

Commercial Court of Moscow refuses to enforce series of Ukrainian awards on grounds of public policy

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Legal update: case report | [Published on 15-Aug-2017](#) | Russian Federation

In a series of decisions (*Case No. A40-4668/17-83-29* and others), the Commercial Court of Moscow considered whether to refuse enforcement of a number of Ukrainian arbitration awards on the grounds that the awards violated public policy.

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The Commercial Court of Moscow has refused the enforcement of a series of decisions on arbitration awards issued by the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce on the common ground that each one violated public policy. According to the Moscow court, the arbitral tribunals failed to check the existence of corporate approval in the transactions in which the disputes arose.

Due to the extremely wide interpretation of the public policy principle by the Commercial Court of Moscow, the judgments have been severely criticised among Russian arbitration practitioners. Practitioners believe that the consistent application of such approach might lead to the refusal of enforcement of numerous arbitral awards, because, as a general rule, arbitral tribunals (and the state courts) do not consider issues related to corporate approval, unless such issues are specifically raised by the parties.

(*Case No. A40-4668/17-83-29; Case No. A40-4677/17-3-33; Case No. A40-4681/17-3-33; Case No. A40-77410/17-143-713; Case No. A40-77427/17-141-732; Case No. A40-77402/17-29-767; Case No. A40-4667/17-29-32; Case No. A40-78411/17-143-725; Case No. A40-77416/17-68-165.*)

In a series of decisions, the Commercial Court of Moscow has refused to enforce several arbitration awards issued by the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce. The common ground for refusal in each case was the violation of public policy due to the fact that the arbitral tribunal in each of the cases did not check the existence of the relevant corporate approval in each transaction in which the dispute arose.

In order to prevent an overly wide interpretation of the public policy principle, in 2013, the Supreme Commercial Court issued Information Letter N 156 which clarified that the public policy is understood to mean "the fundamental legal tenets/principles that are most imperative, universal, of special social and public significance, and that form the core of the state's economic, political or legal systems".

Under Russian corporate law, any transactions that are outside the ordinary course of a company's business and related to the acquisition, disposal or possible disposal of its assets, directly or indirectly worth at least at 25% of the book value of its assets are subject to corporate approval. However, the absence of such approval does not automatically invalidate the transaction: in such a case the person challenging the transaction is required to prove that company's shareholders were not aware of the transaction.

In the cases at issue here, a Ukrainian party concluded several supply and raw material processing agreements with a Russian company. It seems that all the agreements were made in the ordinary course of the Russian company's business activity, and, therefore, they were not subject to corporate approval.

However, even if corporate approval had been required, the absence of such approval should only have been considered as a ground to challenge the agreement in separate proceedings, not as a preclusion to enforcement of an arbitration award.

Nevertheless, the Commercial Court of Moscow refused enforcement in each case. In giving their judgment in each case, despite making reference to Informational Letter N 156, it seems that the Commercial Court of Moscow ignored the essence of the Supreme Commercial Court's approach.

Notably, all the court judgments were silent on whether the parties had addressed the issue of corporate approval themselves during the arbitration proceedings. Further, the state court did not examine whether the transactions required corporate approval.

Given the Commercial Court of Moscow's extremely wide interpretation of public policy principle in each of these cases, the judgments have been severely criticised among Russian arbitration practitioners. Practitioners believe that the consistent application of such approach might lead to the refusal of enforcement of numerous arbitral awards, because, as a general rule, arbitral tribunals (as well as the state courts) do not consider issues related to corporate approval, unless they are specifically raised by the parties.

Cases:

- [Case No. A40-4668/17-83-29](#) (Commercial Court of Moscow).
- [Case No. A40-4677/17-3-33](#) (Commercial Court of Moscow).
- [Case No. A40-4681/17-3-33](#) (Commercial Court of Moscow).
- [Case No. A40-77410/17-143-713](#) (Commercial Court of Moscow).
- [Case No. A40-77427/17-141-732](#) (Commercial Court of Moscow).
- [Case No. A40-77402/17-29-767](#) (Commercial Court of Moscow).
- [Case No. A40-4667/17-29-32](#) (Commercial Court of Moscow).
- [Case No. A40-78411/17-143-725](#) (Commercial Court of Moscow).
- [Case No. A40-77416/17-68-165](#) (Commercial Court of Moscow).

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