Netherlands No. 41, Nikolai Viktorovich Maximov v. OJSC Novolipetsky Metallurgichesky Kombinat, Provisions Judge of the District Court of Amsterdam, 491569/KG RK 11-1722, 17 November 2011

A Russian (ICAC) award was denied enforcement because it had been annulled in the Russian Federation. Although annulment decisions rendered in the country of origin may be disregarded under exceptional circumstances and with utmost caution, there was no proof here of any unacceptable – by Dutch public policy standards – violation of the principles of proper judicial procedure. Claimant's argument that Russian courts are corrupt and biased in cases involving the Russian state was not based on verifiable independent sources and did not prove that the judges had been corrupt and biased in the case at hand. Also, there was no evidence that state interests had been at stake.

41. Voorzieningenrechter [President], Rechtbank [Court of First Instance], Amsterdam, 17 November 2011, Case no. 491569/KG RK 11-1722 (1) , (2)

Parties:	Claimant: Nikolai Viktorovich Maximov (Russian Federation) Defendant: OJSC Novolipetsky Metallurgichesky Kombinat (Russian Federation)
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Summary

On 22 November 2007, Nikolai Viktorovich Maximov (3) and OJSC NLMK Metallurgichesky Kombinat (NLMK) entered into a Purchase Agreement under which Maximov sold 50 percent plus one of his

Author

Albert Jan van den Berg

Jurisdiction

Netherlands

Court

Provisions Judge of the District Court of Amsterdam

Case date

17 November 2011

Case number

491569/KG RK 11- 1722

Parties

Claimant, Nikolai Viktorovich Maximov Defendant and Appellant, OJSC Novolipetsky Metallurgichesky Kombinat

Key words

award set aside
discretion to enforce set aside award

Applicable legislation

New York Convention

shares in the capital of OJSC Maxi-Group to NLMK at a price calculated on the basis of a formula laid down in the Purchase Agreement. The Purchase Agreement contained a clause for arbitration of disputes at the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC).

A dispute arose between the parties when NLMK, after making an advance payment of RUR 7,329,840,000.00 on 10 January 2008, failed to pay the remainder of the purchase price. On 22 December 2009, Maximov commenced ICAC arbitration as provided for in the Purchase Agreement, seeking payment of the balance of the shares' purchase price. NLMK filed a counterclaim, seeking repayment of part of the advance payment on the purchase price. On 31 March 2011, an ICAC arbitral tribunal directed NLMK to pay RUR 8,928,001,875.70 to Maximov and denied its counterclaim.

On 7 April 2011, NLMK filed an action with the *Arbitrazh* (Commercial) Court in Moscow, seeking annulment of the award. The request was granted on 21 June 2011. This decision was affirmed by the Federal *Arbitrazh* Court in Moscow on 26 September 2011. At the time of the present decision, an appeal against this decision could still be filed with the Supreme *Arbitrazh* Court.

In turn, Maximov sought to enforce the ICAC award in the Netherlands. He first obtained pre-judgment attachment of NLMK's shares in the capital of NLMK International B.V., a Dutch company, then filed a request for leave to enforce the award.

By the present decision, the president of the Amsterdam Court of First Instance denied Maximov's request, finding that the award had been set aside in the Russian Federation and as a consequence there was a ground for refusal under Art. V(1)(*e*) of the 1958 New York Convention, to which both the Netherlands and the Russian Federation are signatories.

Maximov argued that leave for enforcement can be granted even if the award has been set aside, if the annulment decision cannot be recognized in the Netherlands. Here, the Russian decisions annulling the ICAC award could not be recognized because they were rendered in proceedings “tainted by dependence, bias, corruption and other procedural irregularities”. The same was to be expected by any cassation decision of the Supreme *Arbitrazh* Court.

The court reasoned that the Russian courts were the “competent authority” to annul the award under the New York Convention – the award was rendered in *page "275"* Russia in an entirely Russian context – so that in principle their decision should be respected. However, the court was of the opinion that the fact that an award is annulled in the country of origin should not lead to a refusal of enforcement under all circumstances. Under the New York Convention, the enforcement court can ultimately decide on the basis of its public policy whether the annulment decision can have effect. “Utmost caution”, however, should be used: “the (in and of itself undesirable) consequence … that an annulled arbitral award does not have the same status in all countries” can be accepted only under exceptional circumstances.

In the present case, Maximov failed to prove that the principles of proper judicial procedure were unacceptably disregarded, by Dutch standards, in the annulment proceedings. Maximov's argument that

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Source

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the Russian courts are and have been for many years overwhelmingly corrupt and biased, particularly in proceedings involving the Russian state, was not based on verifiable independent sources and in any case it was not proven that this was the case in the proceedings at issue here. Also, there was no evidence that the Russian state had an interest in the present case: rather, NLMK's shares were partly listed on the London Stock Exchange and otherwise held by a majority shareholder whose interconnection with the Russian state was not proved.

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Excerpt

I. The Parties' Requests

[1] "[Maximov] requests the president [*voorzieningenrechter*] to grant:

– *principally*, recognition and leave for enforcement of the arbitral award under Art. 1075 Dutch Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering – Rv) and the [1958 New York Convention], with immediate effect;
– *subsidiarily*, recognition and leave for enforcement of the arbitral award under Art. 1075 Rv and the New York Convention if Maximov is not given, within five Dutch working days after service of the ruling to [NLMK], an irrevocable bank guarantee
  (1) issued by a Dutch bank;
  (2) for an amount of € 264,000,000.00;
  (3) to be enforced if on 7 April 2011 the request for annulment of the arbitral award filed by [NLMK] before the Russian civil courts
    (i) is not pursued;
    (ii) is wholly or partially granted by the Russian courts and NLMK does not ask the competent Dutch civil court to recognize that decision within one week of the decision having become final, or if NLMK does not pursue that recognition request, or if the Dutch civil court wholly or partially denies that recognition request, or declares that it lacks jurisdiction to rule on the recognition request, or if NLMK's recognition request is declared inadmissible, and
  (4) to be issued if a decision of the Dutch civil court recognizing a final decision of the Russian civil court fully annulling the arbitral award has become res judicata;
– *principally and alternatively*, [to direct] NLMK to bear the costs of the proceedings (pursuant to Art. 289 Rv) and the costs of the pre-judgment attachment (pursuant to Art. 706 Rv), with immediate effect.

[2] "NLMK raises a defence. It concludes, *principally*, that Maximov's request should be denied; *subsidiarily*, that a decision on the enforcement of the arbitral award should be adjourned until such time as a definitive decision has been rendered in the annulment proceedings in the Russian Federation and in the proceedings referred to in the statement of defence, in which NLMK is claiming damages from Maximov. NLMK further requests [the court]: (a) if the

court decides to adjourn the decision on the enforcement of the arbitral award, to rule that [NLMK] shall not provide any security; (b) if the court decides not to adjourn the decision and grants leave for the enforcement of the arbitral award to Maximov, to rule that Maximov, before he proceeds to enforcement, shall provide NLMK with security for the entire amount that NLMK must pay to Maximov under the arbitral award, so that NLMK can recover this amount from Maximov when the arbitral award is definitively annulled in the Russian Federation or NLMK's claims against Maximov in the other proceedings in the Russian Federation are granted or recognized; and (c) to direct Maximov to pay the costs of the proceedings, within fourteen days of the decision, failing which Maximov shall be in default by operation of the law.

[3] "These arguments and defences will be discussed hereafter insofar as relevant to the examination."

II. Discussion

[4] "The [court] agrees with the parties that the request must be examined under the 1958 New York Convention, to which both the Netherlands and the Russian Federation are signatories.

[5] "Art. XVI(1) of the Convention states that 'the Chinese, English, French, Russian and Spanish texts shall be equally authentic'. [Quotation of Art. II(1) and Art. IV of the Convention "in the (authentic) English text" omitted.] The court finds that Maximov has complied with the requirements of Art. IV Convention.

[6] "[Quotation of Art. V(1)(*e*) omitted.] NLMK first argues the following in its defence. Since the *Arbitrazh* (Commercial) Court in Moscow has set aside the arbitral award (and the Federal *Arbitrazh* Court in Moscow has affirmed the ruling of the *Arbitrazh* Court), it follows from Art. V(1) preamble and (*e*) of the Convention that Maximov's request should be denied. This provision does not leave the exequatur court room for any other decision.

[7] "NLMK refers in this connection, inter alia, to the (authentic) French text of Art. V(1) preamble and (*e*) Convention ('*ne seront refusées, que si cette partie fournit … la preuve*'), and to a decision of the Common Court of Justice of the Netherlands Antilles and Aruba of 10 March 2009 (LJN: BH9584). [It says that] there is no room for a (substantive) assessment by the exequatur court of the correctness of the ruling of the *Arbitrazh* Court in Moscow and the judgment of the Federal *Arbitrazh* Court in Moscow. Furthermore, the objections of Maximov to the ruling and the judgment are unfounded, and the ruling will therefore also be affirmed in cassation for that reason, according to NLMK.

[8] "Maximov argues the following in reply to the above. The 1958 New York Convention does not concern the international recognition of decisions in civil courts that annul or set aside arbitral awards. A Dutch court shall therefore simply grant leave for the enforcement of an annulled arbitral award if the foreign ruling that has annulled the arbitral award cannot be recognized in the Netherlands. If the ruling of the foreign court that annulled the arbitral award cannot be recognized in the Netherlands, this means that when examining the petition for granting leave for enforcement of the arbitral award the ruling annulling that arbitral award cannot be taken into account. This is the case here. NLMK has not sought recognition of the ruling annulling the arbitral award in the Netherlands, and even if it did,

recognition would have to be refused by the Dutch court.

[9] "[Maximov argues that] the proceeding in which the award was annulled by the *Arbitrazh* Court in Moscow (as affirmed by the Federal *Arbitrazh* Court in Moscow) was tainted by dependence, bias, corruption and other procedural irregularities, and for these reasons cannot be recognized in the Netherlands either now or in the future. Those proceedings did not satisfy the requirements of, inter alia, Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Art. 14 of the International Covenant on Civil and Political Rights of the United Nations (ICCPR). Furthermore, the ruling is based on incorrect grounds, or at least on grounds that cannot lead to annulment of the award. The decision of the Federal *Arbitrazh* Court in Moscow (the reasons for which are not yet known) will not be any better, and the annulment can be expected to be upheld in cassation as well, again according to Maximov. Maximov refers to the judgment of the Amsterdam Court of Appeal in *Yukos Capital v. Rosneft* of 28 April 2009 (LJN: BI2451).

[10] "The court points out that the underlying dispute concerns a dispute between a Russian national, Maximov, who also resides in the Russian Federation, on the one side, and a company under Russian law, NLMK, which is registered in the Russian Federation, on the other side. The subject matter of the dispute concerns the sale of a Russian company. In the contract regulating that sale, the parties chose for Russian law and voluntarily submitted to arbitration by a Russian arbitral tribunal in the Russian Federation.

[11] "This means that the parties thereby also (voluntarily) subjected themselves to the ordinary Russian courts in respect of the possible annulment of the arbitral award, and that the ordinary Russian courts (in this case the *Arbitrazh* Court in Moscow) are the 'competent authority' [English original] under Art. V(1)(*e*) Convention; this is not disputed by the parties. Seen in this light, the dispute falls in principle entirely within the Russian legal context.

[12] "Only because NLMK holds (or at least held) assets in the Netherlands, namely the shares in NLMK International B.V., and Maximov has levied a pre-judgement attachment on these shares, does this court have jurisdiction to hear Maximov's request for the recognition and enforcement of the arbitral award pursuant to Art. 1075 Rv.

[13] "In the system of the 1958 New York Convention, the 'competent authority' in the country in which, or under the law of which, the arbitral award was rendered (in this case the ordinary Russian courts), decides under its national law on (the formal and material aspects of) requests for the annulment of arbitral awards. In principle, the exequatur court may not examine this decision. The starting point is thus that the arbitral award has been annulled by the *Arbitrazh* Court in Moscow (the 'competent authority'), and consequently no longer exists. In principle, this decision (upheld by the Federal *Arbitrazh* Court in Moscow) must be respected when examining the request at hand.

[14] "'In principle', however, because unlike NLMK the court is of the opinion that the fact that the arbitral award was annulled in the country of origin should not lead to a rejection of the application for leave for enforcement under all circumstances. Otherwise than argued by NLMK, the court is of the opinion that also under the system of the New York Convention the exequatur court can

ultimately determine for itself on the basis of its own national public policy – although with the utmost caution – whether the ruling by which the arbitral award was annulled can be given effect. There is room elsewhere in the Convention for the exequatur court in the country where the enforcement is sought to carry out a review on the basis of its own national public policy (see for example Art. V(2)(*b*) Convention).

[15] "In the court's opinion, leave for the enforcement of an arbitral award that has been annulled by the 'competent authority' can be granted only under exceptional circumstances, because only then can the (in and of itself undesirable) consequence be accepted that an annulled arbitral award does not have the same status in all countries.

[16] "All of this means that the court shall deny the operation of the ruling of the *Arbitrazh* Court in Moscow that annulled the arbitral award (and was upheld on appeal) only if (insofar as relevant here) the enforcement of the ruling annulling the arbitral award would violate Dutch public policy, for example because the annulment ruling was rendered in proceedings in which by Dutch standards the principles of proper judicial procedure were unacceptably disregarded.

[17] "In the present case it does not appear in a sufficient manner that such exceptional circumstances exist. Further, it should once more be pointed out that by his choice for arbitration under Russian law Maximov willingly and knowingly chose to have possible disputes concerning the legal relationship between him and NLMK dealt with by the Russian courts.

[18] "Maximov later argued – with the support of reports – that the state judiciary in Russia has been overwhelmingly corrupt and biased for many years, certainly in proceedings where the Russian state is involved as an interested party.

[19] "Even if this argument were to be accepted as being true in general terms, this would not mean, however, that the judges who dealt with the case (in first instance and on appeal) were corrupt and biased in this concrete case, and that the decisions that led to the annulment of the arbitral award were rendered in unacceptable violation of the principles of proper judicial procedure.

[20] "Even if, as Maximov argues, it must be accepted in light of the judgment of the Amsterdam Court of Appeal of 28 April 2009 referred to above (*Yukos Capital v. Rosneft*) that the judicial authorities in Russia are not impartial and independent in cases involving interests which the Russian state considers to be its own, but makes decisions based on the interests of the Russian state and is instructed by the executive authorities, Maximov has failed to provide sufficient concrete facts and circumstances which can support the conclusion that this was also the situation in this case.

[21] "Maximov does argue that NLMK should be deemed as being equivalent to the Russian state, or at least that there are close links between NLMK and the Russian state, but he does not support his argument with facts in a sufficiently concrete manner, against NLMK's reasoned challenge.

[22] "The established facts actually show the opposite. The shares of NLMK are partly listed on the London Stock Exchange, and otherwise held by V.S. Lisin (Lisin). It has not been argued nor

proven that the Russian state holds shares in NLMK. Maximov also does not support with facts in a sufficiently concrete manner his argument that the interests of Lisin, the majority shareholder of NLMK, are intertwined with the Russian state, and that the influence and power of Lisin is such that he can influence judicial proceedings. The statements quoted by Maximov as evidence for this interconnection came (directly or indirectly) from Maximov himself or advisers engaged by him. He further refers to newspaper articles (e.g., from the Scottish newspaper The Scotsman), internet pages, and other public sources that cannot be independently substantiated. Only the report of the European Centre for International Political Economy cited by Maximov can be deemed to be a verifiable independent source, but the statement in that report – 'Minority shareholder rights continue to be fragile. Recently this has been exemplified in court battles between metals magnates in the Maxi-Group/NLMK cases…. Powerful majority shareholders aim to force minority shareholders to sell out their shares at lower prices, or to be driven out of the company through declaration of bankruptcy.' [English original] – is too general in order to support Maximov's argument that up to the highest court he will not have a fair hearing before an independent and impartial court in the annulment proceedings at hand.

[23] "It must be concluded, therefore, that Maximov has provided insufficient evidence to substantiate a close link between NLMK, or at least Lisin, and the Russian state and that – partly for that reason – the annulment proceedings were biased and therefore took place (and shall continue to take place) in violation of the principles of proper judicial procedure.

[24] "Furthermore, Maximov has only submitted objections to the ruling of the *Arbitrazh* Court in Moscow, the ruling in first instance. These objections concern both procedure and contents of and reasons for the ruling. Since all these objections can or could have been upheld on appeal, strictly speaking they do not have to be taken into consideration here. However, the objections that Maximov submitted in respect of the proceedings before the *Arbitrazh* Court in Moscow also are insufficient to support the conclusion that by Dutch standards the principles of proper judicial procedure were unacceptably disregarded . This also applies for Maximov's objections concerning the contents of and reasons for the ruling of the *Arbitrazh* Court in Moscow. Since that ruling is prima facie neither incomprehensible nor unfounded, these objections also cannot lead to the conclusion that the recognition of the annulment ruling in the context of the present proceedings would violate Dutch public policy.

[25] "Although the judgment of the Federal *Arbitrazh* Court in Moscow, which annulled the arbitral award on appeal, has not yet become res judicata because an appeal can still be lodged with the Supreme Court [English original] in Moscow, the court agrees with the parties' assumption (see [at [6]-[9]] above) that any (possible) appeal to be filed by Maximov against the judgment of the Federal *Arbitrazh* Court will be rejected. This means that it can be assumed for a decision on the present request that the arbitral award has been definitively annulled by the 'competent authority'.

[26] "On the basis of the considerations above, Maximov's principal and subsidiary requests are therefore refused. The other arguments and defences of the parties do not need to be discussed."

III. Decision

[27] "The court directs Maximov, as the losing party, and as requested by NLMK, to bear the costs of the proceedings….

[28] "The court: (1) denies the request; (2) directs Maximov to bear NLMK's costs of the proceedings up to today's date, estimated at € 1,015.00, to be paid within fourteen days of today's date."

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[1] The General Editor wishes to thank Mr. Marnix A. Leijten, The Hague, for his invaluable assistance in providing this decision and translating it from the Dutch original.

[2] *Note General Editor*. The President of the *Rechtbank* (Court of First Instance) is now called the "*Voorzieningenrechter*" which may be translated literally as "interim measures judge" or "provisional measures judge". Since it is still customary in the context of international arbitration in the Netherlands to use the term "President of the Court of First Instance", this terminology has been retained.

[3] The name of the claimant is not indicated in the decision as published online.