

## **Survey of Judicial Practice of the Supreme Court of the Russian Federation in Civil Cases**

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1999, N. 3, at 12-14*

The conclusion of the city court that the award of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation is contrary to the public policy of the Russian Federation is declared incorrect.

The award of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC at CCI RF) of June 21, 1996 obliged State Enterprise "Izmeritel" to pay the LLC "Omegatech Electronics GmbH" USD 2,197,119.53 plus interest from October 31, 1992 and until the day of actual payment; USD 33,797.00 in arbitration costs, and USD 60,000.00 as the reimbursement of the claimant's expenses.

State Enterprise "Izmeritel" applied to the Moscow City Court with an application to set the award aside claiming that it never entered into a contract with the LLC "Omegatech Electronics GmbH"; that the original of the contract does not exist; that the parties never entered into an arbitration agreement; that the award of the arbitration court is based on forged documents.

On August 19, 1998 the Moscow City Court satisfied the petition of the State Enterprise "Izmeritel" and set aside the award of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation of June 21, 1996 indicating that during the proceedings at the ICAC at CCI RF, grounds for civil liability of the Enterprise to the LLC "Omegatech Electronics GmbH" had not been confirmed, and that the enforcement of the said award would contradict public policy of the Russian Federation.

The LLC "Omegatech Electronics GmbH," in its private petition, put a question of vacating the court decision as rendered in violation of the rules of procedural law.

On September 25, 1998, the Judicial Collegium for Civil Cases of the Supreme Court of the Russian Federation satisfied the private petition of the LLC "Omegatech Electronics GmbH" on the following grounds.

According to Article 34 of the Law of the Russian Federation "On International Commercial Arbitration" of July 7, 1993 N. 5338-1, application for setting an award aside is the exclusive recourse against an arbitral award; therefore, satisfaction of such application is possible only in the cases specified in par. 2 and 3 of the said Article.

According to Article 34 (2) of this Law, an arbitral decision may be set aside by the court only in cases when:

(1) the party making the application furnishes proof that:

a party to the arbitration agreement referred to in Article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the Russian Federation; or

the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(2) the court finds that:

the subject-matter of the dispute is not capable of settlement by arbitration under the law of the Russian Federation; or

the award is in conflict with the public policy of the Russian Federation.

Therefore, there are provided procedural (Art. 34 (2)(1) of the Law) and substantive-law (Art. 34 (2)(2) of the Law) grounds for setting an arbitral award aside.

In ruling on the application of the State Enterprise "Izmeritel" on setting aside the award of ICAC at CCI RF of July 21, 1996, the Moscow City Court did not properly check the observance of the norms of procedural law during the arbitral procedure and wrongly interpreted substantive-law grounds for setting an arbitral award aside.

As demonstrated by the materials provided to the court, the arbitral procedure during the consideration of the case in the arbitration court conformed to the agreement of the parties. Because the parties did not agree on the application of special arbitral procedure, the one different from the Rules, ICAC at CCI RF, during the consideration of the case, was guided by the Rules of ICAC at CCI RF.

In the City Court opinion, violation of the arbitral procedure lied in accepting by ICAC, as written evidence in the case, of photocopies of the contracts of December 19, 1991 which were provided to the court by both parties of the case.

This conclusion of the court is not a ground for setting an arbitral award aside and does not conform to § 34 of the Rules of ICAC at CCI RF, which states that a party may (but not obliged) to provide written evidence in the original or certified copy. From the contents of this article, it does not follow that the parties must provide the court only with the original documents, and it is not provided for that ICAC at CCI RF may not take into account, as evidence, copies of the documents. According to § 34 (5) of the Rules of ICAC at CCI RF, non-presentation by one of the parties of proper evidence does not prevent the arbitration court from continuing the court examination and rendering an award based on the evidence available to the court.

The challenged decision of ICAC at CCI RF, as it follows from its content, is not based on photocopies of the contract, but on the totality of evidence which attests to the conclusion of the contract. So, each party provided ICAC at CCI RF with its copy of the contract, and the defendant, State Enterprise "Izmeritel," provided three copies; the parties provided explanations regarding the circumstances of the conclusion of the contract and their evaluations of its validity; the intentions and actions of the parties were considered; and the evaluation of the legal relationship between the parties was given.

In the reply to the claim N. 1/765 of September 25, 1995 (to which ICAC at CCI RF referred in its decision), which was provided to the Judicial Collegium for Civil Cases of the Supreme Court of RF, the defendant did not deny the fact of signing the contract; accordingly, it did not contest its existence, but argued only the invalidity of the contract. The defendant also argued that the contract "remained under-executed" because the defendant was not provided with the credit, in the amount of 17 million DM, from the federal organs of executive power of Russia, and that "without such a credit, the contract did not have any sense;" which is, the defendant did not deny the fact that the contract existed and that it signed the contract.

Apart from that, the claimant provided ICAC at CCI RF with the written confirmation of "Aviabank" which demonstrated that a representative of the State Enterprise "Izmeritel" presented the contract to the said bank in order to receive a credit. This fact also confirms the existence of the contract between the two parties.

After evaluating the totality of the enumerated evidence, ICAC at CCI RF came to the conclusion that the contract, which is the legal foundation of the liability of the defendant to the claimant, was actually concluded by the parties.

According to Art. 28 of the Law of the Russian Federation "On International Commercial Arbitration," questions as to whether the parties had a contractual relationship and whether the defendant had a civil-law obligation to the claimant, concern the jurisdiction of the arbitration court. According to Art. 5 of the said Law, the courts of general jurisdiction, while considering an application to set aside an arbitral award, shall not revise the conclusions of ICAC at CCI RF as to the substance of the dispute, except in situations enumerated in Art. 34 (2)(2) of the said Law.

Considering this case, the City Court admitted that the decision of ICAC at CCI RF contradicted public policy of the Russian Federation because it did not conform to its legislation.

However, this conclusion is based on the wrongful interpretation of the term "public policy of the Russian Federation" and also contradicts the content of the decision, which contains no reference to the legal norms of international or foreign law. The decision of the arbitration court is based on the norms of Russian civil law, which completely excludes the possibility to refer to the violation of public policy because application of the norms of national Russian law cannot be interpreted as violation of public policy of the Russian Federation.

The content of the term "public policy of the Russian Federation" does not coincide with the content of the national legislation of the Russian Federation. Because legislation of the Russian Federation allows application of the legal norms of foreign countries (Art. 28, Law of the Russian Federation "On International Commercial Arbitration"), existence of principal distinctions between a Russian statute and a statute of another state cannot, by itself, serve as a ground for application of the public policy reservation. Such an application of this reservation means the total denial of application of foreign law in the Russian Federation.

"Public policy of the Russian Federation" means the foundations of the social system of the Russian state. The public policy reservation is possible only in those special cases when application of a foreign statute might create a result inadmissible from a point of view of Russian legal conscience.

According to Art. 16 (1) of the Law of the Russian Federation "On International Commercial Arbitration," the arbitration court may determine its own jurisdiction to decide a specific case.

The decision of ICAC at CCI RF of June 21, 1996 states that ICAC at CCI RF has jurisdiction to decide the dispute between the parties and this jurisdiction is based not on the arbitration clause in the contract between the parties but on the arbitration agreement between the claimant and the defendant entered into in writing, in the form of an exchange of the statement of claim and reply to the claim in which the claimant asserted that ICAC at CCI RF had jurisdiction to decide the case and the respondent did not object to it. This indication conforms to the requirements of Art. 7 (2) of the Law of the Russian Federation "On International Commercial Arbitration," but it was not taken into account by the City Court in considering the application to set aside the decision of ICAC at CCI RF.

The court did not check the arguments of the firm "Omegatech Electronics GmbH" that the state enterprise "Izmeritel" provided ICAC at CCI RF with a reply to the claim in which it did not contest the jurisdiction of ICAC at CCI RF to decide the dispute and asked the arbitration court to settle the merits of the case taking into account the defendant's arguments. While considering the case anew, the court should check this

argument of the claimant in the arbitration dispute, after which the court should settle the question of whether the parties actually entered into an agreement to settle the dispute at ICAC at CCI RF and, depending on that, to settle the question of satisfaction or denial of the application of the State Enterprise "Izmeritel" to set aside the decision of ICAC at CCI RF of June 21, 1996.

In such circumstances, the decision of the Moscow City Court is subject to repeal, and the case must be returned to the Moscow City Court for a new consideration.