Service of process on a Russian defendant by e-mail. International treaties on legal assistance in civil and family matters and new technologies

Written by Alexander A. Kostin, Senior Research Fellow at the Private Law Research Centre (Moscow, Russia) and counsel atAvangard law firm

and Valeria Rzyanina, junior associate, Avangard Law Firm

The Decree of the Arbitrazh (Commercial) Court of the Volga District of December 23, 2019 N F06-55840 / 2019 docket numberN A12-20691 / 2019, addresses service of process on the Russian party by the Cypriot court by e-mail and thus the possibility of further recognition of a foreign judgment.

1. Factual background

1.1. Within the framework of the court proceedings, the Russian party (the defendant in the Cypriot proceedings) was notified by the Cypriot court by sending a writ of service of process to the known e-mail addresses of the defendant. In order to substantiate the manner of service, the Cypriot court referred to Art. 9 of Decree 5 of the Rules of Civil Procedure (Cyprus), according to which "In any case, when the court considers that, for any reason, the service provided for in Rule 2 of this Decree will not be timely or effective, the court may order a substitute for personal service, or other service, or substitute for a notice of service in any way that will be found to be fair and correct in accordance with the circumstances".

1.2. After the default judgment of the Cypriot court was rendered, an application for its recognition was lodged with the Arbitrazh Court of the Volgograd Region. In addressing the issue of compliance with the notification rules, the Russian court referred to paragraph 2 of Art. 24 of the Treaty on Legal Assistance of the USSR-Cyprus 1984 on civil and family matters, according to which judgments are

recognized and enforced if the party against whom the judgment was made, who did not appear and did not take part in the proceedings, was promptly and duly notified under the laws of the Contracting Party in the territory of which the judgment was made. The foreign judgment in question was recognized and enforced by the Russian court based on the fact that the proper manner of the notification was confirmed by the opinion of experts under Cypriot law. The Ruling of the Supreme Court of the Russian Federation of March 27, 2020 N 306-ES20-2957 in case N A12-20691 / 2019 left the acts of the lower courts unchanged.

2. Analysis of the Decree of the Arbitration Court of the Volga District of December 23, 2019 N F06-55840 / 2019 in the case N A12-20691 / 2019

2.1. At first glance the logic of the Supreme Court and lower courts appears to be flawless. Nevertheless we find it important to correlate the provisions of paragraph 2 of Art. 24 of the 1984 Legal Aid Treaty with the provisions of Art. 8 of the Treaty. Article 8 requires that: "the requested institution carries out the service of documents in accordance with the rules of service in force in its state, if the documents to be served are drawn up in its language or provided with a certified translation into this language. In cases where the documents are not drawn up in in the language of the requested Contracting Party and are not provided with a translation, they are handed over to the recipient if only he agrees to accept them. "

2.2. In this regard, it should be taken into account that when using the wording "notified under the laws of a Contracting Party," the Treaty States simultaneously tried to resolve the following situations:

1) where the parties were in the state of the court proceedings at the time of the consideration of the case. In this case, the national ("domestic") law of the State in which the dispute was resolved shall apply;

2) where the parties were in different states at the time of the consideration of the case. In this case, the provisions of the relevant international treaty shall apply, since the judicial notice is [a] subject to service in a foreign state and, therefore, it affects its sovereignty.

2.3. In this regard, attention should be paid to the fact that under the doctrine and case law of the countries of continental law, the delivery of a judicial notice is

considered as an interference with the sovereignty of the respective state. The following are excerpts from case law. Excerpts from legal literature are provided for reference purposes:

1. a) “The negotiating delegations in The Hague faced two major controversies: first, some civil law countries, including Germany, view the formal service of court documents as an official act of government; accordingly, they view any attempt by a foreign plaintiff to serve documents within their borders as an infringement on their sovereignty ” – Volkswagen Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988);
2. b) “The exclusive competence to carry out acts of state power on its own territory follows from the sovereignty of states. As a rule, a state cannot perform actions of this kind within the borders of another state without violating its sovereignty and, therefore, without violating international law. An act is compatible with this right only if it is permitted by a specific international regulation, for example, if it is agreed in a treaty concluded between the states concerned, or if it is unilaterally accepted by the state in which it is carried out. When the notification is given abroad without permission under international law, this notification is invalid under Swiss domestic law due to its supremacy – Decision of the Swiss Federal Court of 01.07.2008 in case No. BGer 4A_161 / 2008.
3. c) “According to the traditional German law approach, delivery is considered to be an act of sovereignty.”- Rasmussen-Bonne H-E., The pendulum swings back: the cooperative approach of German courts to international service of process P. 240;
4. d) “From prospective of the Japanese state, certain judicial acts of foreign courts, such as the service of court notices and the receipt of evidence, are considered as a manifestation of sovereignty.”- Keisuke Takeshita, “Sovereignty and National Civil Procedure: An Analysis of State Practice in Japan,” Journal of East Asia and International Law 9, no. 2 (Autumn 016): 361-378

2.4. In light of the above, the interpretation of the Treaty on Legal Assistance of the USSR-Cyprus 1984, according to which a party located in the territory of Russia is subject to notification in accordance with Art. 8 of the Treaty, seems to be preferable.

We welcome further discussion on this intricate matter.