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Federal Court Rejects Russian Team's Attempt to Prevent Hockey Sensation Ovechkin from Playing in the NHL

By Peter J.W. Sherwin and Steven Holinstat

The Washington Capitals and their star player, Alexander Ovechkin, can breathe easier after receiving the Jan. 18, 2006, decision by Judge Emmet G. Sullivan of the U.S. District Court for the District of Columbia.

In his well-reasoned decision, Judge Sullivan dismissed a petition to enforce an arbitral award rendered by the Arbitration Committee of the Russian Ice Hockey Federation that would have forced Ovechkin to make the Hobson's choice of either sitting on the sidelines and not playing hockey in the National Hockey League this season after relocating to the United States or moving back to Russia to play for a team and a league he left to further his career. The judge's ruling put an end to the attempts by Ovechkin's former Russian team to secure Ovechkin's services or to obtain compensation from the Capitals so that Ovechkin could continue to play for them in the United States.

Although this is obviously a tremendous victory for Ovechkin, personally, as well as for the Capitals, the NHL and fans, it does not foreclose the RIHF or any other foreign or international sports association from establishing mandatory contractual arbitration regimes that could be used to erect significant (if not nearly insurmountable) obstacles to a player's ability to move to a different league.

This article details the facts relevant to Ovechkin's situation that allowed him to leave the RIHF for the NHL, analyzes the legal issues that were presented by the case and highlights areas that lawyers and players alike should be wary of in future situations.

Dynamo's pre-arbitration efforts to get money from the Capitals

As anyone following professional ice hockey knows, Ovechkin is a fast-rising star. He played in the World Junior Championships in 2003, 2004 and 2005, the World Championships in 2004 and 2005, the World Cup of Hockey in 2004 and the Olympics in 2006. In fact, at the Turin Olympics, he scored the winning goal in Russia's quarter-final win over Canada and was one of most dynamic players on the ice. At the 2005 World Junior Championships, held in the United States, Ovechkin was named the top forward and also earned a silver medal.

Since starting for the Capitals this season, he was twice named rookie-of-the-month because of his prowess on the ice. He scored 52 goals in his rookie season. He was third in the league in goals and points and is the favorite to win the NHL's rookie-of-the-year award.

Ovechkin's relationship with the Capitals started dramatically a year and a half ago when they selected him as the No. 1 overall pick in the 2004 draft. Unfortunately, the 2004-2005 NHL season was canceled. Thus, while he waited for the lockout to end so that he could come to the United States and play with the Capitals, Ovechkin played that season for Moscow Dynamo, the club in the Russian Professional Hockey League where he had previously played.

Ovechkin's contract with Dynamo expired by its express terms on April 30, 2005. The RIHF and the

RPHL, however, had implemented a matching system, allowing Russian teams the opportunity to try to hang on to their players. To exercise its matching rights, the old team must offer to re-sign a player at a higher salary within a specified period after the conclusion of the player's contract.

Once such an offer is made, the player can elect to: (a) accept the offer; (b) reject the offer and not play hockey that season; or (c) reject the offer and accept an offer from a different team, but subject to a catch. The catch in the last option is that the old team can purportedly match the financial terms of the contract with the other team and thereby force a new contract with the player for that season.

Once Ovechkin's contract with Dynamo ended, Dynamo offered Ovechkin a new contract at a higher salary for the 2005-2006 season. Ovechkin, however, refused the offer because he did not want to play for Dynamo any longer. Rather, Ovechkin anticipated that for the 2005-2006 season he would play for the Capitals if the labor negotiations were successful and, if they were not, he would play for a different Russian team, Avangard Omsk.

So, on June 30, Ovechkin entered into a contract with Omsk for the 2005-2006 season that would go into effect on July 21 unless Ovechkin gave notice by July 20 that he was going to accept an offer from an NHL team. In that event, the contract would be null and void. This "null and void" provision was very important to Ovechkin. On July 1, though, Dynamo purported to exercise its claimed right to match the Omsk contract, though it did not match the very significant "null and void" provision. Dynamo rationalized its failure to match the "null and void" provision by characterizing it as a nonfinancial term.

Ovechkin rendered all of that moot. As it was widely reported on July 14, 2005, that the NHL and the NHL Players Association had reached a deal on a new collective bargaining agreement, Ovechkin decided that he was going to contract with the Capitals and play with them starting with the 2005-2006 season. Thus, on July 20, he delivered to Omsk a written notice that he would contract with the Washington Capitals and therefore exercised his right to terminate the contract and render it null and void. Omsk accepted the notice, acknowledged that the contract was null and void and wished Ovechkin success with the Capitals.

On July 22, Ovechkin's decision was covered in the Russian sports press. As part of that coverage, Dynamo acknowledged that it did not have a contract with Ovechkin and expressed no concern or desire to have Ovechkin play for Dynamo. Rather, it repeatedly lamented the problems it would face in demanding significant compensation from the Capitals in the absence of Russia being a signatory to the International Ice Hockey Federation agreement with the NHL regarding transfer payments.

Ovechkin then went forward, brought his family from Russia and arrived in Washington on Aug. 31. He started training camp with the Capitals on Sept. 12 and played several exhibition games with them. Ovechkin and the Capitals began the regular season on Oct. 5 and Ovechkin scored two goals in the Capitals' opening game.

Dynamo's arbitration against Ovechkin

It was not until Oct. 6, 2005, that Dynamo finally commenced the underlying arbitration before the Arbitration Committee of the RIHF and the RPHL. That standing internal body is comprised of six individuals, all of whom are appointed by the RPHL and RIHF and not by the parties. The arbitral hearing in the proceeding against Ovechkin took place on Oct. 20 and Ovechkin did not participate.

Dynamo's statement of claim alleged that it had an enforceable agreement with Ovechkin for the 2005-2006 season, that Ovechkin had violated that contract by playing for the Capitals and requested that Ovechkin be enjoined from playing for any team other than Dynamo. The next day, Oct. 21, the Arbitration Committee issued its award, which parroted back the allegations in Dynamo's statement of claim and then granted Dynamo everything it had demanded, including an injunction preventing Ovechkin from playing for any team other than Dynamo.

As an interesting side note, the Arbitration Committee issued its award against Ovechkin despite the serious concerns of the Russian Superleague Council and Dynamo's public acknowledgment, that that body was partisan and lacked independence. With that pressure, on Oct. 28, the Executive Committee of the RIHF formally decided to replace the members of the Arbitration Committee and new members were confirmed on Nov. 14 and started their term on Dec. 1. However, that was clearly too little too late to be of any assistance to Ovechkin.

In the month following the award, Ovechkin continued to play with the Capitals. By mid November, he was 11 weeks into the season (including the pre-season), had scored a notable 15 goals and 21 points in 20 regular-season games and was being widely heralded as a prime candidate for rookie-of-the-year honors. Indeed, on Nov 15, he had his biggest game of the year to-date. It was a home game at the MCI Center against the defending Stanley Cup Champion Tampa Bay Lightning and he scored late in the game and then won the game on a shootout goal. The next day, Ovechkin was in the world-wide sports press for his performance on the ice.

On Nov. 18, two days after that remarkable press coverage and one month after the award was issued,

Dynamo finally filed a petition in the U.S. District Court for the District of Columbia to confirm and enforce the award.

The legal issues presented in the ease

This action presented two legal issues of first impression in the District of Columbia of significance to international arbitration in general, as well as to international sports in particular. The first issue was whether a federal court has subject-matter jurisdiction to hear a petition to confirm a foreign arbitral award in the absence of a signed written agreement consenting to arbitrate or its equivalent. The second issue was what is sufficient to constitute an equivalent to a signed agreement. All of this is under the rubric of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the Convention).

Overview of the Convention

For those unfamiliar with the Convention, we provide the following general background. Early U.S. jurisprudence frowned on and refused to enforce arbitration agreements and arbitral awards. This changed domestically with Congress' enactment of the Federal Arbitration Act (FAA) in 1925, which provided for enforcement of agreements to arbitrate in the United States and awards rendered in arbitrations that took place in the United States. The FAA, however, does not apply to foreign arbitral awards.

In the late 1950s, due in part to an ever-increasing growth in international trade, the United Nations facilitated the creation of the Convention, which provides a set of rules governing the procedure for the recognition and enforcement of foreign arbitral awards. The United States eventually ratified the Convention in 1970 and Congress enacted implementing legislation, codified as Chapter II of the FAA, providing jurisdiction in federal courts for actions and proceedings falling under the Convention.

The Convention contemplates two types of proceedings: (1) an action to compel arbitration following an arbitration agreement falling under the Convention; and (2) an action to confirm an award following an arbitration agreement falling under the Convention. The Convention, however, does not provide for wholesale recognition and enforcement of all foreign arbitral awards. Rather, the Convention includes specific safeguards to ensure that the awards it will recognize and enforce fall within the scope of the Convention and were the result of due process and basic fairness.

With respect to enforcement actions, a court's analysis begins with Article IV of the Convention — and, by incorporation, Article II — which identifies the requirements a petitioner must satisfy for a court to have subject-matter jurisdiction to enforce the arbitral award. To comply with Article IV(1), the petitioner must supply at the time of the application a certified copy of the award and the agreement to arbitrate referred to in Article II of the Convention. The agreement to arbitrate "referred to in Article II" must, among other things, be "in writing," which is defined to be "in an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

If the party seeking enforcement meets its Article IV burden, then the burden shifts to the respondent to overcome the presumption of a valid arbitration agreement and award by establishing grounds for one or more of the seven enumerated affirmative defenses set out in Article V of the Convention. The Article V defenses to enforcement of a foreign arbitration award reflect the Convention's concern regarding due process and the fairness of the arbitral procedure.

Specifically, the first set of exceptions, listed in Article V(1), cover: (a) the validity of the arbitration agreement; (b) the propriety of the respondent's notice; (c) the scope of the arbitration agreement; (d) the composition of the arbitral body; and (e) whether the award was vacated in the country where it was made.

The second set of defenses, listed in Article V(2), emphasizes the issues of the fairness of recognizing the award in the country where enforcement is sought. Article V(2) further permits courts to refuse to enforce a foreign award if: (a) the award covers something not subject to arbitration in the country where recognition is sought; or (b) the arbitration or award violates the public policy of the country where recognition is sought.

Surprisingly, there is very little case law surrounding the application of the Convention to sports-related arbitrations and we found no prior reported case seeking to enforce a foreign arbitral sports award, let alone one purporting to enjoin a player from playing for another league. Thus, the Ovechkin situation was one of first impression in the United States and the request for injunctive for relief by Dynamo was novel.

Enforcing a foreign arbitral award

The issue of whether the existence of an agreement to arbitrate is a prerequisite to a court's subject-matter jurisdiction to confirm a foreign arbitral award has been the subject of some recent controversy among the federal circuits. Prior to 2005, the federal courts ruling on this issue, including the Second Circuit, held that a federal court did not have subject-matter jurisdiction over a petition either to compel a foreign arbitration or to enforce a foreign arbitral award absent an agreement to arbitrate complying with Article II of the Convention.

In April 2005, however, a panel of the Second Circuit in *Sarhank Group v. Oracle Corp.*, purported to abrogate an earlier ruling by another panel in *Kahn Lucas Lancaster Inc. v. Lark Int'l Ltd.*, noting in a footnote that "to the extent that Kahn Lucas is read as viewing an element of a claim as a jurisdictional requisite, the absence of which deprives the court of subject-matter jurisdiction, it is contrary to prior holdings of this court [] and has been subsequently contradicted..." The court in *Sarhank* went on to discuss the absence of a valid agreement to arbitrate as an Article V affirmative defense to enforcement.

In the instant case, Ovechkin made several powerful arguments that *Sarhank* was not applicable or was wrongly decided and Judge Sullivan ultimately agreed that an agreement to arbitrate is, in fact, a jurisdictional prerequisite to a court's subject-matter jurisdiction to hear a petition to enforce an award under the Convention. However, besides the *Ovechkin* decision, there has only been one other reported case that addressed the issue and it also did not follow *Sarhank*. Notwithstanding these two recent district court rulings, this remains very much an open issue, particularly for cases brought within the Second Circuit.

This is of great practical importance. Subject-matter jurisdiction arguments can be readily briefed and generally stay discovery as well as the hearing on the fact-intensive affirmative defenses. Thus, being unable to raise the existence of an agreement to arbitrate as a threshold issue of subject-matter jurisdiction means that the respondent must go forward with time-consuming and expensive discovery and must wait to raise this argument at the hearing along with its affirmative defenses.

Did Dynamo have a cognizable agreement to arbitrate?

Having determined that a valid agreement to arbitrate is a prerequisite to a federal court's subject-matter jurisdiction, the court was next tasked with determining whether Dynamo actually had such an agreement that covered the issue of whether Ovechkin was obligated to play the 2005-2006 season for Dynamo.

Article II of the Convention requires an agreement in writing, which is defined to include "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." Thus, Article II of the Convention envisions that the typical arbitration clause will be contained in a single agreement and signed by both parties. However, no such agreement existed between Ovechkin and Dynamo. The Dynamo contract for the 2004-2005 season had expired by its terms on April 30, 2005, and the contract Dynamo was seeking to create and enforce for the 2005-2006 season had not been signed by anyone.

Apparently given this problem, Dynamo was vague in its statement of claim before the Arbitration Committee, as well as in its petition to the district court, as to the exact basis for the Arbitration Committee's jurisdiction to hear and resolve Dynamo's claim. Given Dynamo's *de facto* control over the Arbitration Committee, this lack of clarity presented no problem for the arbitrators.

However, to avoid dismissal of its petition before the district court where Dynamo held no such sway, Dynamo argued a written agreement to arbitrate from a patchwork of documents attached to its petition in the hopes of creating an "exchange" of documents under Article II of the Convention.

In sum, Dynamo requested that the court imply an agreement to arbitrate based on the following documents: (a) the expired contract between Ovechkin and Dynamo for the 2004-2005 season; (b) Ovechkin's signed contract with Omsk for the 2005-2006 season; and (c) Dynamo's unilateral offer to match the financial terms of that agreement. These documents allegedly showed Dynamo's exercise of its option rights, which Dynamo claimed resulted in a new contract with Ovechkin for the 2005-2006 season.

In analyzing this argument, Judge Sullivan stated that he was "aware of no alchemical formula that can transform an expired contract, Dynamo's unilateral matching offer and Ovechkin's signed contract with a third party into a 'definite and seasonable expression of acceptance' by Ovechkin of Dynamo's offer to play for that team for the 2005-2006 season. To the contrary, Dynamo's patchwork of documents, without more, persuasively supports the argument that Ovechkin wished to end his relationship with Dynamo once and for all."

The court's refusal to imply an agreement to arbitrate by operation of law in the absence of Ovechkin's consent closed an important gap in U.S. law interpreting Article II of the Convention in connection with petitions to confirm foreign arbitral awards.

Lessons to be learned from the Ovechkin matter

The court's decision reinforces the fundamental notion that U.S. courts are reluctant to bind parties to foreign arbitral awards absent the party's manifest agreement to arbitrate the dispute at issue. That is not only consistent with the plain language of Article II of the Convention, but also comports with basic principles of due process and fairness.

Had this case not been dismissed for lack of subject-matter jurisdiction, the unique facts here would nonetheless have provided Ovechkin with several affirmative defenses, including among others, that: (a) the Arbitration Committee was corrupt or biased; (b) the award would have violated the public policy of the United States; and

(c) the award was defective under Russian law. However, those types of affirmative defenses are costly to litigate and are traditionally extremely difficult to prove.

Notably, the result here may have been very different had Dynamo sought to litigate — as opposed to arbitrate - its underlying claim in a Russian court and thereafter seek enforcement of a Russian judgment in the United States. Indeed, Judge Sullivan did not foreclose the possibility that, "under Russian contract law, the parties agreed to a 2005-2006 contract and, in doing so, to arbitration. Rather, the court makes the narrow determination that the documents identified by Dynamo and the Arbitration Committee do not satisfy Article II's requirement that there be an 'agreement in writing' under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship."

It would not be surprising if Judge Sullivan's decision resulted in a flurry of activity in sports associations around the world to make sure that arbitration awards rendered by their respective internal bodies conform to the Convention to ensure, to the maximum extent possible, enforceability in the international arena.

Peter Sherwin is a partner at Proskauer Rose. He represented Alexander Ovechkin in the case brought by Moscow Dynamo. Steven Holinstat is an associate at the same firm and was integrally involved in the Ovechkin matter. Both are in the firm's New York City office. Their e mails are psherwin@proskauer.com and sholinstat@proskauer.com.

Endnotes

1 *Moscow Dynamo v. Ovechkin*, — F.Supp.2d—, 2006 WL 120339 (D.D.C. Jan. 18, 2006).

2 The only two cases involving sports arbitration awards that even reference the Convention involved affirmative attempts by athletes to overturn arbitration decisions suspending them for violating drug policies and neither were brought under the Convention, let alone for enforcement and recognition of an award. In *Reynolds v. Int'l Am. Athletic Fed'n*, the Sixth Circuit dismissed the athlete's action for lack of personal jurisdiction over the international sports organization. 23 F.3d 1110 (6th Cir. 1994). And in *Slaney v. Int'l Am. Athletic Fed'n*, the Seventh Circuit affirmed the district court's dismissal of the athlete's state law-contract and tort claims against the international sports organization. 244 F.3d 580 (7th Cir. 2001).

3 *See Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005); *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286 (11th Cir. 2004); *Kahn Lucas Lancaster Inc. v. Lark Int'l Ltd.*, 186 F.3d 210 (2d Cir. 1999); *Guang Dong Light Headgear Factory Co., Ltd. v. ACI Int'l Inc.*, 2005 WL 1118130 (D. Kan May 10, 2005); *Consorcio Rive, S.A. De C.V. v. Briggs of Cancun Inc.*, 134 F. Supp. 2d 789 (E.D. La. 2001), aff'd, 82 Fed. Appx. 359 (5th Cir. 2003); *Compagnie D'Enterprises CFE, S.A. v. Republic of Yemen*, 180 E. Supp. 2d 12 (D.D.C. 2001); *Lo v. Aetna Int'l Inc.*, 2000 WL 565465 (D. Conn. March 29, 2000); *Bothell v. Hitachi Zosen Corp.*, 97 F. Supp. 2d 1048 (WD. Wash. 2000); *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907 (D.D.C. 1996).

4 *Sarhank Group v. Oracle Corp.*, 404 F.3d 657 (2d Cir. 2005).