NEWSLETTER

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CROSS-BORDER LITIGATION ISSUES FROM A RUSSIAN PERSPECTIVE

RECIPROCITY & COMITY FROM A RUSSIAN PERSPECTIVE

1. General overview

The main principle of recognition and enforcement of foreign judgments and arbitration awards executed in relation to commercial disputes arises from Article 241 of *the Arbitrazh (Commercial) Procedural Code of the Russian Federation* (the "**APC**")[1], which states that foreign judgments and arbitration awards are recognized and enforced in Russia if such is **provided for by an international treaty of the Russian Federation and Russian federal law**.

Russia is a signatory to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "**New York Convention**"), which regulates the process of recognition and enforcement of arbitration awards, thus making it fairly straightforward. However, there is no such applicable "global" treaty for enforcing foreign court judgments in Russia. Though, since 2009 Russian courts showed a "pro-enforcement" tendency with foreign court judgments.

The principles of reciprocity and comity are not expressly stated in Russian procedural legislation. However, the latest trend in cases where there are no bilateral treaties on foreign judgment enforcement Russian courts rely upon (1) the international principle of reciprocity and comity, and (2) international treaties stipulating a person's right to a fair and public hearing before an independent and impartial court.

2. Rentpool Case

The first "pro-enforcement" case, in which the Supreme Arbitrazh Court of the Russian Federation (the "**Supreme Commercial Court**") affirmed reasoning based on the reciprocity principle, is believed to be *Rentpool B.V. v. Podiemnye Tekhnologii LLC* of 2009 ("**Rentpool Case**").

The Supreme Arbitrazh Court therein held that a foreign judgment may be enforced in Russia on the basis of international law principles of "reciprocity and comity" even where there does not exist a relevant bilateral treaty on foreign judgment enforcement. In other words, the court confirmed that a judgment, executed in a state that itself enforces Russian judgments, should be enforceable in Russia, subject only to the limited defenses set out in Article 244 (1) of the APC.

[1] Article 241 (1) of the APC: "Judgments of foreign courts, rendered in disputes and other cases arising in a course of entrepreneurial and other economic activity (foreign courts), awards of arbitration tribunals or of international commercial arbitration courts, rendered on territories of foreign states in disputes and other cases, arising in a course of entrepreneurial and other economic activity (foreign arbitration awards), are recognized and enforced in the Russian Federation by commercial courts, if the recognition and enforcement of such judgments and awards is provided for by an international treaty of the Russian Federation and federal law".

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Rentpool B.V. ("**Rentpool**"), a Dutch company, entered into a lease contract with a Russian company, Podyemnyie Tekhnologii LLC ("**PT**"), to which it had leased equipment. The contract was regulated by Dutch law and was subject to the jurisdiction of the District Court of Dordrecht (the "**Dutch Court**"). When PT defaulted on its lease payment obligations, Rentpool terminated the contract and sued PT, demanding that PT provides Rentpool with information about the equipment, returns the equipment to the offices of Rentpool, and pays for Rentpool's legal costs. The Dutch Court granted the requested relief to Rentpool, and Rentpool thereafter filed an enforcement application with the Arbitrazh Court of Moscow District (the "**First Instance Court**").

On June 8, 2009 the First Instance Court enforced the Dutch Court's judgment, notwithstanding the fact that there was no relevant bilateral treaty between the Netherlands and Russia[2]. The court granted Rentpool's application on the following grounds:

- Russia is a party to a number of international treaties stipulating a person's right to a fair and public hearing before an independent and impartial court. Particularly, the court referred to the provisions of Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms dated November 4, 1950 (the "**European Convention on Human Rights**").
- On June 24, 1994 Russia concluded with a number of European countries, including the Netherlands, the Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part (the "**1994 Partnership Agreement**"). Under the 1994 Partnership Agreement, Russia has assumed an obligation to ensure non-discriminatory access of individuals and legal entities of other contracting states to the competent court.
- Recognition and enforcement of foreign court judgments is mandated by the general international law principle of reciprocity even where there are no treaties. According to Article 15 (4) of the Russian Constitution, generally recognized principles of international law constitute an integral part of the Russian legal system. The international principle of reciprocity, originating from the principle of international comity, is widely interpreted as a rule providing mutual cooperation by states in recognizing rights and interests of individuals, which can be stipulated not only by foreign law provisions but also by a judgment of a foreign court.
- In the end, the court was further persuaded by the observation that the laws and courts of the Netherlands do permit enforcement of Russian judgments in the Netherlands - an argument that was supported by an expert opinion from a Dutch Law firm Loyens & Loeff which Rentpool presented to the court.

Notably, a similar approach was also expressed earlier in a famous case from 2006 - *BNP Paribas S.A. and other creditors v. NK Yukos OGSC* ("**Yukos Case**")[3]. However, the decision in the Yukos Case was widely considered to be unusual and politically motivated. In any case, after the Rentpool Case, we can be more confident that Russian courts are more likely than before to take the pro-enforcement stance. This is evidenced in the 2012 decision on *Boegli-Gravures S.A. v. Darsail-ASP LLC and Mr. Pyzhov* ("**Boegli-Gravures Case**")[4], which enforced a judgment of the High Court of England & Wales against Russian respondents on the basis of reciprocity and applicability of the European Convention on Human Rights and the 1994 Partnership Agreement.

3. Burden of proof of reciprocity

However, notwithstanding the fact that in Yukos Case, Rentpool Case and Boegli-Gravures Case, the courts relied upon the applicability of European Convention on Human Rights, 1994 Partnership Agreement and international principle of reciprocity, it is notable that in all three cases the applicants had filed "evidence of reciprocity," which were experts' opinions on foreign law and/or official confirmations of reciprocity established by a foreign court.

[2] Ruling by the Arbitrazh Court of Moscow District of June 08, 2009 in case No. A41-9613/2009.
[3] Resolution by the Federal Arbitrazh Court of Moscow Circuit of February 22, 2006 No. KG-A40/698-06-P in case No. A40-53839/05.
[4] Resolution by the Federal Arbitrazh Court of Moscow Circuit of April 19, 2012 in case No. A40-119397/11.

They demonstrated that Russian court judgments are enforceable in that foreign jurisdiction where the enforcing judgment was executed.

In turn, in 2008 (before the Rentpool case but already after Yukos case), in the case *Mr. Portnik v. NPO Alternativa LLC and others"*[5] the Supreme Commercial Court refused to enforce a decision of the Circuit Court of the City of Tel Aviv-Yafo (Israel), basing its conclusion *inter alia* on the fact that no evidence of reciprocity with regard to the enforcement of Russian court judgments in Israel was presented to the First Instance Court and there was no relevant treaty between Russia and Israel. A similar approach was stated as *obiter dicta* in 2008 regarding reciprocity between the USA and Russia in the case *"Pan Am Pharmaceuticals Inc. v. Ministry of Health of the Russian Federation"*[6].

Certainly, Israel and the USA are not members to the European Convention on Human Rights or the 1994 Partnership Agreement, but a question is why Russian courts did not apply the principle of reciprocity as a generally recognized principle of international law. It appears that some risk indeed remains with regard to enforcement of judgments issued in countries which are not members of the Council of Europe and European Communities and do not have agreements with Russia providing enforcement of foreign judgments. In such circumstances, we strongly believe that an applicant should present "evidence of reciprocity," which would demonstrate that Russian court judgments are enforceable in that foreign jurisdiction where the judgment-to-be-enforced was issued.

By this time only two cases are known when judgments issued in the USA were enforced in Russia. However, these cases do not represent an established precedent court practice due to the following reasons.

The first case was heard in 2011 when a judgment rendered in the State of New York of the USA was enforced in Russia exclusively on the basis of the reciprocity principle. However, in this case the Russian debtor did not appear before the court and, consequently, did not argue. Also the judgment was rendered only by the First Instance Court in Moscow and was never challenged. It means that it was not reaffirmed by supervising instances[7].

In the second 2012 case the First Instance Court in Moscow, Russia enforced a court judgment rendered in the State of California of the USA, but *inter alia* mistakenly relying upon the Partnership Agreement to which the USA are not party to. The Second Instance Court cancelled the enforcement but on the grounds of lack of notification of the defendant regarding the hearings in California and lack of evidence of legal status of the claimant presented to the court, without saying a word about the Partnership Agreement[8].

Taking into account that Russia is a civil law country where judicial precedents do not have the force of law except for precedents adopted by the Constitutional Court and Supreme Courts, these two cases do not constitute established court practice which we can undoubtedly rely upon. Unless the similar decisions are reaffirmed by the Russian Supreme Courts we will stay on a position that some risk still remains with regard to enforcement of judgments issued in countries which are not members of the Council of Europe, European Communities and (or) do not have agreements with Russia providing enforcement of foreign judgments.

4. Interim Relief from a Russian Perspective (by the example of "Teorema case of 2010")

The right to file a motion in Russian court for securing assets in support of foreign court proceedings is not expressly provided for by the APC. Article 90 (3) of the APC provides for applications for interim measures only in support of arbitration proceedings but not foreign court proceedings. However, recent court practice demonstrates that Russian courts are ready and able to order injunctive relief in support of disputes litigated abroad.

[5] Ruling by the Supreme Arbitrazh Court of the Russian Federation of May 19, 2008 No. 5105/08 in case No. A40-73830/2006.
[6] Resolution of the Federal Arbitrazh Court of Moscow Circuit of September 09, 2008 No. KG-F40/7229-08 in case No. A40-7480/2008.
[7] Decision by the Arbitrazh Court of Moscow City of December 01, 2011 in case No. A40-99438/11-69-854.
[8] Resolution of the Federal Arbitrazh Court of Moscow Circuit of February 06, 2013 in case № A40-99083/2012.

Such was observed for the first time when in July 2010 in the case *Finisterre Recovery Fund 1 Limited (Cayman Islands) and others v. Teorema Holding Plc. (Cyprus)*, wherein the Federal Arbitrazh Court of North-West Circuit (the "**Second Instance Court**") stated that Russian commercial courts may order interim relief in support of disputes litigated abroad[9].

Finisterre Recovery Fund 1 Limited and a group of creditors ("**Creditors**") filed a claim with the Circuit Court of Limassol City (the "**Cyprus Court**") against Teorema Holding Plc. ("**Teorema**"), requesting the winding-up of Teorema due to its default in bond repayment in an amount of more than USD 157 mln. Simultaneously, the Creditors requested the Cyprus Court to order injunctive relief by which Teorema was to be prohibited from (1) performing any actions towards disposal of any of its assets, including shares it owned in two Russian companies – Teorema-Terminal LLC and Quartal Krasnyie Zori LLC – or to encumber its assets in any possible manner, and (2) exercising its voting rights in relation to the shares it owned in any companies, including Teorema-Terminal LLC and Quartal Krasnyie Zori LLC, if such voting could lead to the disposal or diminishing of Teorema's or its subsidiaries' assets. The Cyprus Court granted the requested interim relief to the Creditors.

However, since orders of interim relief executed by foreign courts are not enforceable in Russia as a matter of law, the Creditors filed a similar motion with Russian commercial court of first instance in St. Petersburg (the "**First Instance Court**"), basing its motion on the fact that Teorema has shares in two Russian companies – both of which are located in St. Petersburg, Russia[i]. In January 2010 the First Instance Court dismissed the motion, stating that, according to direct interpretation of Article 250 of the APC[10], Russian commercial courts are empowered to consider motions for interim relief only in disputes involving foreign entities, which are themselves subject to the jurisdiction of Russian commercial courts.

On July 29, 2010 the Second Instance Court reversed the First Instance Court's holding and remanded the case for a new trial. The Second Instance Court also provided the following guidance for the First Instance Court:

- Since injunctive measures require quick implementation and, on the other hand, quick cancellation if the grounds for them have since expired, then they shall be granted by a "court of effective jurisdiction";
- The jurisdiction of a dispute itself might not be the same as the jurisdiction where interim measures may need to be implemented;
- And, finally, if a foreign dispute is of a commercial character, a Russian commercial court is empowered to grant interim relief in support of that foreign dispute litigated abroad.

This reasoning was adopted by the First Instance Court, and on August 16, 2010 the requested injunctive measures were granted in favor of the Creditors. This is a significant case which shows the Russian courts' increasingly propitious attitude in support of cross-border disputes.

However, the default rule that interim relief executed by foreign courts is not enforceable in Russia still remains unchanged. Though this rule is not expressly stated in Russian procedural law, it was articulated by the Supreme Commercial Court in its Information Letter No. 78 of July 07, 2004[11]. The main reason provided by the court was that orders of interim relief cannot be enforced within the territory of the Russian Federation because they are not final court judgments on the merits of a dispute. The APC provisions do not provide for enforcement of foreign court judgments other than for final judgments on the merits of a dispute

[9] Resolution by the Federal Arbitrazh Court of North-West Circuit of July 29, 2010 in case No. A56-95127/2009.
[10] Article 250 of the APC: "In cases with a participation of foreign persons and entities, referred to the competence of commercial courts in the Russian Federation in conformity with Chapter 32 of this Code, the commercial court in the Russian Federation may apply interim measures in accordance with the rules, provided for by Chapter 8 of this Code".
[11] The Information Letter by the Presidium of the Supreme Arbitrazh Court No. 78 of July 07, 2004: "Overview of practice of implementation of interim measures by arbitrazh courts".