Recognition and Enforcement of Foreign Arbitral Awards in Russia and Former USSR States

Edited by Roman Zykov

The 15 sovereign states that emerged from the dissolution of the Union of Soviet Socialist Republics (USSR) in 1991, having all adopted the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, today are drawing increasing attention from international law firms and global arbitral institutions. This book, compiled under the editorship of the Secretary General of the Russian Arbitration Association, is the first full-scale commentary in English on the application of the New York Convention in Russia and the other 14 former USSR states, with attention also to the various relevant national laws and procedures.

A total of 71 contributors, all leading experts on arbitration and litigation in the covered jurisdictions, provide in-depth research encompassing the following approaches:

- article-by-article commentary on the New York Convention with emphasis on the practice of Russian state commercial (arbitrazh) courts;
- commentary on the relevant provisions of the Russian International Commercial Arbitration Law and the Code of Commercial Procedure;
- analysis of law and practice on setting aside, recognition, and enforcement of arbitral awards in all non-Russian former USSR states, state by state, written by experts in each jurisdiction; and
- a unique statistical study of all international commercial arbitration cases under the New York Convention conducted in Russia between 2008 and 2019, showing which grounds of the New York Convention are widely used by the Russian courts in different instances.

With this detailed information, practitioners will be able to understand how judicial developments in the covered jurisdictions have impacted the enforceability of arbitral awards, and how parties can take steps to ensure that they secure enforceable awards. In addition, they will clearly discern the enforcement track record for arbitral awards in Russia and former USSR states and how each jurisdiction treats enforcement applications, greatly clarifying decisions on choices by parties and determination of seat of arbitration.

Because this book makes arbitration law and procedure in Russia and the former USSR states accessible for the first time in English – thus assisting evaluation of prospects of enforcing foreign arbitral awards in that part of the world – it will be warmly welcomed by in-house counsel, arbitrators, arbitral institutes, judges, researchers, and academics focused on international arbitration.

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1.25

Commentary on Russian Procedural Law, Article 35 ICAL RF (Recognition and Enforcement of an Arbitral Award)

Sergey Lysov & Alexandra Chilikova

1. **The arbitral award, regardless of the country in which it was made, is recognized as binding and when a written application is submitted to the competent court, it shall be enforced taking into account the provisions of Articles 35 and 36, as well as the provisions of the procedural legislation of the Russian Federation.**
2. **A party relying upon an arbitral award or applying for enforcement thereof shall supply a duly certified copy of the arbitral award signed by the arbitrators, as well as documents confirming the conclusion of the arbitration agreement. If the arbitral award or agreement is made in a foreign language, the party shall supply a duly certified translation of these documents into Russian.**
3. **If an arbitral award is made outside the Russian Federation that does not require enforcement, the party against which the said award was invoked shall be entitled to object to the recognition of the said award in the Russian Federation on the grounds and in accordance with procedure established by the procedural legislation of the Russian Federation.**

1

Article 35(1) ICAL RF reproduces the language of Article III of the New York Convention, according to which each contracting state recognizes arbitral awards as binding and enforces them in accordance with the procedural rules of the territory where recognition and enforcement of these awards are sought. This rule is aimed at

giving binding force to arbitral awards, as well as eliminating the need for double exequatur, that is additional recognition of the award at the place of arbitration before its enforcement in another state. To put that in context, under the Geneva Convention 1927, the applicant was required to provide proof of the 'finality' of the arbitral award. It practically meant the need to obtain exequatur at the place of arbitration, since no other methods of proving finality were provided for in most national laws.[1]

The commented article establishes that the arbitral award is recognized as binding regardless of the country in which it was made. The specified norm shall be read with close reference to the provisions of the current procedural legislation of RF, in particular with Article 241(1) APC RF, which establishes that foreign arbitral awards arising out of commercial cases are recognized and enforced in RF by state arbitrazh courts if the recognition and enforcement of such awards are stipulated in an international treaty of RF and in federal law. Thus, only arbitral awards adopted on the territory of a contracting state to the New York Convention or other relevant international treaties to which RF is a party, or based upon the principle of reciprocity, can be enforced. Such a restriction does not contradict the international obligations of RF, since, according to the reservation made by USSR when signing the New York Convention, with respect to awards made in the territory of non-contracting states, RF applies the New York Convention only to the extent that these states recognize reciprocity.

The commented article states that the application shall be submitted to the competent court. In practice, situations are possible when the court refuses to accept the application or terminates the proceedings due to the lack of competence of the Russian court. Thus, a refusal to recognize competence may be due to the lack of so-called effective jurisdiction of Russian courts, in particular the absence of a debtor or his property in RF.[2]

Furthermore, examples are known where it was not even enough for the Russian courts to even have the property of the debtor in RF, since the courts deemed it necessary for the debtor to be located in RF.[3] This is due to the literal reading by the

1. Otto D., Article IV in: H. Kronke et al. (eds), Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention (Kluwer Law International, 2010), p. 145.
2. The principle of effective jurisdiction was originally enshrined in Resolution of the Supreme Arbitrazh Court of the Russian Federation No. 55 dated 12 October 2006 (as amended on 27 June 2017) 'On the Application of Interim Measures by Arbitrazh Courts', but subsequently it also became applicable to cases of recognition and enforcement of arbitral awards in relation to the presence in the Russian Federation of the property of the debtor. *See*, Ruling of the Supreme Court of the Russian Federation No. 308-ES15-19723, Case No. A32-2858/2015, dated 24 February 2016; Ruling of the Supreme Court of the Russian Federation No. 307-Э С14-1887, Case No. A21-8191/2013, dated 14 October 2014.
3. Ruling of the Supreme Arbitrazh Court of the Russian Federation No. 4791/10, dated 7 June 2010; Resolution of the Arbitrazh Court of the Volgo-Vyatsky Circuit, Case No. A38-1384/2017, dated 9 October 2017; Resolution of the Arbitrazh Court of the North-Caucasian Circuit, Case No. A53-17450/2015, dated 7 April 2016; Rulings of the Arbitrazh Court of Moscow, Case No. A40-80617/2014, dated 24 July 2014; Case No. A40-6239/2010, dated 12 February 2010; Case No. A40-6514/2010, dated 24 February 2010; Case No. A40-48938/2010, dated 3 June 2010. The Supreme Court of the Russian Federation did not clarify in its Ruling dated 11 September 2017 No. 305-ES17-9080 in Case No. A40-183971/2016, because it did not reveal any violations in the

courts of Article 242(1) APC RF, from which it follows that an application can be submitted at the location of the debtor's property only if his location or place of residence is unknown; that is, if it is known (which happens in most cases) and it is located abroad, then enforcement in RF becomes impossible. Undoubtedly, such an interpretation of the indicated norm of APC RF deprives the creditor of the right to effective protection and creates a situation where the property of a non-resident debtor located on the territory of RF has actually received immunity from recovery. In addition, the question arises of the correlation between this practice and practice within the framework of Article 247(1) APC RF, according to which the presence of the property of the debtor in RF (as well as other grounds listed in Article 247(1) APC RF) is sufficient ground for the recognition of the competence of Russian courts in disputes with a foreign element. It seems that within the framework of the above-stated practice, the courts mistakenly mix the concepts of 'competence' and 'domestic jurisdiction'. The issue of competence, regulated by Article 247 APC RF, concerns the fundamental possibility of hearing cases involving foreign persons in the courts of RF. The issue of domestic jurisdiction, regulated by Article 242 APC RF, concerns the defining of a specific Russian court in which a dispute shall be considered. So, in paragraph 3 of Resolution of the Supreme Court of RF dated 27 June 2017 No. 23 'On Hearing by Arbitrazh Courts of Cases on Economic Disputes Arising from Relations Complicated by a Foreign Element', there the necessity to apply Article 247 APC RF is enshrined for resolving the issue of competence of Russian courts: 'When resolving the issue of the competence of the arbitrazh courts of the Russian Federation in economic disputes complicated by a foreign element, the arbitrazh courts shall be guided by the general rules established by Article 247 of the Arbitrazh Procedure Code of the Russian Federation, the rules on exclusive and contractual competence (Articles 248, 249 of the Arbitrazh Procedure Code of the Russian Federation), as well as the rules on the competence of the arbitrazh courts to apply interim measures for economic disputes complicated by a foreign element established by Article 250 of the Arbitrazh Procedure Code of the Russian Federation.' Only then, 'if the arbitrazh court of the Russian Federation comes to the conclusion that there is competence in relation to a certain dispute, domestic jurisdiction shall be determined by the rules of Paragraphs 1 and 2 of Chapter 4 of the Arbitrazh Procedure Code of the Russian Federation. However, if Paragraphs 1 and 2 of Chapter 4 of the Arbitrazh Procedure Code of the Russian Federation do not contain applicable rules, the terms on the competence shall be interpreted as simultaneously establishing rules on domestic jurisdiction'.

termination by the Court of First Instance of the application for enforcement of a foreign arbitral award, due to the fact that the debtor's location was not on the territory of the Russian Federation. At the same time, the Supreme Court of the Russian Federation referred to the absence of the property of the debtor in the Russian Federation only in addition to this argument – which does not make it clear whether the Supreme Court of the Russian Federation would make the same decision if the property of the debtor were in the Russian Federation.

Currently, the above-stated practice is much less common, mainly at the level of courts of first instance, and is often adjusted by higher courts.[4]

It shall be noted that the problem of competence is rarely found in foreign practice. Courts can initiate their competence already on the basis of the New York Convention – without any additional requirements,[5] including with the requirement that the property of the debtor be available on his territory.[6] For instance, in the Judgment of the Supreme Court of South Africa in *Laconian Maritime Enterprises Ltd. v. Agromar Lineas Ltd.*,[7] the court defined as grounds for the enforcement of the arbitral award: (a) the existence of such an award in favour of the applicant against the defendant; (b) extending the New York Convention to an arbitral award; and (c) compliance by the applicant with the procedural terms. Even in US judicial practice, in which the principle of forum non conveniens is usually of great importance (allowing courts to refuse formally existing jurisdiction in favour of a more 'suitable' foreign forum, for instance, at the location of the debtor),[8] there has recently been a tendency of compulsory enforcement (*pro-enforcement bias*) to comply with the New York Convention. For instance, in *MR Energy Ltd v. State Property Fund of Ukraine*, 2005,[9] the court refused to apply the forum non conveniens doctrine, stating that 'only a US court can foreclose on commercial property of a foreign state located in the United States'. In *Belize Social Development Ltd v. Government of Belize,*[10] the court did not refuse to issue a writ of execution on a foreign arbitral award by the defendant's reference to the forum non conveniens doctrine, stating that the application of this doctrine is an artificial ground of refusal, not provided for by the New York Convention.

As noted above, the right of states to subject the enforcement of foreign arbitral awards to domestic procedural rules is provided for in Article III of the New York Convention. Unlike restrictions related to the refusal in recognizing and enforcing arbitral awards (Article V of the Convention), the New York Convention does not impose any specific restrictions on the procedural regulation of the contracting states. The only condition contained in Article III of the Convention is that states shall not be entitled to establish more onerous rules as compared to rules for the enforcement of arbitral awards of domestic arbitration courts. As a result, in practice, procedural rules

4. Ruling of the Arbitrazh Court of the Moscow Circuit, Case No. A40-183971/2016, dated 30 March 2017; Resolution of the Arbitrazh Court of Moscow Circuit, Case No. A40-175651/2017, dated 17 November 2017.
5. Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention, H. Kronke et al. (eds) (Kluwer Law International, 2010), p. 123.
6. Lew J.D.M., Mistelis L.A., Kroll S.M., Comparative International Commercial Arbitration (Kluwer Law International, 2003), § 26-56.
7. *Laconian Maritime Enterprises Ltd. v. Agromar Lineas Ltd.* (decided 1984), 499 (at 500-501) (Supreme Court, Durban, and Coast Local Division, South Africa), as cited in Yearbook Commercial Arbitration 1987, Volume XII (van den Berg (ed.); January 1987), Kluwer Arbitration Online.
8. *Monegasque De Reassurances v. Nak Naftogaz*, 158 F. Supp. 2d 377 (S.D.N.Y. 2001), https://law.justia.com/cases/federal/Circuit-courts/FSupp2/158/377/2415223; *First Inv. Corp. of the Marshall Islands v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 746 (5th Cir. 2013).
9. *TMR Energy Limited v. State Property Fund of Ukraine et al.*, 2005 FCA 28 (200501-24).
10. *Belize Social Dev. Ltd. v. Gov't of Belize*, 5 F. Supp. 3d 25 (D.D.C. 2013).

can create serious obstacles to the recognition and enforcement of foreign arbitral awards, including the termination of proceedings in respect of the application or the refusal to accept it. Among these rules of the Russian procedural legislation that can have a significant impact on the enforcement of arbitral awards, there can be distinguished as follows:

- competence and jurisdiction of Russian courts;
- jurisdictional immunity against states and their property (Article 256.3 APC RF, Article 417.3 of CPC RF and Federal Law No. 297-ФЗ 'On Jurisdictional Immunities of a Foreign State and Property of a Foreign State in the Russian Federation' dated 3 November 2015);
- enforcement immunity in respect of certain types of property (Article 446 CPC RF, Article 101 of the Federal Law 'On Enforcement Proceedings');[11]
- a foreign arbitral award may be brought for enforcement in Russia within three years from the date it was made (Article 246(2) APC RF);
- compliance with the rules for notifying parties to the court proceeding (it is of particular importance in the case of notifying a foreign person, which can take a long time).

2

Article 35(2) ICAL RF sets out the requirements for documents that the applicant files to the court for recognition and enforcement of a foreign arbitral award.

So, the following shall be enclosed to the application for recognition and enforcement of an arbitral award:

- a certified copy of the arbitral award signed by the arbitrators;
- documents confirming the conclusion of an arbitration agreement.

Article 35(2) of ICAL RF reproduces almost verbatim Article IV of the New York Convention. However, compared with the New York Convention, as well as the previous version of Article 35 ICAL RF,[12] the current version clarifies that the parties can supply not only the arbitration agreement itself (or a copy thereof) but also documents confirming the conclusion of the arbitration agreement (for instance, correspondence with the approval of the arbitration agreement, statement of claim and statement of defence, in which the claimant declares the existence of an agreement and the defendant does not raise objections).

Pursuant to the New York Convention, no other documents shall be required by the courts for the purpose of accepting the application (with the exception of the standard documents listed in Article 242 APC RF or Article 416 APC RF – a power of attorney, confirmation of sending of a copy of the application to the debtor and a receipt for payment of the state duty).

11. Federal Law No. 229-ФЗ 'On Enforcement Proceedings', dated 2 October 2007.
12. As amended by Federal Law No. 250-FZ, dated 3 December 2008.

The commented article establishes that if the arbitral award or agreement is made in a foreign language, the applicant shall submit a certified translation of these documents into Russian. Standard practice shall be the notarization of translation into Russian.[13]

Legalization or affixing of the apostille on the original of the arbitral award shall not be required, since within the meaning of the Hague Convention of 1961[14] it is not an official document emanating from a foreign state,[15] unless the signatures of the arbitrators on the award were verified by a foreign state authority, for instance, a foreign notary. The situation is similar with respect to the original of the arbitration agreement.

There are several ways to properly certify copies of an arbitral award or arbitration agreement.

First, a copy of a document can be notarized.[16] If the copy is certified by a foreign notary, then it shall be legalized (apostilled). Since the apostille is affixed in French or English, and the language of the Russian legal proceedings is Russian, following the formal requirements of the law, the stamp of the apostille shall also be translated into Russian, and the translation shall be certified by a Russian notary.

Second, in case of an institutional arbitral award, the secretariat or another standing technical authority of the arbitration institute can also certify a copy thereof.[17]

Third, a copy of the arbitration agreement can theoretically be certified by the authorized representative of the parties to the agreement, by virtue of the valid Decree of the Presidium of the Supreme Soviet of USSR dated 4 August 1983 No. 9779-X. However, the practice in this regard is unstable: some courts believe that the certification of the representative is not enough, since the arbitration agreement is a bilateral transaction and in this case it is also required to have certification of a copy of the agreement from the opponent.[18] Other courts consider that notarization of a copy of a document is mandatory in cases expressly provided by law, and since such requirements are not provided for in an arbitration agreement, a copy thereof can be certified

13. Article 81 of the Fundamentals of the Legislation of the Russian Federation on Notaries (approved by the Supreme Court of the Russian Federation on 11 February 1993 No. 4462-1).
14. The Hague Convention, repealing the requirement of legalization of foreign official documents dated 5 October 1961. For the Russian Federation, as the successor of USSR, entered into force on 31 May 1992.
15. Resolution of the Presidium of the Supreme Arbitrazh Court of the Russian Federation No. 14548/04, Case No. A40-47341/03-25-179, dated 22 February 2005; Resolution of the Federal Arbitrazh Court of North-Western Circuit, Case No. A21-1267/2007, dated 12 September 2007.
16. Article 77 of the Fundamentals of the Legislation of the Russian Federation on Notaries (approved by the Supreme Court of the Russian Federation on 11 February 1993 No. 4462-1).
17. Karabelnikov B.R., Enforcement and Contestation of Awards of International Commercial Arbitration: Commentary on the 1958 New York Convention and Chapters 30 and 31 of the Arbitrazh Procedure Code of the Russian Federation as of 2002, 3rd ed., rev. and amend. (Moscow, Statut, 2008), p. 90.
18. Resolution of the Arbitrazh Court of North-Caucasian Circuit No. Ф08- 3395/2015, Case No. A53-28388/2014, dated 1 July 2015; Resolution of the Federal Arbitrazh Court of Far-East Circuit No. Ф03-1702/2009, Case No. A24-173/2009, dated 29 April 2009.

by an authorized representative of the applicant.[19] In this regard, notarization is a safer option.

There may be situations when the foreign arbitral award is not signed by all arbitrators, for example, when one of the colleagues of the arbitrators is set aside or resigns for other reasons or when the arbitrator has a dissenting opinion and refuses to sign the main arbitral award. In this regard, Article 31 ICAL RF contains a rule that, in the arbitration proceedings conducted by a panel of arbitrators, it is sufficient to have the signatures of the majority of the members of the panel, provided that the reason for the absence of other signatures is indicated. It shall be noted that, according to the position of the Presidium of the Supreme Arbitrazh Court, in a situation where it is impossible for the arbitrator to participate in the arbitration after the hearing of the case (for instance, in connection with death), an award can be issued by an incomplete composition of arbitrators only in exceptional cases, when it is obvious that the absent arbitrator took part in the decision-making process in the case, expressed his opinion and was able to convey its position to other arbitrators.[20]

3

Article 35(3) ICAL RF sets out that foreign arbitral awards that are not subject to enforcement are recognized automatically if no objection is received from the interested party. The point at issue is the recognition of arbitral awards of a declarative nature – that is, awards that determine only the rights and obligations of the parties, and not the consequences of the violations that occurred.[21] This procedure is unique compared to most foreign legal orders in which declarative awards are not automatically recognized – the winning party shall submit an application for their recognition in the same manner that applies to all other arbitral awards (for instance, in order to prevent the other party from continuing dispute on the same subject matter in state courts).[22]

Despite the fact that the commented clause was introduced by Federal Law dated 29 December 2015 No. 409-FЗ, it is not a novelty. A similar rule was contained in clauses 10-11 of Decree of the Presidium of the Supreme Soviet of USSR dated 21 June 1988 No. 9131-XI 'On Recognition and Enforcement of Awards of Foreign Courts and

19. Resolution of the Arbitrazh Court of Uralskiy Circuit No. Ф09-6604/16, Case No. A50-1178/2016, dated 14 July 2016; Resolution of the Federal Arbitrazh Court of Povolzhskiy Circuit, Case No. A12-13752/2014 dated 14 July 2014; Resolution of the Arbitrazh Court of East-Siberian Circuit, Case No. A33-2485/2013, dated 29 July 2013.
20. Resolution of the Presidium of the Supreme Arbitrazh Court of the Russian Federation No. 4325/10, Case No. A40-96594/09-68-760, dated 20 July 2010.
21. Kurochkin S.A., International Commercial Arbitration and Arbitral Proceedings (Infotropic Media, 2013), p. 90; Bruntseva E.V., International Commercial Arbitration, Manual for Higher ed. Law Institutions, Bruntseva E.V., SPb., p. 217.
22. *Redfern* and *Hunter* on International Arbitration (Hardcover and eBook). Sixth Edition. Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, §§ 10-10, 10-11, 10-12; Lew J.D.M., Mistelis L.A., Kröll S.M., Comparative International Commercial Arbitration (Kluwer Law International, 2003), § 26; Otto D., Article IV in: H. Kronke, et al. (eds), Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention (Kluwer Law International, 2010). p. 150.

Arbitrations in the USSR'. However, the practice of applying this clause was unstable: there were precedents when the winning party anyway applied to the Russian court for recognition, and the court considered and even satisfied such an application.[23]

The procedure for raising objections is provided for in Articles 413 and 416 of CPC RF and Article 245.1 APC RF. The interested party may object to the recognition of the award within one month after it became aware of the award. The grounds for refusing recognition of such awards are similar to the grounds for refusing to enforce arbitral awards.

23. Resolution of the Arbitrazh Court of West-Siberian Circuit. Case No. A27-781/2011, dated 12 May 2014.

1.26

Commentary on Russian Procedural Law, Article 36 ICAL RF (Grounds for Refusing Recognition or Enforcement of an Arbitral Award)

Sergey Lysov & Alexandra Chilikova

1. Recognition or enforcement of an arbitral award, regardless of the country in which it was made, may be refused in one of the following cases:

1) at the request of the party against whom it is invoked, if that party furnishes to the competent court in which recognition or enforcement is sought proof that:

- **the award was made on the basis of an arbitration agreement, which is referred to in Article 7 and where one of the parties was under some incapacity, or**
- **the arbitration agreement is not valid according to the law to which the parties subordinated it, and in the absence of such an indication, according to the law of the country where the award was invoked, or**
- **the party against which the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings, including the time and place of the arbitration court, or for other valid reasons could not provide its explanations, or**
- **the award is made on a dispute that is not covered by the arbitration agreement or is not subject to its terms, or contains decisions on matters beyond the scope of the arbitration agreement. If the decisions on matters covered by the arbitration agreement can be separated from those not covered by such an agreement, that part of the arbitral award, which contains decisions on matters issues**

covered by the arbitration agreement, may be recognized and enforced, or

- **the composition of the arbitral court or the arbitration procedure did not comply with the agreement of the parties or the law of the country where the arbitral proceedings took place, or**
- **an award made in the territory of a foreign state has not yet become binding on the parties to the arbitration proceedings or the enforcement by the competent authorities of the country where it was made or the country whose law is applied was cancelled or suspended;**

2) The competent court shall determine that:

- **the subject matter of the dispute may not be the subject of arbitration in accordance with the Federal Law or**
- **the recognition and enforcement of an arbitral award are contrary to the public policy of the Russian Federation.**

2. If, in the court referred to in Paragraph seven of Subclause 1 of Clause 1 hereof, an application is filed to cancel or suspend the enforcement of an arbitral award made in the territory of a foreign state, the competent court in which the recognition or enforcement of the arbitral award is sought, if it considers it appropriate, may adjourn its decision and, at the request of the party that requests recognition or enforcement of the arbitral award, may oblige the other party to provide appropriate security.

3. Enforcement of the arbitral award by issuing a writ of execution may be refused on the grounds established by Subclause 2 of Clause 1 hereof, as well as if the party against which the award is issued does not refer to these grounds.

1

The commented article establishes the grounds for the refusal to recognize and enforce the award of the international commercial arbitration and is, in fact, a continuation of Article 35 of the Law on the general principles of recognition.

The commented article on the grounds for refusing recognition and enforcement of arbitral awards is a mirror image of Article V of the New York Convention,[1] and at first glance it might seem that the articles are completely identical in content. However, unlike the provisions of the Convention, Article 36 ICAL RF applies both to awards issued in Russia and to foreign awards of international commercial arbitration. So, in Article 1(1) ICAL RF, it is established that the law applies to international commercial arbitration if the place of arbitration is on the territory of RF, but the provisions provided for in Articles 35 and 36 also apply in cases where the place of arbitration is

1. Lew J.D.M., Mistelis L.A. and Kröll S.M. Comparative International Commercial Arbitration. Kluwer Law International, 2003. p. 697.

abroad. In addition, Article 36(1) explicitly states the application, regardless of the country in which the arbitral award is issued.

During the time of drafting of UNCITRAL Model Law, from which the language of Article 36 ICAL RF was borrowed, there was a discussion regarding the appropriateness of equating international and domestic arbitral awards in terms of the procedure[2] and the grounds for refusing the recognition and enforcement.

Thus, opponents of the separation said that national legislation often imposes much less stringent requirements on domestic arbitral awards than on foreign ones, and in some cases even equates them with judicial decisions.[3]

Arguments in favour of a single regime were the lessening within the meaning of the place of arbitration[4] and the fact that the Model Law would be incomplete if it did not cover awards that are not regulated by the New York Convention.[5]

It is worth noting that the commented article applies to awards issued on the territory of RF, adopted precisely within the framework of proceedings in international commercial arbitration, and not to domestic arbitral awards.

At the legislative level, the distinction is made in Article 239 APC RF, which regulates the grounds for refusing to issue a writ of execution for domestic (arbitral) arbitration awards,[6] and in terms of awards of international commercial arbitration, refers to the relevant provisions of ICAL RF, that is, to the commented article.[7]

The practice of Russian courts also proceeds from the fact that when issuing a writ of execution for the enforcement of international arbitral awards made on the territory of RF, the courts verify the awards for compliance with the commented article.[8]

In matters of recognition and enforcement of foreign arbitral awards, the commented article is usually applied in connection with Article V of the New York Convention. However, in Russian judicial practice, there are cases when hearing cases on the recognition and enforcement of foreign arbitral awards, the courts only referred to the commented article[9] or did not refer to the commented article or the Convention, applying other regulatory acts governing the recognition of judgments of state courts.[10] Often, Russian courts only refer to the relevant provisions of APC RF.

2. Article 35 of UNCITRAL Model Law.
3. Holtzmann H.M. and Neuhaus J.E. A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary. Kluwer Law International, 1989. p. 1007.
4. Seventh Secretariat Note, A/CN.9/264, Art. 36, para. 3, p. 79, https://documents-dds-ny.un.org/doc/UNDOC/GEN/V85/244/18/PDF/V8524418.
5. *Ibid.*, para. 2, p. 76.
6. Article 239(3) and Art. 239(4) APC RF.
7. Article 239(5) APC RF.
8. *See*, for instance, Resolution of the Presidium of the Supreme Arbitrazh Court of the Russian Federation dated 3 February 2009 No. 10680/08 in Case No. A19-2579/08-31-10, Resolution of the Presidium of the Supreme Arbitrazh Court of the Russian Federation No. 4495/06, Case No. A58-3154/2005, dated 12 September 2006; Ruling of the Supreme Court of the Russian Federation No. 45- Г 02-22, dated 21 October 2002.
9. Ruling of the Arbitrazh Court of Krasnodar Region, Case No. A32-20596/2012, dated 17 October 2013.
10. Ruling of the Arbitrazh Court of Moscow City, Case No. A40-134797/13, dated 24 December 2013.

Subclauses (1) and (2) of Article 36(1) ICAL RF contain grounds for refusing to recognize and enforce awards of international commercial arbitration, which, as already mentioned above, practically verbatim reproduce the similar grounds specified in Article V of the New York Convention. The specifics of the application of these grounds by the Russian courts are described in detail in the section hereof related to the application of Article V of the Convention.

2

Article 36(2) ICAL RF is formulated on the basis of Article VI of the New York Convention and, unlike Clause 1, only applies to foreign arbitral awards.

The purpose of this provision is to avoid the risk of issuing conflicting awards, one of which is reversed, and the other is recognized on the territory of a foreign state.

In UNCITRAL Model Law, the commented norm is not limited to foreign arbitral awards and, like Clause 1, can be applied to arbitral awards made in the territory of the state in which the enforcement of the award is required. Similarly, this provision was also formulated in ICAL RF before the reform that was carried out in 2015.[11]

As a result of the reform, a provision was introduced into the procedural legislation on consolidating into one proceeding cases on the annulment of an arbitral award and on the issuance of a writ of execution if such applications are considered in one arbitrazh (state) court.[12] If the applications are considered in different arbitrazh courts, the law obliges the court to suspend the proceedings on the application submitted later, and if the applications are submitted simultaneously, on the application for the issuance of a writ of execution.[13]

However, before the reform, Article 36(2) ICAL RF was also not widely used in relation to domestic arbitral awards: as a rule, if applications to annul an arbitral award in Russia and issue a writ of execution were considered at the same time, the courts consolidated the cases into one proceeding.[14]

3

Article 36(3) ICAL RF was introduced as a result of the reform of the legislation on arbitration in 2015[15] and is not reproduced in a similar way in the Model Law.

11. Amendments were introduced by Federal Law dated, 29 December 2015 No. 409-ФЗ 'On Making Amendments to Certain Legislative Acts of the Russian Federation and Invalidation of Clause 3 of Part 1 of Article 6 of the Federal Law "On Self-Regulated Organizations" in connection with the adoption of the Federal Law "On Arbitration (Arbitral Proceedings) in the Russian Federation"'.
12. Article 238(5) APC RF.
13. Article 239(6) APC RF.
14. *See*, for instance, Resolution of the Arbitrazh Court of Moscow Circuit No. F05-19809/2015, Case No. A40-65735/2015, dated 27 January 2016; Resolution of the Arbitrazh Court of Moscow Circuit No. Ф05-11124/2015, Case No. A40-38405/15-56-298, dated 24 August 2015; Resolution of the Arbitrazh Court of Moscow Circuit, Case No. A40-100424/12-141-937, dated 30 January 2013.
15. Amendments were introduced by Federal Law No. 409-FZ, dated 29 December 2015.

The commented provision clarifies that the court may, on its own initiative, apply such grounds for refusing to recognize a foreign arbitral award, such as non-arbitrability of a dispute and contradiction to public policy, which is consistent with Article V of the New York Convention.

It shall be noted that the Russian court is not entitled to apply the grounds set forth in Article 36(1)(1) ICAL RF according to its own initiative. Thus, these grounds can only be stated by the party itself, against which recognition and enforcement of the award of the international commercial arbitration are sought.