Presidium of the Supreme *Arbitrazh* Court of the Russian Federation, 30 March 2004
Case No. 15359/03[1]

Parties:	Petitioner: Interconstruction Project Management S.A. (Switzerland) Respondent: OAO Stoilensky GOK (Russian Federation)
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Articles:	I (1), IX (1)
Subject matter:	- applicability of the Convention - possibility of setting aside a foreign arbitral award in the state under the law of which, the award has been made - European Convention of 1961 - New York Convention 1958

Excerpt

[1] "OAO Stoilensky GOK appealed to the *Arbitrazh* Court of Belgorod Oblast' asking to set aside the arbitral award dated 22.02.2002, which was rendered by an *ad hoc* arbitration in Stockholm, Sweden, to levy USD 5,070,059 and EUR 48,000 from OAO Stoilensky GOK under the lawsuit of Mabetex Project Engineering S.A. (Switzerland) (beginning 26.06.2003, the company's new name is Interconstruction Project Management S.A.) and Mabetex Project Engineering Industrieanlagenplanungs und Errichtungs GmbH (Austria).

[2] "The asserted claim was maintained in the ruling of the *Arbitrazh* Court of Belgorod Oblast' dated 23.05.2003.

[3] "In a ruling dated 02.09.2003, the Federal *Arbitrazh* Court of the Central District left the award intact.

[4] "While considering the application to annul the foreign arbitral award, the courts were governed by Article 230.5 of the *Arbitrazh* Procedure Code of the Russian Federation ('*Arbitrazh* Procedure Code'),

according to which, in cases stipulated in an international agreement of the Russian Federation … a foreign arbitral award may be challenged when Russian law was applied when making an award.

[5] "The court of first instance applied the European Convention on International Commercial Arbitration (Geneva, 21 April 1961) ('European Convention') and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) as [the] international agreements which permit setting aside foreign arbitral awards, while the appellate court only considered the first of said documents. When setting aside the foreign arbitral award, the courts proceeded from the premise that the award was made on the grounds of the Russian substantive law.

[6] "In the application to reconsider the rulings [of lower instances] in exercise of supervisory powers, which was submitted to the Supreme *Arbitrazh* Court, Interconstruction Project Management S.A. (Switzerland) requested that they [rulings] be quashed, referring to the incorrect application by the lower courts of the norms of substantive and procedural law.

[7] "Having reviewed the validity of the arguments set forth in the application, the response to the application, and the presentations of the parties, the Presidium considers that the contested rulings are subject to being quashed and that the case shall be discontinued on the following grounds.

[8] "Pursuant to Article I of the European Convention, the convention is applied to the following:

[9] "a)to arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding the agreement, their habitual place of residence or their seat in different contracting states;

[10] "b)to arbitral proceedings and awards based on agreements referred to in paragraph 1(a) above.

[11] "Pursuant to the case materials, the *ad hoc* award dated 22.02.2002 … was made in Stockholm, Sweden under the Swedish Arbitration Act (SFS (1) 1999:116) regarding a dispute between Mabetex Project Engineering Industrieanlagenplanungs und Errichtungs GmbH (Austria) and OAO Stoilensky GOK (Russia), which entered into an arbitration agreement, as well as Mabetex Project Engineering S.A. (Switzerland) (beginning from 26.06.2003, the company's new name is Interconstructin Project Management S.A.), in favour of which the Austrian company assigned rights under the primary contract, and moneys were levied by the foreign *ad hoc* arbitral tribunal.

[12] "Considering that the parties to the arbitration agreement are domiciled in Austria and Russia - both are contracting states to the European Convention - the *Arbitrazh* courts came to the conclusion that the provisions of the European Convention are applicable to the *ad hoc* award rendered in Stockholm, Sweden.

[13] "However, the following was not taken into consideration by the courts.

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[1] Prepared by Roman Zykov, Hannes Snellman Attorneys, Moscow/Helsinki.

[14] "According to paragraph 1 of Article IX 'Setting aside of the arbitral award' the setting aside of an arbitral award which comes within the purview of the convention in one of the contracting states of the convention will only constitute grounds for the refusal of recognition or enforcement of this award in other contracting states of the convention only upon the condition that the setting aside of the arbitral reward took place in the state in which, or under the law of which, the award was made, and only for one of the reasons listed in the convention.

[15] "Article IX of the European Convention does not touch upon issues connected with the possibility, grounds, and method for setting aside arbitral awards by states which are not contracting states of the convention. Such issues are regulated by the domestic legislation of the corresponding states and international agreements.

[16] "The *ad hoc* award … was rendered in Stockholm, Sweden according to Swedish procedural laws. Sweden is not a contracting state of the European Convention.

[17] "The Swedish Arbitration Act of 1999 (SFS (1) 1999:116) permits setting aside arbitral awards within three months from a party receiving the award's definitive text and is applied to arbitral proceedings taking place in Sweden, [even] despite the presence of an international element in the dispute (Articles 33, 34, and 36).

[18] "Considering that the *ad hoc* award … was rendered in the territory of and under the laws of Sweden, which stipulates the possibility to set aside awards of arbitration courts made in Sweden, the *ad hoc* award concerning the given case was subject to challenge in Sweden.

[19] "The court of first instance's reference to the regulations of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) is unsound as this convention does not govern issues of setting aside foreign arbitral awards, but contains criterion for a refusal to recognize and enforce foreign arbitral awards which may be used by an interested entity to protect its interests against corresponding requirements.

[20] "Under such circumstances, the case concerning the application of OAO Stoilensky to set aside the *ad hoc* award … rendered in Stockholm, Sweden, is to be discontinued on the grounds of Article 150.1.1 of the *Arbitrazh* Procedure Code.

[21] "The contested judicial acts hinder forming a uniform practice of *Arbitrazh* courts in defining and applying the provisions of law, which is the basis for their being quashed, according to Article 304.1 of the *Arbitrazh* Procedure Code.

[22] "Considering the abovementioned and governed by Article 303, Article 305.1.4, and Article 306 of the *Arbitrazh* Procedure Code, the Presidium has hereby decreed:

[23] "to annul the ruling of the *Arbitrazh* Court of Belgorod Oblast' (the court of first instance) dated 23.054.2003 concerning Case No. A08-7941/02-18 and the Decree of the Federal *Arbitrazh* Court of the Central District dated 02.09.2003 concerning the same case and to close the judicial proceedings.

Federal *Arbitrazh* Court of the Central District, 2 September 2003
Case no. A08-7941/02-18

Parties: Petitioner: OAO Stoilensky GOK (Russian Federation)
Respondents: Mabetex Project Engineering S.A.. (Switzerland)
Mabetex Project Engineering Industrieanlagenplanungs und Errichtungs GmbH (Austria)

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- European Convention of 1961
- New York Convention 1958

Excerpt

[1] "The Federal *Arbitrazh* Court of the Central District, having, in an open judicial proceeding, considered the cassation appeal of Mabetex Project Engineering S.A. regarding the ruling of the *Arbitrazh* Court of Belgorod Oblast' dated 23.05.2003 concerning case No. A08-7941/02-18, determined:
[2] "OAO Stoilensky GOK ('OAO Stoilensky GOK') appealed to the *Arbitrazh* Court of Belgorod Oblast' with an application to set aside the foreign arbitral award dated 22.02.2002, which was rendered in Stockholm, Sweden, to levy USD 5,070,059 and EUR 48,000 from OAO Stoilensky GOK under the

lawsuit of Mabetex Project Engineering S.A. (Switzerland) (beginning 26.06.2003, the company's new name is Interconstruction Project Management S.A.) and Mabetex Project Engineering Industrieanlagenplanungs und Errichtungs GmbH (Austria).

[3] "The appeal was sustained in the ruling of the *Arbitrazh* Court of Belgorod Oblast' dated 23.05.2003.

[4] "In the cassation appeal, Mabetex Project Engineering S.A. ('Mabetex') requests to annul the ruling of the *Arbitrazh* Court of Belgorod Oblast' dated 23.05.2003 and to refuse to satisfy the application owing to the court's application of a law which is not subject to application (Article 230.5 230 of the *Arbitrazh* Procedure Code and Article IX of the European Convention on International Commercial Arbitration), the invalidity of the courts conclusions, and the incorrect application of norms of substantive and procedural laws (specifically Article 230.3 of the *Arbitrazh* Procedure Code).

[5] "A representative of Mabetex confirmed the arguments of the cassation appeal regarding the motives stated in the appeal and stated that on 26.06.2003 the name of Mabetex Project Engineering S.A. changed to Interconstruction Project Management S.A.

[6] "Representatives of OAO Stoilensky GOK requested to leave the ruling of the *Arbitrazh* Court of Belgorod Oblast' dated 23.05.2003 unchanged.

[7] "Having examined the case materials, heard explanations from the parties' representatives, and evaluated the arguments of the appeal, the appellate court does not find any grounds for satisfying the appeal.

[8] "Pursuant to the case materials, the collection of USD 5,070,059 was ordered in the arbitral award rendered in Stockholm, Sweden, dated 22.02.2002 in favour of Mabetex.

[9] "Annulling the arbitral award the *Arbitrazh* court correctly applied Article 230.5 of the *Arbitrazh* Procedure Code and Article IX of the European Convention. By virtue of Article 230.5 of the *Arbitrazh* Procedure Code, in those cases stipulated in an international agreement of the Russian Federation, a foreign arbitral award may be contested if norms of Russian laws were applied when making an award.

[10] "Arbitration proceedings were initiated on the grounds of Contract No. 810/00186862/1-001/V145 dated 12.11.92, which was executed by OAO Stoilensky GOK and Mabetex Project Engineering Industrieanlagenplanungs und Errichtungs GmbH (Austria). At the moment of executing the contract, the European Convention had entered into force and was valid both for the Russian Federation and Austria.

[11] "Therefore, according to Article I of the European Convention, it is applied to arbitration proceedings arising out of the contract at hand. In meantime, the place of arbitration is not significant as the European Convention does not contain provisions which would limit or exclude its application in cases when the place of arbitration is in a non-signatory state.

[12] "Article IX of the European Convention stipulates the possibility and grounds for setting aside an award, and such setting aside may be carried out by a court of the state under the laws of which the award was made. Therefore, the given norm of … the [European Convention] stipulates the jurisdiction of this category of claims to *Arbitrazh* courts of the Russian Federation, upon the condition that Russian law is applied when rendering a foreign arbitral award.

[13] "When rendering the arbitral award dated 22.02.2002, Russian law was applied (Clause 8.4 of the award dated 22.02.2002). The *Arbitrazh* Court of Belgorod Oblast' made a valid conclusion that the arbitrators' reference to the Swedish Arbitration Act of 1999 as an act which regulates the procedure of arbitration does not deprive OAO Stoilensky GOK of the right to appeal to an *Arbitrazh* court of the Russian Federation to set aside a foreign arbitral award. The norms of the Swedish Arbitration Act of 1999 are applied to all arbitration proceedings in Sweden … . Similar provisions are contained in the legislation of other nations and in the Law of the Russian Federation on International Commercial Arbitration.

[14] "Therefore, when rendering an arbitral award, some mandatory norms of the national legislation at the place of arbitration are always applied. Extension of such mandatory norms … does not exclude applying Article 230.5 of the *Arbitrazh* Procedure Code and Article IX of the European Convention. [Therefore], applying the norms of Russian substantive law in the award leads to the application of said [Article 230.5 and Article IX] provisions.

[15] "The jurisdiction of disputes on setting aside foreign arbitral awards by *Arbitrazh* courts of the Russian Federation was first stipulated in Article 230.5 of the *Arbitrazh* Procedure Code, which was put into force beginning 01.09.2002. In addition, Article 230.3 of the *Arbitrazh* Procedure Code establishes that an application to set aside an arbitral award, including an award of an international commercial arbitration, may be contested within 3 months from a party receiving the award. Neither the *Arbitrazh* Procedure Code, nor the Introductory Act to the *Arbitrazh* Procedure Code, defines the method for calculating the term to appeal awards received by a party before the *Arbitrazh* Procedure Code was enacted. Since the procedural possibility to contest a foreign arbitral award and, consequently, the term for contesting a foreign arbitral award were absent before 01.09.2002, according to Article 9 of the Introductory Act to the *Arbitrazh* Procedure Code, the term should be calculated from the moment the corresponding provisions of the *Arbitrazh* Procedure Code were enacted, i.e. from 01.09.2002. OAO Stoilensky GOK appealed to set aside the arbitration award on 06.11.2002, i.e. before the expiration of the three-month term stipulated in Article 230.3 of the *Arbitrazh* Procedure Code.

[16] …

[17] "According to Article 233.2.3 of the *Arbitrazh* Procedure Code, the evaluation of the award's conformity to an arbitration clause is part of the jurisdiction of an *Arbitrazh* court of the Russian Federation.

[18] "Pursuant to the case materials, Contract No. 810/00186862/1-001/V145, which contains an arbitration clause, was executed by OAO Stoilensky GOK and Mabetex Project Engineering Industrieanlagenplanungs und Errichtungs GmbH (Austria). The arbitral award dated 22.02.2002 was rendered in favour of Mabetex (Switzerland). An arbitration clause is a written agreement of the parties (Article 7.2 of the Law of the Russian Federation on International Commercial Arbitration).

[19] "Therefore, amendments and additions to the arbitration clause, as well as the approval to cede rights and obligations under the clause to a third party, should also be carried out in writing.

[20] "Article 18.8 of the contract also stipulates the obligation to receive the written approval of the other party to transfer the rights and obligations under the contract. Case materials confirm that OAO Stoilensky GOK did not provide written approval to transfer the rights under the arbitration clause to Mabetex (Switzerland) and contested the legality of Mabetex's (Switzerland) participation in the arbitration hearing during all of its stages.

[21] "Therefore, an arbitral award rendered in favour of a party which is not a party to an arbitration clause, i.e. under a dispute which is not stipulated or does not meet the conditions of the arbitration clause in an agreement is unconditional grounds for it being set aside according to Article IX(1)(c) of the European Convention.

[22] "In addition, a violation of the guiding principles of Russian laws is mentioned as one of the grounds for setting aside an arbitral award in the ruling dated 23.05.2003, and specifically the principle of equality of the parties. In the cassation appeal, Mabetex states that a violation of the guiding principles of Russian legislation when rendering an arbitral award is not, on its own account, grounds for the jurisdiction of an *Arbitrazh* court of the Russian Federation regarding disputes on setting aside foreign arbitral awards. The list of grounds for setting aside an arbitral reward stipulated in Article IX of the European Convention is exhaustive, and violation of the guiding principles of law is not mentioned in Article IX of the European Convention. However, violations during the arbitral proceedings and when rendering the arbitral award dated 22.02.2002, which were established by the court and which were the foundation for the conclusion on the award's nonconformity to guiding principles of the law (Article 233.3), are independent grounds for setting aside the award which are directly stipulated in Article IX of the European Convention. In specific, in the ruling dated 23.05.2003, a violation of the principle of equality of the parties to the process is indicated, and the court refers to facts which are grounds for setting aside an arbitral award pursuant to

Article IX(1)(b) of the European Convention– since they were established by the court based on the case materials and the attest that a party was not provided the possibility to present its case.

[23] …

[24] …

[25] …

[26] …

[27] Governed by Articles 284, 286, 287.1.1, 289, and 290 of the *Arbitrazh* Procedure Code, the court decreed to leave the ruling of the *Arbitrazh* Court of Belgorod Oblast' concerning Case No. A08-7941/02-18 dated 23.05.2003 unchanged, and to leave the cassation appeal unsatisfied. The decree enters into legal force from the day it is adopted and is not subject to appeal.