Russian Federation territory, of court acts containing mutually exclusive conclusions. Over the past year, there has been a series of 12 cases involving refusals on the above grounds.

Significance of the Case

The legal positions laid down by the SCC Presidium in this case will be applied widely in the Russian courts' cases concerning the recognition and enforcement of foreign court decisions for the following reasons:

- the wide scope of the Anti-Corruption Convention makes it applicable to more cases concerning the siphoning off of assets into offshore zones;
- the legal position of the SCC Presidium in acknowledging numerous international treaties as sufficient grounds for possible enforcement of foreign court decisions opens up more opportunities for recognition in the Russian Federation of foreign court decisions, rendered not only in the countries of the European Union but also Europe, in general, including the territories of such offshore zones as the British Virgin Islands, the Cayman Islands, the Isle of Man and others to which the application of treaties have been extended;
- the restriction on using procedural tactics to involve third parties to the proceedings and obtain Russian decisions which contradict foreign court acts will serve as an effective tool against the creation of artificial obstacles in many cases concerning recognition and enforcement of foreign court decisions in the Russian Federation.

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