Recognition and Enforcement of Foreign Arbitral Awards in Russia revisited: the case of Hipp GmbH & Co. Export KG (Austria) v. OOO SIVMA Detskoe Pitanie & ZAO SIVMA (Russia)¹

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Paul Hobeck and Christian Stubbe explained that internationally operating companies fear a “surprising interpretation of the term public policy”² when it comes to the recognition and enforcement of foreign arbitral awards. Indeed, Russian public policy has been notorious for being unpredictable. Diana V. Tapola concluded in 2006 that “Russian judicial practice is inundated with a great variety of judgments and therefore no uniform interpretation can be given on the question of public policy of the RF.”³ It has been argued that this statement remains true in 2010, after an analysis of recent Russian court cases, by Eugenia Kurzynsky-Singer and Dmitry Davydenko.⁴ Similarly, Nacimiento and Barnashov pointed out that “it is almost impossible to identify a uniform interpretation of the question of public policy” in Russia.⁵

David Goldberg and Eugenia Levine concluded on the Kluwer Arbitration Blog on 31 August 2010 that “[i]n the past, Russian authorities have exhibited some reluctance to enforce arbitration awards or court decisions rendered outside Russia against Russian entities” and that Russian courts “have previously refused enforcement on the basis of very broad interpretations of public policy.”⁶ However, in the very same contribution, the authors pointed out that “there is a recent trend within the Russian judiciary towards greater support of arbitration and litigation taking place abroad.” This positive trend, based on the cases that were provided as evidence, is certainly a good sign. Other recent Russian decisions, such as the decision of the Supreme Arbitrazh / Commercial Court in the case of Hebenstreit-Rapido GmbH (Germany) v. OAO Konditerskaya Fabrika “Saratovskaya” (Russia), decided on 22 September 2009, further prove the statement made to be true.

Does this mean that the recognition and enforcement of foreign arbitral awards in the Russian Federation is predictable now?

To answer this question, one may have a look at a very recent series of decisions:⁷ On 6 July 2005, the Austrian company Hipp GmbH & Co. Export KG concluded an exclusive distributorship contract with the Russian OOO SIVMA Detskoe Pitanie (Children’s Nutrition) which contained an arbitration clause referring to the Vienna International Arbitration Center

¹ The following case note is an updated version of a post on the Kluwer Arbitration Blog (www.kluwerarbitrationblog.com) by Michael Wietzorek for YIAG, dated 6 December 2010.
⁷ All Russian Arbitrazh / Commercial Court decisions in the case discussed here are available at www.arbitr.ru (in Russian language).
(VIAC) and the Vienna Rules. On 6 November 2006, Hipp concluded a guarantee contract with the OOO and the ZAO SIVMA, according to which the ZAO declared to be jointly reliable for the obligations of the OOO towards Hipp. This guarantee contract also contained an arbitration clause referring to VIAC and the Vienna Rules. Based on these arbitration clauses, an arbitral tribunal constituted according to the Vienna Rules decided on 19 August 2009 that the OOO and the ZAO jointly had to pay approximately 4,271,060 Euros, as well as interest and procedural costs, to Hipp.

Hipp filed a request for recognition and enforcement of this arbitral award in the Arbitrazh / Commercial Court for the City of Moscow on 18 January 2010, which refused this request on 25 March 2010. The Arbitrazh Court based its decision on the reasoning that delivery from Hipp to the OOO did not take place as a fulfillment of the 2005 contract, but as fulfillment of a frame contract concluded between Hipp and the OOO in 2001, which contained a different forum selection clause. This clause referred all disputes to the “Arbitrazh Court” of the country of the seller. The Court held that this clause was ambiguous, since it did not specify which court has local jurisdiction and furthermore, the German notarized translation of the contract – where it says “Arbitrazhnij sud” (Arbitrazh Court, or: State Commercial Court) in Russian – used the term “Schiedsgericht” (arbitration court / arbitral tribunal), which corresponds to the Russian term “tretejskij sud”. Thus, since it was not specified which language should apply in case of ambiguities, the parties had not concluded a valid arbitration clause. In addition, the Court held that since there was no principal contract at the moment that the guarantee contract was concluded, the guarantee contract is null and void; thus, the VIAC tribunal rendered an arbitral award in a dispute where it did not have jurisdiction.

Following an appeal to the Federal Arbitrazh / Commercial Court for the Moscow District by Hipp, the decision of the Arbitrazh Court for the City of Moscow was reversed on 20 May 2010. The Federal Arbitrazh / Commercial Court for the Moscow District found that in the arbitral award, it was established that the delivery took place both in fulfillment of the 2001 contract and the 2005 contract. It further held that the Arbitrazh / Commercial Court had no legal basis to revise the arbitral award on the merits. With regards to the guarantee contract, the Federal Arbitrazh / Commercial Court held that the contract clearly established that all disputes in relation with this contract were subject to arbitration according to the Vienna Rules, with all legal consequences.

Following the decision of the Federal Arbitrazh / Commercial Court for the Moscow District, Hipp again requested recognition and enforcement of the arbitral award in the Arbitrazh / Commercial Court for the City of Moscow on 3 June 2010. The Arbitrazh Court again refused to recognize and enforce the award on 26 August 2010, elaborating further on its previous findings that the VIAC arbitral tribunal had no jurisdiction to hear the case with regards to the OOO and consequently, also with regards to the ZAO. It furthermore based its refusal of recognition and enforcement on Art. V Sec. 1 c of the New York Convention and stated that the VIAC award contradicts public policy. This second decision by the Arbitrazh / Commercial Court for the City of Moscow was followed by yet another appeal filed by Hipp in the Federal Arbitrazh / Commercial Court for the Moscow District on 16 September 2010. This court decided on 2 November 2010, upholding the Arbitrazh / Commercial Court for the City of Moscow’s decision dated 26 August 2010, thus refusing to recognize and enforce the VIAC award.

It should be noted that both the Arbitrazh / Commercial Court for the City of Moscow as well as the Federal Arbitrazh / Commercial Court for the Moscow District, in their respective first decisions in the Hipp case, had not made reference to public policy. Their respective second
decisions, going the exact opposite way from their previous decisions, show that despite the positive trend noted above, the court practice regarding recognition and enforcement of foreign arbitral awards in the Russian Federation remains unpredictable, as of November 2010, and that some Russian courts continue to resort to “public policy” in order to prevent foreign arbitral awards from being recognized.

This might still not be the last word in the present case. According to Art. 292 Sec. 1 Arbitrazh / Commercial Procedural Code, the court judgments of the Arbitrazh / Commercial Courts in the Russian Federation can be reconsidered by means of supervision (nadzor) in the Supreme Arbitrazh / Commercial Court, if — and this is Art. 292 Sec. 2 Arbitrazh / Commercial Procedural Code — the parties reasonably believe that as a result of infringement or wrong application of the norms of substantive or procedural law by the Commercial / Arbitrazh Courts, the challenged judgment essentially violates their rights and legitimate interests in the sphere of commercial and other economic activity. According to Art. 292 Sec. 3 Arbitrazh / Commercial Procedural Code, such a supervision can be instituted within three months from the date that the last challenged court judgment entered into legal effect,⁸ if other legal remedies are exhausted.

Perhaps a decision by the Supreme Arbitrazh / Commercial Court of the Russian Federation could further clarify the interpretation of “public policy” under Russian law.

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⁸ According to Art. 289 Sec. 5 of the Arbitrazh / Commercial Procedural Code, a decision (postanovlenie) of an Arbitrazh / Commercial court in the cassation instance enters into legal effect on the day that it is rendered, which in this case would be 2 November 2010.