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HARE COURT

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Recognition of foreign judgments and suspected judicial bias:

Maximov v OJSC Novolipetsky Metallurgichesky Kombinat [2017] EWHC 1911 (Comm)

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Introduction

Judgments of foreign courts have been recognised and enforced in England at common law since the seventeenth century. Reported cases as early as the 1740s show French judgments being recognised in England (*Roach v Garven* (1748) 1 Ves Sen 157), while the famous Victorian case of *Henderson v Henderson* (1843) 3 Hare 100 – best known for establishing the eponymous species of estoppel – actually concerned the recognition of a judgment of a foreign court, in Newfoundland.

Despite having been superseded between EU member states by the Brussels Regulation (formerly the Brussels Convention), the common law rules still apply to judgments from all other parts of the world, including the United States, Russia, China and other major countries. Virtually identical rules apply to enforcement between various Commonwealth and other countries, including Australia, Canada and India under two UK statutes (the Administration of Justice Act 1920 and Foreign Judgments (Reciprocal Enforcement) Act 1933).

This article sets out the common law principles on the enforcement of judgments, before illustrating some of these rules in a recent and unusual case of *Maximov v OJSC Novolipetsky Metallurgichesky Kombinat* [2017] EWHC 1911 (Comm). Although it focuses on cases from Russia, the lessons apply equally to the enforcement of judgments from any non-EU state.

Enforcement and recognition of judgments: principles

There are two concepts to consider: first recognition of a judgment and secondly, enforcement. Recognition of a foreign judgment simply involves the English court acknowledging that the foreign judgment conclusively decides a claim or issue between the parties, preventing it from being re-litigated in England. Enforcement involves the English court ordering the party against whom the foreign judgment is made ('the defendant') to pay to the other party ('the claimant') the sum of money ordered in the judgment. Thus, only foreign judgments ordering sums of money to be paid can be enforced; but many other types of foreign judgments can be recognised, including judgments dismissing a claim or resolving an issue in some other way.

In order for a foreign judgment to be enforced, certain conditions must be fulfilled:

(i) **The judgment must be for a debt or definite sum of money**. A fine or penalty will not be enforced. (If the issue is only recognition of the judgment, the judgment does not have to be for a sum of money.)

(ii) **The judgment must be final and conclusive on the merits of the case.** It cannot be an interim judgment capable of being set aside in the foreign court, but it can be subject to an appeal on the merits in the foreign court. There are two important aspects of the is rule. First, the English court will not review the foreign judgment on its merits, even if it considers it incorrect: this rule was considered in *Maximov*, discussed below. Secondly, the defendant must take all available defences in the foreign court and cannot raise new defences in England (unless there is fresh evidence which could not be obtained during the foreign proceedings): *JSC VTB Bank v Skurikhin* [2014] EWHC 271 (Comm).

(iii) **The foreign court must have had jurisdiction over the defendant**. This is considered from an English law perspective and is satisfied by any of the following factors:

- the defendant was present in the foreign state when the proceedings were started;
- the defendant brought a counterclaim in the foreign state (or the judgment is against a claimant, who brought the original claim. This is a rule of fairness: if a party brought a claim in a court he has to accept the result;
- the defendant appeared in the foreign court and took part in the case on the merits, thereby submitting to the jurisdiction;
- there was an agreement to submit to the jurisdiction of the foreign court.

If these conditions are satisfied, the judgment will be regarded as conclusive on law and fact, and capable of being recognised and enforced. There are three main defences to enforcement or recognition, which are narrowly defined:

(i) **The judgment was obtained by fraud**. The fraud can be by either a party or the court, for instance a claimant bribing witnesses to lie or bribing the judge.

(ii) **Enforcement is contrary to UK public policy**. Some common examples are:

- the foreign proceedings breached the right to a fair trial under ECHR, art. 6;
- the foreign proceedings breached essential legal principles, such as legal certainty or the principle of finality (for instance by re-opening final judgments or increasing the sum of money ordered in a previous judgment, *JSC Aeroflot Russian Airlines v Berezovsky*

[2012] EWHC 3017 (Ch), overturned on appeal [2014] EWCA Civ 20; *Merchant International Co Ltd v NAK Naftogaz Ukrainy* [2012] EWCA Civ 196, [2012] 1 WLR 3036);

- the foreign proceedings were brought in breach of a jurisdiction or arbitration agreement, or an anti-suit injunction issued to prevent them: *AK Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804; Civil Jurisdiction and Judgments Act 1982, s. 32.

(iii) **The foreign proceedings were contrary to natural justice**. This is viewed from an English-law perspective. A breach of natural justice occurs if:

- no notice of the claim is given to the defendant;
- the defendant does not have an opportunity to be heard in the foreign proceedings;
- there is a significant procedural defect according to the rules of the foreign court, which is not remedied (this must be a significant, non-technical breach which affects the justice of the case).

<u>*Maximov* and the issue of bias in foreign judgments</u>

The recent case of *Maximov* is a recent, and rather unusual, illustration of some of these principles, including the effect of recognition of a judgment (in this case, recognising a foreign judgment annulling an arbitration award) and a detailed application of the principle that the English court will not review the foreign judgment on its merits.

The defendant ('NMK') agreed a share purchase agreement ('the SPA') with Mr Maximov to buy 50% of the shares in the Maxi Group of companies, which Mr Maximov had founded. There was a dispute as to the calculation of the purchase price, which was resolved by a Russian arbitral tribunal, comprising

experienced arbitrators, who gave an award for some 8.9 billion rubles (£113 million).

NMK appealed to the Russian Arbitrazh (Commercial) Court and the Russian judge annulled the arbitral award on various grounds. This decision was upheld on appeal to the first appeal court and on paper to the Supreme Court.

Mr Maximov brought proceedings to enforce the arbitral award in England. In defending the claim, NMK sought recognition of the Russian judgments which had annulled the award.

Mr Maximov's response was that the court should not recognise the Russian judgments, because the decisions were perverse and their reasoning wholly unsupportable. Thus, Mr Maximov argued, the judges must have been biased against him. If the judges were biased, this would be a breach of the right to a fair trial, and so recognition could be refused on the grounds of public policy.

This was an unusual argument and required the English court to come close to examining the judgments on their merits. There was no evidence of actual bias by the Russian judges, the issue was whether bias could be inferred from the judgments.

Sir Michael Burton (sitting as a High Court Judge) held that it is not enough that the English court considers a foreign court judgment wrong or even perverse; the judgment will still be recognised. The decision must be so wrong that no court acting in good faith could have reached it. This is a high threshold to satisfy. The English court will examine the merits of the judgment only for the purposes of examining if it meets this threshold.

Sir Michael Burton considered the three grounds given by the Russian judges for annulling the award, which were:

(i) **Non-disclosure:** the fact that two of the arbitrators were in the same academic institutions as two of the experts instructed by Mr Maximov and were in subordinate positions. This, the Russian judges held, called into question the arbitrator's impartiality and required

annulment of the award. However, the academic connections were disclosed at the time and NMK had not objected to them. The arbitral tribunal rules required challenges to an arbitrator to be made within 15 days, or else the point would be deemed waived. The Russian judge did not apply this rule and found that challenges could not be waived and could be made later, even after the arbitration. Sir Michael Burton considered this decision wrong, as it contradicted the arbitration rules.

(ii) **Russian public policy:** the Russian judges' second ground was that the arbitrators' decision did not comply with the SPA and so breached a provision of the Russian Civil Code which states that performance of a contract is paid for at a price agreed by the parties. This, the judges held, was a breach of a fundamental Russian public policy. However, the arbitrators' award followed the SPA and the law. Even if it had not done so, the judges' decisions ignored the widespread rule in arbitration that even if arbitrators commit an error of law, that is not ground for a court to interfere with its decision. Previous Russian courts, and the first-instance judge herself had held that a breach of this provision of the Civil Code was not a breach of a fundamental rule of public policy and so did not allow interference with an award.

(iii) **Non-arbitrability:** the Russian judges found that disputes over the price in the SPA were not arbitrable, since they related to transfer of title to shares in a Russian company, which is part of the court's exclusive jurisdiction. However, this was a novel conclusion on which there was no judicial authority (although there was some academic support). The arbitration claim was simply a claim for the price, it did not relate to transfer of the shares at all. Sir Michael Burton found that this was a very thin decision with no real support.

Overall, Sir Michael Burton was very critical of the Russian judgments, finding that all three grounds were flawed and some of them were barely even

arguable. He also criticised the first-instance judge for not raising the latter two grounds with the parties at any time before her judgment.

However, crucially, he did not find that the judgments were so wrong that the only answer must be that the judges was biased against Mr Maximov. The Russian judges' serious criticism of experienced arbitrators reflected rather more their hostility to arbitration generally, rather than bias against Mr Maximov. Despite the flaws in the judgments, they were still recognised by the English court as having annulled the arbitration award. The award therefore could not be enforced.

This case provides a strong example of the rule that the English court will not refuse recognition or enforcement based on the merits of the case. Unusually, the court examined the merits of the judgments (and found them to be probably incorrect), but it only did so only to test whether the judgments were so perverse that they must have been reached by bias. When there was no bias found, the judgments had to be recognised, despite the flaws in their reasoning.