Enforcement of Investment Treaty Arbitration Awards

A Global Guide
Second Edition

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3.1 Legislation

(a) General provisions of Russian law on the recognition and enforcement of arbitral awards rendered in international commercial disputes

Russian law[40] does not currently provide for any specific legal regime on the recognition and enforcement of arbitral awards rendered by tribunals in investment disputes, except for the rules on jurisdictional immunity of states and their property. Hence, there is hardly any developed case law on these matters. For this reason, it is useful to refer to the general provisions of Russian law regulating these issues in the context of international commercial arbitration. It may be assumed that Russian courts will most likely adopt the same approach when resolving cases concerned with the recognition and enforcement of foreign investment treaty awards.[41]

This category of dispute falls within the jurisdiction of the commercial (*arbitrazh*) courts, the highest body of which was the Supreme Commercial Court until August 2014, when that judicial organ was abolished and its functions were entrusted to the Supreme Court. The legal regime for the enforcement of investment awards, however, has not changed significantly. The Supreme Court adopted some clarifications, ensuring that the parties to disputes concerning foreign investments can refer those disputes to commercial arbitration, unless a federal law or international treaty provides otherwise, which is also stipulated in Article 10 of the Russian Law on Foreign Investment.[42] Thus, this is further confirmation that the general regime on recognition and enforcement of arbitral commercial awards will apply to investment awards.

40 This section of the chapter discusses Russian legislation in force as of February 2020.
41 See JDM Lew, LA Mistelis and SM Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003), pp800–804; RD Bishop, J Crawford *et al* (eds), *Foreign Investment Disputes: Cases, Materials and Commentary* (Kluwer Law International, 2014), p1178; but see also M Sornarajah, *The Settlement of Foreign Investment Disputes* (Kluwer Law International, 2000), pp308–310.

Applicable legislation: With respect to applicable legislation, foreign commercial arbitral awards are recognised and enforced in Russia by commercial courts if recognition and enforcement of such awards are provided for by international treaties or federal laws of the Russian Federation. As mentioned in section 2.1, Russia is a party to a number of international instruments and, in particular, the New York Convention. Such international instruments have direct application in Russia and prevail over the national legislation.

The relevant rules on the recognition and enforcement of foreign arbitral awards are found in Sections 241 to 246 of the Commercial Procedure Code (CPC), and in Sections 35 to 36 of Law 5338-1 of 7 July 1993 on International Commercial Arbitration, which is based on the UNCITRAL Model Law.[43] Several important guidelines and clarifications were also issued by the Supreme Commercial Court and the Supreme Court in respect of international arbitration.[44]

In 2016, Russia embarked on a radical arbitration reform. Some amendments were introduced in the statutes on international arbitration, including in relation to recognition and enforcement. The Supreme Court declared that the reform aimed to align the Russian regime with the approaches enshrined in the New York Convention.[45] The most notable amendment was the introduction of the rules on recognition of awards that do not require enforcement.[46] Another important development was the introduction of a right to request the postponement of an enforcement proceeding where a foreign court is considering an application for annulment of an award or for suspension of its enforcement.[47] After the foreign court has decided on an application, the Russian court shall have regard to the foreign court decision in deciding whether to grant recognition and enforcement.[48]

When considering an application, the court examines whether a foreign arbitral award can be recognised and enforced. The lower court is restricted by law from reviewing awards on the merits (Section 243(4) of the CPC refers to foreign court judgments only, but has been applied with reference to foreign arbitral awards too).[49] The exhaustive list of grounds upon which the

42 Para 22 of the "Review of the Court Practice in Connection with the Protection of Foreign Investors" adopted by the Supreme Court on 12 July 2017, para 8 of Plenum Resolution of the Supreme Court 53 dated 10 December 2019 "On Performing of Assistance and Control Functions in Relation to Domestic Arbitration and International Commercial Arbitration by the Courts of the Russian Federation".

43 Russia has not, however, adopted the 2006 version of the UNCITRAL Model Law.

44 The most significant are the so-called Information Letters of the Presidium of the Supreme Commercial Court 96 dated 22 December 2005, 156 dated 26 February 2013; 158 dated 9 July 2013; and Resolution of the Supreme Court's Plenum 53 dated 10 December 2019 "On Performing of Assistance and Control Functions in Relation to Domestic Arbitration and International Commercial Arbitration by the Courts of the Russian Federation".

45 Review of case law on performance of assistance and control functions in relation to domestic arbitration and international commercial arbitration by the Russian courts (adopted by the Presidium of the Supreme Court dated 26 December 2018).

46 CPC, Article 245.1.

recognition and enforcement of an award may be refused is set out in Article V of the New York Convention. The same list is provided for in Section 36 of the International Commercial Arbitration Law. These grounds mirror those upon which the court may set aside the award of an international commercial tribunal, which are set out in Section 34 of that law; except that an obvious difference is that the grounds for refusal include cases where an award has not entered into force or has been set aside or stayed.

Grounds for setting aside awards rendered in international commercial arbitration and grounds for refusing their recognition or enforcement can be categorised in two groups. First, there are the grounds available to the court where a party resisting recognition and enforcement of the award invokes them. These include challenging the jurisdiction of the tribunal (where there are alleged defects in arbitration agreement, including where the agreement is void) and instances where the arbitrators have acted beyond their competence; and issues relating to breach of arbitral procedure. Secondly, there are the grounds available to the court of its own motion, which relate to the issue of arbitrability and public order of Russia.

When deciding whether to recognise and enforce (or set aside) an international arbitral award, the court should grant the relevant application if no grounds for refusing the application exist.

However, one further ground for refusing recognition and enforcement of an international arbitral award is provided in Section 246(2) of the CPC and not included in the International Commercial Arbitration Law or the New York Convention. Section 246(2) of the CPC provides for a three-year timeframe during which an application for recognition and enforcement of the award must be filed. This timeframe starts to run from the date on which an award becomes final and binding. The expired timeframe may be restored by the court, but only in limited circumstances.

Irrespective of whether it allows or denies the recognition and enforcement of an award, a court judgment on this issue takes legal effect immediately. Sections 245(3) and 245.1(14) of the CPC, however, allow for an appeal against the judgment to the Cassation Court within one month. The degree of review is limited, as the Cassation Court can examine only whether the lower court erroneously applied the substantive and procedural laws.

As stated previously, the regime for recognising and enforcing foreign arbitral awards made by investment treaty tribunals in non-ICSID cases should

47 *Ibid*, Articles 243(5)–(6).
48 *Ibid*, Article 243(7).
49 This has been confirmed by the Supreme Commercial Court in its Information Letter 96 of 22 December 2005, Review of case law of commercial courts on resolving disputes on recognition and enforcement of foreign court judgments, challenge of arbitral awards and issuance of writs of execution for the enforcement of the awards of arbitral tribunals, para 20, para 1 of Resolution of the Supreme Court's Plenum 53 dated 10 December 2019.

be the same as that for awards issued by international commercial arbitration tribunals. The recognition and enforcement regime will therefore follow the general approach adopted by those jurisdictions that have applied the UNCITRAL Model Law to investment treaty awards in a manner that does not conflict with the New York Convention.

3.2 Domestic legal provisions

(a) Issues of state immunity

In modern international trade, states have become increasingly involved in acts of a commercial or private nature, often through their agencies, organs or state-owned enterprises. This has prompted a distinction between public or sovereign activities of states on the one hand, and their private or commercial activities on the other. The currently almost uniform approach in theory to this matter is that only in respect of its sovereign activities may the state reasonably expect to be immune from proceedings in a foreign court.

The doctrine of restrictive immunity is reflected in the text of international conventions such as the European Convention on State Immunity, which was adopted by the Council of Europe in 1972. In Russia, until recently, there was no separate law that specifically dealt with the Russian Federation's sovereign immunity in the context of international arbitration. Only one law touches upon sovereign immunity in relation to arbitration: the Law on Production Sharing Agreements (1995), which allows the Russian Federation to waive its sovereign immunity in a related agreement from the jurisdiction of state courts, interim measures and enforcement of judgments or arbitral awards.[50]

In 2006, Russia signed (but has not since ratified) the UN Convention on Jurisdictional Immunities of States and Their Property (2004). As of January 2007, when the convention closed for signatures, however, it had fallen two states short of the 30 signatures necessary to become effective. However, in 2015 there were important developments in the regime of state immunity. The Russian Federation adopted the Federal Law "On Jurisdictional Immunity of a Foreign State and the Property of a Foreign State in the Russian Federation" (the Law on Jurisdictional Immunity), which is based on the UN Convention.

The Law on Jurisdictional Immunity ensures that the doctrine of restrictive immunity applies to the issue of states' participation in court proceedings and execution (enforcement) proceedings; and for now, it supersedes an outdated doctrine of absolute immunity, which was previously provided for in Russian legislation. Previously, the issue of immunity of foreign states was regulated in Russian procedural law only. Section 251(1) of the CPC applied the principle of

50 Section 23 of Federal Law 225-FZ of 30 December 1995, "On Production-Sharing Agreements".

state immunity and provided that a foreign state was immune from suit and injunctions only if it acted in the exercise of sovereign authority. Thus, if the dispute concerned an economic or commercial activity of a particular state, that state would be unable to benefit from immunity. The criteria for differentiating the exercise of sovereign immunity from commercial activities were based on the nature of the agreement or transaction and its purpose. Despite this express provision, there were some different views which held that the rule of Article 251(1) of the CPC applied the principle of absolute immunity.[51] Moreover, the rules of immunity provided for by two Procedure Codes of the Russian Federation (Commercial and Civil)[52] were different, because Article 401 of the Civil Procedure Code (as opposed to the Commercial Procedure Code) did not indicate that immunity was granted only for action in exercise of sovereign authority and thus implied the doctrine of absolute immunity.[53]

However, since the Law on Jurisdictional Immunity entered into force, it is clear that the doctrine of restrictive immunity will regulate court proceedings with foreign states. With the adoption of the Law on Jurisdictional Immunity, the respective amendments were made to the CPC, the Civil Procedure Code and the Law on Execution Proceedings (in particular, a new Chapter 33.1 was introduced to the CPC which covers the participation of foreign states in Russian commercial proceedings).

The Law on Jurisdictional Immunity provides that a foreign state does not enjoy immunity if it consented to the exercise of jurisdiction by a Russian court by means of an international agreement (treaty), written consent or a declaration made in a Russian court. Such consent cannot be revoked and extends to all stages of proceedings, without prejudice to immunity from injunctions and immunity from execution. To guarantee foreign states' rights to invoke immunity, the law provides that consent cannot be derived from the following actions:

- participation in the proceedings for the sole purpose of invoking immunity;
- assertion of a right or interest in property that is at issue in the proceedings;
- non-participation in the proceedings; or
- appearance in a Russian court of a foreign state representative as a witness or expert in the proceedings.

51 See, for example, RM Valleev and GI Kurdyukov (eds) *International Law, General Part: Student Book* (2017), p187); EE Veselkova, *The Concept of the Bill "On Jurisdictional Immunity of a Foreign State and Its Property"* (2015).

52 The Civil Procedure Code regulates the procedure for the resolution of disputes with natural persons that are not connected with economic activity, while the CPC regulates the resolution of disputes that are of commercial (economic) character.

53 SI Shchegolev, *Jurisdictional Immunity of Foreign Central Banks: International and Foreign Regulation* (2013).

A foreign state is deemed to have waived its immunity rights if it submits a claim to a Russian court or otherwise participates in court proceedings on the merits (the waiver extends to counterclaims against the claims submitted by a foreign state). A foreign state is also deemed to be waiving its immunity if it submits counterclaims.[54] Like consent, a waiver cannot be revoked and extends to all stages of court proceedings, without prejudice to immunity from injunctions and immunity from execution. A foreign state cannot refer to immunity with regard to court proceedings that are connected to an arbitration agreement entered into by a foreign state.

There is one notable case on the issue of state immunity in the context of international investment arbitration, which arose from a dispute between Russian state-owned oil company Tatneft and the Republic of Ukraine. Before turning to this landmark case, which is discussed below, it is important to trace the evolution of the Russian courts' approach to this matter through the prism of the general commercial litigation in which the state has invoked immunity, as in general this approach informed the new Law on Jurisdictional Immunity. Thus, in the absence of specific case law, it is likely that the Russian courts will have regard to this approach in future cases concerning the recognition and enforcement of investment treaty awards.

The case law reveals that the courts will analyse the purpose of the transaction in dispute in each particular case. The Supreme Commercial Court's 2001 guidelines on foreign investor protection disputes provide that a commercial court will discontinue an investment litigation case where a foreign state is the respondent and that state's impugned actions were taken in the exercise of sovereign authority.[55] In the 2001 guidelines, the Supreme Commercial Court provides the example of a case brought by a Russian construction company for the recovery of a sum of money against the embassy of a foreign state for work done in relation to the construction of a hotel in Moscow under the embassy's auspices. The construction agreement did not contain a waiver of sovereign immunity. On that basis, the embassy objected to the court's jurisdiction. That objection was supported by a letter of the prime minister of that state confirming that construction of the hotel had been performed according to an international treaty with Russia and was intended "for public sovereign purposes" of the contracting state, and that it did not purport to make a profit on the territory of a foreign state. The Supreme Commercial Court overturned the lower court judgment ordering recovery of the debt from the embassy, and directed the court to determine whether state

54 Previously, this approach was spelled out in Information Letter of the Presidium of the Supreme Commercial Court of Russia 58 dated 18 January 2001, Review of case law relating to resolution by commercial courts of disputes relating to the protection of foreign investors, para 6.

55 *Ibid*, para 5.

immunity was at issue and whether it could have been waived. As it had failed to find a waiver of immunity, the lower court was directed to consider discontinuing the case, as the embassy was carrying out the construction "for the public sovereign and not a commercial" purpose.[56]

In another case considered by the Supreme Commercial Court, a dispute arose from a guarantee agreement under which a Czech bank was entitled to receive money.[57] The claimants argued that the guarantee was void, but the lower court discontinued the proceedings on the grounds that the Czech Republic could not be joined for state immunity reasons. The court upheld the appeal court's decision, which had disagreed with the lower court and allowed the case to proceed. The court held that "the state possesses the immunity only when it exercises public-sovereign functions, whereas the current dispute arose out of private commercial relations and is not related to the exercise of sovereign powers by the Czech Republic".

As stated previously, the Law on Jurisdictional Immunity provides that a foreign state may be deemed to have waived its immunity. This provision has longstanding roots. The Supreme Commercial Court's 1999 guidelines on the effect of international treaties of the Russian Federation in relation to commercial proceedings provide that where a respondent in a commercial claim is a foreign state acting in the exercise of its sovereign authority, a commercial court can consider a claim relating to a commercial dispute only if there is "clearly expressed consent" to resolve the dispute in a Russian commercial court. Such consent should be viewed as a waiver of state immunity by that foreign state.[58]

Before the introduction of the Law on Jurisdictional Immunity in 2015, waivers of sovereign immunity were strictly construed by the courts in favour of the sovereign. In the absence of documents establishing waiver and the authority of the persons who signed the waiver documents, the court would find that immunity was not waived. In one case, a dispute arose between a Russian state property agency and the Belarusian embassy regarding a lease for non-residential premises.[59] The Cassation Court ruled that the jurisdiction clause could not be regarded as a proper waiver of immunity. The head of the embassy's branch who had signed the agreement was not authorised to sign such a waiver. Further, the court noted that the claimant did not provide "evidence of the respondent's carrying out commercial or other business activity" in respect of the premises.

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56 See also Judgment of the Federal Commercial Court of the Volgo-Vyatsky Circuit, Case 43-4888/2012, 24 July 2012. In this case, which concerned a dispute under a non-residential lease agreement, the court granted the state immunity defence to the tenant embassy on the grounds that the agreement was made for the purpose of locating the embassy's branch there and in the exercise of its diplomatic functions.

57 Judgment of the Supreme Commercial Court 1363/11, in Case A55-3476834769/2009, 20 October 2011.

58 Resolution of the Plenum of the Supreme Commercial Court of Russia 8 of 11 June 1999 On the Effect of International Treaties of the Russian Federation in Relation to Commercial Procedure Issues of Commercial Proceedings, para 8.

The same approach may be seen in the context of international arbitration, as the Supreme Commercial Court adopted a formalistic approach to the waiver of immunity. The cases[60] concerned a challenge by the Russian Ministry of Transport of two preliminary awards made by an UNCITRAL tribunal. The tribunal was constituted pursuant to two agreements for the supply of airport equipment concluded in the 1990s between the Soviet Union's Civil Aviation Ministry and an Italian supplier. The Ministry of Transport disagreed with the tribunal's finding that it was the right respondent in this case and alleged in court that the agreements were void. This allowed the Ministry of Transport to avoid the fact that the agreements contained a waiver of sovereign immunity. The Supreme Commercial Court held that "the state in the exercise of sovereign authority is immune from suit, joinder as a third party or attachments of its property and issuance of interim relief against it". The court held further that the waiver of state immunity is allowed only subject to "the consent of competent authorities of the state and should be made in accordance with the procedure provided for in the law of that state". The Supreme Commercial Court referred to Section 251 of the version of CPC that was in force prior to 2015, which dealt with the immunity of foreign states. The court held that the disputed agreement had not been signed in accordance with the prescribed procedure, and that the authority of the persons who had actually signed the agreements on behalf of the ministry was not confirmed by evidence. As such, the arbitration clause and the state immunity waiver had been signed by persons without authority to waive the immunity. For that reason, the preliminary awards in the two cases were set aside.

In this case the Supreme Commercial Court *de facto* extended the immunity regime to the ministry, which was not a foreign state. This approach is just and fair, and is now enshrined in Article 2 of the Law on Jurisdictional Immunity, in which the definition of 'foreign state' covers not only foreign states themselves, but also constituent parts of foreign states, their representatives and other entities, to the extent that such entities and representatives are executing sovereign authority.

As previously mentioned, a foreign state loses its right to invoke immunity if it brings a counterclaim. Moreover, an immunity plea cannot be raised against a counterclaim if it was the state which initiated the proceedings or intervened to present a claim.

Finally, the approach of the Russian commercial courts in relation to immunity from enforcement against the property of a foreign state located in

59 Judgment of the Federal Commercial Court of the Volgo-Vyatsky Circuit, Case A43-4888/2012, 24 July 2012; see also Judgment of the 17th Commercial Appellate Court 17 P-2041/2012-AK dated 16 March 2012.

60 Judgment of the Presidium of the Supreme Commercial Court of Russia, 9982/05 of 12 December 2005, and Judgment of the Presidium of the Supreme Commercial Court of Russia, 10074/05 of 12 December 2005.

Russia is worth noting. This issue has been considered in several proceedings brought against foreign states. One case considered by the Supreme Commercial Court concerned a dispute between a Russian company and Ukraine.[61] In that case, the Russian company brought an action for recovery of money against Ukraine based on alleged secondary liability for debts incurred by a health resort. The case was discontinued by the lower courts on the grounds that Ukraine was immune unless it had waived immunity. The underlying dispute was between the Russian company and the resort. The dispute was settled and the resort admitted its liability to the claimant. As the resort became insolvent, however, the Russian company filed a claim against Ukraine on the basis of the state's secondary liability for the resort's debts, as provided for in the latter's articles of association. The Supreme Commercial Court confirmed the lower court's decision, referring to Section 251 of the CPC and holding that there was no reason to conclude that the state had not acted in the exercise of sovereign authority or had waived its immunity.

The recent case mentioned above is *Tatneft v Ukraine*, which is the first Russian case on the enforcement of an investment treaty award. It is of particular interest as the same resort was the subject of enforcement proceedings of an investment award initiated after the introduction of the Law on Jurisdictional Immunity. However, on this occasion the case had the opposite result. The ambiguity of these decisions confirms that before the immunity regime was amended in 2015, it was absolute; while the amendments introduced a restrictive approach to the issue of immunity that should increase investor confidence.

Tatneft v Ukraine related to a request for recognition and enforcement of an investment award rendered in 2014 in PCA Case 2008-8, decided by the PCA tribunal under the UNCITRAL Arbitration Rules. After losing its stake in Ukrtatnafta in 2007, Russian oil company Tatneft filed a claim against Ukraine for alleged expropriation and breach of FET/minimum standard of treatment, including denial of justice. In 2014, the PCA tribunal granted the Russian company's claim and ordered Ukraine to pay $144 million in compensation. Ukraine tried to appeal the decision to a French court, but the French court rejected the appeal.

Tatneft then initiated enforcement proceedings in Russia in 2017 and the case was first considered by the courts of the Moscow circuit. The courts applied the general rules on enforcement of foreign arbitral awards (Sections 241 to 244 of the CPC and Article V of the New York Convention), as well as the provisions on state immunity. Based on those provisions, the courts ruled that Ukraine's property was immune from enforcement, as the assets identified were diplomatic premises.[62] The issue of the immunity of the Ukrainian Cultural

61 Judgment of the Supreme Commercial Court of Russia, VAS-1602/14, 24 March 2014.

Centre in Moscow was decided along the same lines: the courts held that the centre served the purpose of exercising sovereign authority and fulfilled consular functions, and as such was protected by immunity in respect of provisional measures and execution. The fact that some premises of the centre were leased did not prove the commercial use of the building, as the income from these activities was not used for profit, but rather to cover the costs of the centre's diplomatic functions; thus, this did not affect the application of the immunity regime.

The Moscow courts subsequently transferred the case to another region of Russia – Stavropol kray – due to the lack of Ukrainian assets available for enforcement in Moscow. The Moscow courts found that Ukraine had property – the aforementioned resort – in the Stavropol region. In contrast to the Moscow courts, the Stavropol Commercial Court granted enforcement, which was upheld by the Cassation Court. The Stavropol court held that the question of the immunity of assets should be decided at the stage of execution, rather than at the stage of granting an application for recognition and enforcement of a foreign arbitral award. The court reached this conclusion based on Article V of the New York Convention, which does not include the immunity of assets as a ground to refuse a request for recognition and enforcement. Moreover, the courts held that Ukraine could not invoke the immunity defence, because it had consented to jurisdiction over the dispute in the arbitration agreement contained in the Russia-Ukraine BIT.[63]

Nevertheless, recognition of the award did not automatically lead to enforcement against Ukrainian state-owned assets, due to Ukraine's state immunity from execution. As stated in the judgment of the Cassation Court of the North-Caucasus Circuit, it was not for the courts, but rather for the court bailiff to decide on the availability of enforcement against Ukrainian state property.

At the time of writing, the courts had decided in favour of the investor (Tatneft) and enforced the award. At the stage of execution of the award by a court bailiff, Ukraine objected to execution on the grounds that the assets enjoyed immunity, which should preclude any such action.[64] At the time of writing, the case is still pending.

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62 Judgment of the Commercial Court of the Moscow Circuit, Case 40-67511/2017, 29 August 2017.
63 Judgment of the Commercial Court of the North-Caucasus Circuit, Case 63-15521/2018, 21 June 2019.

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The growth in cross-border investments in an increasingly globalised economy means that there are more international disputes between foreign investors and states than ever before. Investment treaty arbitration has become the preferred dispute resolution mechanism for resolving such disputes, however, securing a final arbitral award is often just the beginning of a complicated process.

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Whether you are an arbitration lawyer in private practice or a user of investment treaty arbitration, this edition will provide you with holistic, practical and theoretical insight on the most important step of an arbitral process against a state or state entity.

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