INTERNATIONAL ARBITRATION LAW

BY EMMANUEL GAILLARD

Enforcement of Arbitral Awards — The Next 'Noga' Episode

THE ENFORCEMENT of foreign arbitral awards is today widely facilitated by the ratification of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention) by a significant number of states, including the United States.

Under the New York Convention, each contracting state recognizes arbitral awards as binding and enforces them. The refusal of the recognition or enforcement of foreign arbitral awards by the courts of the host country is permissible under the restricted conditions set forth in Article V of the convention, namely irregularities internal to the arbitration (relating in particular to the existence and validity of the arbitration agreement, the conduct of arbitral proceedings or the status of the arbitral award) and grounds involving matters essential to the host country (such as the arbitrability of the dispute and the non-compliance of the award with international public policy) (see Fouchard Gaillard Goldman on International Commercial Arbitration, 1999, paras. 1666 et seq.).

A decision rendered on Sept. 19, 2002 by the Southern District of New York in the case of *Compagnie Noga d'Importation et d'Exportation v. The Russian Federation* (Mealey's International Arbitration Report, Vol. 17, #10, 10/02, page C-1) illustrates, in a questionable manner, the possibility under the New York Convention to refuse enforcement of an arbitral award on the basis of a nonexisting or invalid arbitration agreement.

The Earlier Episodes

This decision constitutes the latest in a legal saga which has been ongoing since the beginning of the 1990s. The underlying dispute arose out of two loan agreements entered into between the Swiss corporation Noga and the Russian government in 1991 and 1992. Noga commenced arbitral proceedings under these agreements in 1993, naming the Russian Federation — the successor to the Federative Socialist Soviet Republic of Russia — as the respondent, alleging that the Russian Federation had defaulted under the loan agreements. An arbitral tribunal appointed under the auspices of the Stockholm Chamber of Commerce issued two awards in February 1997 and May 1997 (the awards), ordering the Russian Federation to pay Noga more than $27 million altogether in damages and fees. The Russian Federation sought to have the second of the awards relating to fees set aside before the Swedish courts, but this action was eventually dismissed in March 1999 by the Svea Court of Appeal.

The next logical step for Noga involved obtaining enforcement of the awards in countries in which the Russian Federation held seizable assets. In particular, Noga commenced proceedings in France and in the United States.

In the French proceedings, Noga was granted enforcement of the awards in France by a decision of the Paris Tribunal de Grande Instance of March 2000. This decision was subsequently upheld by the Paris Court of Appeal in a decision rendered on March 22, 2001. An appeal by the Russian Federation to France's Supreme Court is currently pending. Despite these decisions, Noga has thus far been unable to obtain seizure of any assets belonging to the Russian Federation in France, having each time faced difficulties on the basis of the Russian state's immunity. In particular, the Paris Court of Appeal, in a decision dated Aug. 10, 2000, annulled the seizure of the bank assets of the Russian representations in France on the basis of the law of diplomatic relations. Although legitimately concerned with the effective accomplishment of diplomatic functions carried out by the Russian representations, the court failed to give effect to the waiver clause incorporated in the loan agreements and expressing the Russian state's unequivocal acceptance to submit to enforcement measures (see Emmanuel Gaillard, "The validity of enforcement measures in France against Russian Federation property pursuant to two awards by an Arbitral Tribunal appointed by the Stockholm Arbitration Institutes: the Sedov Affair and the Noga case", 2000 Stockholm Arbitration Report 119).

In parallel, Noga filed enforcement proceedings in the United States. On Jan. 27, 2000, Noga filed an action seeking confirmation and enforcement of the awards in the Western District of Kentucky in order to pursue Russian government assets such as grain and highly enriched uranium that were presumably located in Kentucky. Significantly, however, President Bill Clinton blocked the attempted attachment of the uranium by executive order. At about the same time, Noga brought an action for recognition and enforcement of the awards in the Southern District of New York to pursue Russian bank accounts located in New York state. On the Russian Federation's motion, the Kentucky action was transferred to the Southern District and consolidated with that action.

District Court Decision

Before the Southern District Court, the Russian Federation opposed enforcement of the awards, mainly arguing that the real party involved in the dispute was the Russian government, an entity distinct from the Russian Federation. Interestingly, the Russian Federation had not put forward this argument in the French action initiated by Noga for the enforcement of the awards. In fact, the Russian Federation had not raised any available ground set out in Article V of the Convention in the French proceedings.

The court denied Noga's motion to enforce the awards on the basis that they were rendered against the government of the Russian Federation and not the Russian Federation. The court stated as follows:

> That the Award uses the terms 'Government of the Russian Federation', 'Russian Federation' and 'Russia' interchangeably is of little moment. (...) Importantly, the Award does not state that the Russian Federation is responsible for the Russian Government's liabilities. Moreover, the Award and Supple-

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mental Award do not state that the Russian Federation was a party to the arbitration. (...) The circumstances attendant to the Stockholm arbitration demonstrate that the Russian Federation did not intend to arbitrate the submitted dispute. Noga named the Russian Federation in its request for arbitration. In response, the Russian Federation objected to the arbitration on the ground that the proper party was the Russian Government. (...) Rather than supporting a conclusion that the Russian Federation clearly and ambiguously intended to arbitrate the dispute, the Stockholm proceedings reveal that the Russian Federation objected to the arbitration and insisted that it was not the proper party. Ultimately, the Stockholm arbitrators issued their Awards only against the Russian Government. Accordingly, this Court cannot confirm the Awards as to the Russian Federation. (at 18-19).

Noga has appealed this decision, and, in an interesting development, has initiated a separate proceeding to have the ruling of the Paris Court of Appeal dated March 22, 2001 recognized in New York.

A Questionable Decision

The District Court's reasoning rests essentially on a distinction between the "Russian Federation" and the "Government of the Russian Federation." The court's demonstration is, however, wanting. After noting simply that "the parties agree that the Russian Government and Russian Federation are separate entities, but sharply disagree with respect to those entities' powers relative to one another" (at 14), the court, without any discussion relating to whether such a distinction could be established, determined that because the party to the arbitration clause was the "Russian Government," the "Russian Federation" could not be bound by the awards.

This determination, which is based on a correct assumption — that "a non-party cannot be bound by an arbitration award unless it clearly and unambiguously demonstrates an intent to arbitrate the submitted dispute" (at 14) — derives, however, from an erroneous deduction.

It is indeed debatable whether a distinction should be drawn between the "Russian Federation" and the "Government of the Russian Federation." First, and from a practical viewpoint, it is doubtful whether Noga could initiate an action against the "Russian Government" as a legal entity distinct from the Russian state. Secondly, and more importantly, the argument that the "Russian Federation" and the "Russian Government" are two separate entities constitutes an ex post facto reliance by the Russian state on its own internal structure in order to avoid enforcement of the awards, which is highly questionable. Similarly, a state's reliance on its own law to renege on an arbitration agreement has not been given effect in arbitral case law (for a recent example, see ICC Case No. 10623, Award of Dec. 7, 2001, 21 Bulletin de L'Asa (2003)).

The 'Framatome' Case

This solution has been long established in arbitral case law. For example, in the *Framatome* case, the arbitral tribunal held that:

> It is superfluous to add that there is a general principle, which today is universally recognized in relations between states as well as in international relations between private entities (whether the principle be considered a rule of international public policy, an international trade usage, or a principle recognized by public international law, international arbitration law or lex mercatoria), whereby the Iranian state would in any event — even if it had intended to do so, which is not the case — be prohibited from reneging on an arbitration agreement entered into by itself or, previously, by a public entity such as AEOI. The position of the current positive law of international relations is summarized well by Judge Jimenez de Arechaga (...) that a government bound by an arbitration clause — and this observation applies equally to obligations assumed directly and

Unpredictability is at odds with the purpose of efficiency underlying the New York Convention.

> those assumed through an intermediary of a public organ, as in this case — 'cannot validly free itself from that obligation by an act of its own will, for example, by a change in its internal law or by a unilateral repudiation of the contract.' (unofficial translation), Award on jurisdiction of April 30, 1982 in ICC Case No. 3896, *Framatome S.A. v. Atomic Energy Organization of Iran (AEOI)*, 111 J.D.I. 58 (1984).

In the present case, the loan agreements were entered into between Noga and, respectively, the government of the USSR (in 1991) and the government of the Russian Federation (in 1992). Different factors indicate that the party to these agreements was the Russian state. The fact that the "government" of the Russian Federation was the signatory to the agreements does not alter that fact — which was implicitly recognized by the arbitral tribunal — given that states do act through their subdivisions. As noted by the District Court, the first of the loan agreements was intended to extend "credits and loans totaling $550 million to the RSFSR (i.e., the Russian Soviet Republic) for the purchase of durable goods, consumer goods, agro-industrial products, and foodstuffs" (at 2), which indicates a public interest purpose carried out by the state. In addition, the fact that the agreements were entered into by the government of the USSR in 1991 and the government of the Russian Federation in 1992 demonstrates the

continuity of the entity which is the true party to the arbitration agreement, i.e., the Russian state acting through consecutive governments. Finally, both agreements included a wide-ranging waiver of sovereign immunity clause which, in very clear terms, specified that "the borrower waives all rights of immunity relating to the application of the arbitration award rendered against it relating to this agreement." Immunity can be invoked, or waived, by a state. It is an inherent attribute of states. The presence of the waiver clause was thus an additional indicator that the Russian state was the party to the agreements and to the subsequent arbitration.

Concept of Attributability

In determining whether the Russian Federation was bound by the arbitration agreement and the arbitral awards, the District Court's reference to the concept of attributability is equally debatable. The court observed that "[i]mportantly, the Award does not state that the Russian Federation is responsible for the Russian Government's liabilities." (at 18). However, a correct application of the concept of attributability would lead to the conclusion that the "Russian Federation" is indeed bound by the acts of the "Russian Government." Customary international law has long recognized that the conduct of any state organ shall be considered an act of that state, as shown in the codified rules of state responsibility:

> The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State. (Article 4(1), Draft articles on Responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its 53rd session (2001)).

Conclusion

Beyond the methodological criticisms it raises, this decision is a new illustration of the difficulties a private party may be confronted with in dealing with a sovereign state. Noga has thus far been unsuccessful in enforcing the awards rendered against the Russian Federation, either on the basis of a questionable recognition by the French courts of the Russian state's immunity from execution in spite of a wide-ranging waiver of that immunity, or on the basis of an equally questionable refusal by the Southern District of New York to recognize the Russian state's intention to arbitrate the submitted dispute. The resulting unpredictability of the process, which has led Noga to seek enforcement in the United States of the enforcement decision of the awards rendered in France, is at odds with the purpose of efficiency which underlies the New York Convention. It further shows that the entire regime of the law of sovereign immunities needs to be re-examined.

New York Law Journal

"Enforcement of Arbitral Awards – The Next 'Noga' Episode", *New York Law Journal*, April 3, 2003.