

Enforcement of Foreign Arbitral Awards in Russia

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1. Brief Introduction to Russia's Legal System

a. Russian Legal System

Russia is a civil law country. The Constitution of the Russian Federation is considered the supreme law of the land.¹ Statutes are the predominant legal source of Russian law, and may only be enacted through the legislative process. Codes are the basis for law on any matter, and they are usually supplemented with legislation to develop certain provisions.

b. Russian Judiciary

Russia has three separate and distinct court systems: 1. Courts of General Jurisdiction; 2. Arbitrazh (Commercial) Courts; and 3. Russian Federation Constitutional Courts. Each court has its own appellat structure.²

1. Courts of General Jurisdiction, headed by the Supreme Court of the Russian Federation, adjudicate criminal and administrative cases, labor disputes and civil disputes between private citizens. If a constitutional issue arises during litigation, the issue is referred to the Constitutional Courts.³

2. Arbitrazh⁴ (Commercial) Courts, headed by the Supreme Arbitrazh Court, are commercial courts that have jurisdiction over commercial

¹ Arina V. Popova and Lev S. Solovyev, *A Guide to Legal Research in Russia*, New York University Law School, July 2006, available at http://www.nyulawglobal.org/globalex/russia_legal_research.htm#_Toc133571074.

² *Id.*

³ *Id.*

⁴ Russia has a system of commercial courts, which is called "Arbitrazhniye sudy." This Russian term is often translated to English as "arbitration courts." "This translation may be misleading in that arbitration courts are not a system of arbitration with the parties consenting to have their claims heard by an arbitrator. It is a system of special state courts with compulsory jurisdiction over commercial and some administrative disputes. From this perspective, they may be called commercial courts." Danilenko, Burnham, *Law and Legal System of the Russian Federation*, 61-62 (1999). To avoid the confusion between state commercial courts and commercial arbitration institutions, the author is using the literal translation of the Russian term "arbitrazh courts".

disputes between business entities, which may include individuals engaged in business.⁵

3. The Constitutional Courts, headed by the Constitutional Court of the Russian Federation: handle disputes between the executive and legislative branches and between Moscow and the regional and local governments. Also rule on violations of constitutional rights and handle appeals and impeachments.⁶ The main function of the Constitutional Court of the Russian Federation is to resolve issues with regard to the compliance of laws and regulations with the Constitution of the Russian Federation.

2. Enforceability of U.S. and Canadian Foreign Judgments and Awards in Russia

Under the Russian system, the procedure to enforce awards and foreign judgment is similar and is described in the New Commercial Procedural Code of the Russian Federation (CPC) if filing in the *arbitrazh* courts.⁷ The enforcement procedure is governed by the Civil Code of the Russian Federation if filing in a court of general jurisdiction.

Foreign judgments and awards must be enforced within three years from their entry into legal force.⁸

The CPC entered into force on September 1, 2002, and has significantly broadened the scope of the provisions governing recognition and enforcement of foreign judgments and arbitral awards. The new CPC includes a new Chapter 31 (Articles 241-246)⁹ which applies to judgments of foreign courts on commercial and other economic-related matters, as well as foreign awards of *ad hoc* arbitration tribunals (*treteiskie sudy*) and international commercial arbitration tribunals on the same matters.

Judgments and awards are recognized and enforced in the Russian Federation by *arbitrazh* courts only if their recognition and enforcement is provided by an international

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Maxim Kulkov, *Enforcing International Arbitration Awards in Russia*, The Moscow Times, Mar. 13 2007. Available at http://www.apostille.us/news/enforcing_international_arbitration_awards_in_russia.shtml.

⁹ Titled "Proceedings in Matters on the Recognition and Enforcement of Foreign Court Judgments and Foreign Arbitral Awards" and including Articles 241-246.

agreement to which the Russian Federation is a party¹⁰ or by a federal law. Such statutes are specific to the act that the creditor seeks to enforce.

a. Statutes and Rules That Provide For the Enforceability of Foreign Judgments

Foreign judgments are recognized and enforced pursuant to statute law as stated in the CPC and in the Civil Procedural Code of the Russian Federation.

A foreign court judgment may be enforced in Russia only if the judgment has been recognized by a Russian court.¹¹ Russian courts will only recognize a judgment that is supported by a relevant International Treaty or, in certain cases, reciprocity. Despite the lack of direct regulation, Russian courts may recognize and enforce foreign court judgments on the basis of international comity.¹² International comity and reciprocity have not been codified in any statute, but they have both been invoked by *Arbitrazh* (Commercial) Court of the Moscow District in March 2006.¹³ The reasoning was based on the provisions of the 1950 European Convention on Human Rights, as well as Article 15 of the Russian Constitution which states that “commonly recognized principles and norms of the international law and international treaties of the Russian Federation shall be a component part of its legal system.”¹⁴

Russia is not a party to Lugano Convention¹⁵ on jurisdiction and the enforcement of judgments in civil and commercial matters. European Council Regulation No. 44/2001¹⁶ on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters that substituted the Brussels Convention is also not applicable in Russia.

¹⁰ The Russian Federation is also a party to a number of bilateral agreements on the recognition and enforcement of court judgments and treaties on judicial cooperation with Argentina, China, Estonia, Greece, India, Italy, Latvia, Lithuania, Poland, Spain and other countries.

¹¹ On International Commercial Arbitration, Law of the Russian Federation (July 7, 1993) [hereinafter “ICA Law”] (stating that “An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced”).

¹² Alexander Vaneev, *New Perspectives for Business Litigation in Russia*, *The European Lawyer*, September 2007. Available at: www.magisters.com.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Lugano Convention – Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters done at Lugano on 16 September 1988, available at: <http://curia.europa.eu/common/recdoc/convention/en/c-textes/lug-idx.htm>.

¹⁶ Council Regulation No.44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters adopted by the Council of European Community on 22 December 2000, available at: http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33054_en.htm.

Russia is party to more than 30 bilateral treaties on legal assistance in civil and related matters which provides the rules of enforcement of foreign courts' judgments within the jurisdiction of Russia. Such treaties have been concluded with CIS countries, several Asian and African states and with the most of Eastern Europe countries. However, Russia has not concluded any such treaties with Eastern Europe states or the U.S. and Canada, and therefore it is very hard to enforce in Russia judgments awarded by state courts of those countries.

b. Statutes and Rules That Provide For the Enforceability of US and Canadian Arbitral Awards

Russia is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention" or "the Convention"), which was ratified by the Soviet Union on August 10, 1960 and entered into force on November 2, 1960.¹⁵ The Russian Federation has entered the following reservations: that it will apply the Convention only to recognize and enforce awards made in the territory of another contracting State; and that with regard to awards made in the territory of non-contracting States, it will apply the Convention only to the extent to which those States grant reciprocal treatment.

In order for an award to be enforced, it must be recognized by a Russian court.¹⁶ The award must be for a dispute whose subject matter involves economic or business matters because Russian courts do not recognize awards that are not subject to arbitration under Russian law.¹⁷ Russian law explicitly provides that the recognition and enforcement of an arbitral award can be granted only if a respective treaty or statutory rule exists.¹⁸

Russia's main domestic law on international arbitration is the law "On International Commercial Arbitration," ("ICA Law") adopted July 7, 1993.¹⁹ Article 35 of the ICA Law states that "an arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this Article and of Article 36."²⁰ The CPC governs proceedings before national commercial courts.

Additionally, Article 12 of the Agreement between Canada and the Russian Federation on Trade and Commerce of December 29, 1992 allows for "Persons of the Russian Federation,

¹⁵ United Nations Commission on International Trade Law, *Status*, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

¹⁶ ICA Law, Article 35.

¹⁷ ICA Law, Article 1(2).

¹⁸ ICA Law, Article 35.

¹⁹ ICA Law.

²⁰ ICA Law, Article 35(1).

on the one hand, and persons of Canada, on the other hand [...] to settle disputes arising out of commercial transactions by arbitration [...] in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), adopted in 1976.”²¹ This may include arbitrations in other countries who were party to the New York Convention. Furthermore, “[t]he persons of Canada and of the Russian Federation shall enjoy access to the courts of the other Party on the same basis as persons of any third country.”²²

The Bilateral Investment Treaty between the Russian Federation and the United States has only been ratified by the US, and not by the Russian Federation.²³ If the treaty came into full force, it would allow for “the right to third party international arbitration in the event of a dispute between a US investor and the Russian government.”²⁴

c. Set-aside Of Arbitral Awards

The grounds for refusal of recognition and enforcement of an arbitral award are contained in Article V of the New York Convention and Article 36 of the 1993 ICA Law.

According to the ICA Law, Article 36, recognition of arbitral awards may be refused only:²⁵

1. At the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition is sought, proof that:
 - a. One of the parties to the agreement was under some incapacity, the agreement is not valid under the law to which the parties subjected it or under the law of the country where the award was made;
 - b. The party against whom the award is invoked was not given proper notice of the appointment of an arbitrator, or of the arbitral proceedings, or was otherwise unable to present his case;
 - c. If the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.
 - d. If the composition of the tribunal or arbitral procedure was not in accordance with the agreement of the parties, or failing such

²¹ Canada-Russian Federation Bilateral Investment Treaty, June 27, 1991.

²² *Id.*

²³ Anders Aslund, Testimony before the Committee on Financial Services, Subcommittee on Domestic and International Monetary Policy, Trade, and Technology, US House of Representatives

October 17, 2007, *available at*: <http://www.iie.com/publications/papers/print.cfm?doc=pub&ResearchID=844>.

²⁴ *Id.*

²⁵ ICA Law, Article 36.

agreement, was not in accordance with the law of the country where the arbitration took place;

- e. If the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.

2. If the court finds that:

- a. The subject matter of the dispute is not capable of arbitration under the law of the Russian Federation;²⁶ or
- b. The recognition or enforcement of the award would be contrary to the public policy of the Russian Federation.²⁷

The parties may further waive the right to arbitration, which would stand as grounds for non-enforcement of an award.²⁸

Russian courts have refused to recognize and enforce foreign arbitral awards under Article V(2)(b) of the New York Convention and Article 36(1)(2) ICA. This provision is also confirmed by in Article 233(3)(2) of CPC. The Federal *Arbitrazh* Court of the Moscow Region has given some light on the interpretation of the public policy exception in its Resolution of April 3, 2003, where it held that “international arbitration awards will violate the fundamental principles of the Russian law (public policy) if its execution leads to activities, forbidden by the law, or damaging the sovereignty or security of the state, or involving large scaled social groups, or not corresponding to principles of economical, political and legal systems of the state, or involving constitutional personal rights and freedoms, or contradictive to general principles of legislation, such as parity of parties, immunity of property, freedom of agreement.”

²⁶ Article 1(2) of the ICA law states that the following may be referred to international commercial arbitration:

(i) Disputes arising from contractual and other civil law relationships arising in the course of foreign trade and other forms of international economic relations, provided that the place of business of at least one of the parties is situated abroad;

(ii) Disputes arising between enterprises with foreign investment, international associations and organizations established in the territory of the Russian Federation;

(iii) Disputes between the participants of such entities;

(iv) Disputes between such entities and other subjects and the law of the Russian federation

²⁷ The courts have set aside judgments of a punitive instead of compensatory character under public policy grounds – however, the notion of contractual penalty for the breach of contract is known to the Russian legal system as “shtrafnaya neustoika” Presidium of the High Arbitrazh Court of the Russian Federation (Jan. 22, 2008). Furthermore, procedural infringements in arbitral proceedings have no relevance to the notion of public policy CLOUT Case 146: Moscow City Court (Nov. 10, 1994). In another case, an award was enforced in accordance with public policy, even though the plaintiff did not have the foreign currency for the award, though the court noted that competent courts could adjust how the award would be enforced. CLOUT Case 149: Moscow City Court (Sept. 18, 1995).

²⁸ ICA Law, Article 4.

3. *Fora in Which Enforcement May Be Sought*

Under the new CPC, *arbitrazh* courts have sole authority to decide whether specific foreign court judgments or foreign arbitral awards on economic matters are to be recognized and enforced (Article 241) in Russia.²⁹

Additionally, *arbitrazh* courts have reserved exclusive jurisdiction over the following matters:

1. Cases on privatization and cases that concern state property;
2. Cases on real estate that is situated in Russian territory;
3. Cases on patent law and disputes over trademarks;
4. Cases involving disputes over inefficiency of records in State Registers;
5. Cases that concern a legal entity's establishment, liquidation, registration on Russian territory;
6. Cases concerning insolvency disputes;
7. Cases involving disputes arising from decision of the executive bodies of corporate entities;
8. Cases regarding family, employment, housing, and inheritance law disputes.³⁰

Moreover, under Article 248 CPC *arbitrazh* courts have exclusive jurisdiction on commercial cases involving foreign parties. The courts of general jurisdiction have only residual jurisdiction on other matters related to the recognition and enforcement of foreign judgments and arbitral awards.

Enforcement is more likely to be granted in cases from countries with which Russia maintains a close diplomatic relationship. Russia has maintained close diplomatic relationships with the courts of the United States and Canada, as well as other countries (including Germany, France, Great Britain, Finland, Denmark, Belgium, and China).³¹

²⁹ Popova and Solovyev, *supra* note 1.

³⁰ ICA Law, Article 36.

³¹ Arbitration Courts of the Russian Federation, *International Jurisdiction and Cooperation*, Courts of the Russian Federation, available at <http://www.arbitr.ru/eng/int/> (last visited June 2, 2008).

Foreign judgments and awards must be enforced within three years from their entry into legal force.³² The enforcement procedure is governed by the CPC if filing in the *arbitrazh* courts³³ and by the Civil Code of the Russian Federation if filing in a court of general jurisdiction.

a. Applicable Procedure

The main procedural rules to seek the enforcement of a foreign judgments or awards are as follows:

- Article 241 CPC sets out the general conditions for the recognition and enforcement of foreign court judgments and foreign arbitral awards. It provides that a party that received a favorable judgment from a foreign court or arbitrator must first obtain leave from a competent court for the recognition and enforcement of the judgment in accordance with the terms established by the relevant international treaty, agreement or domestic legislation of the country in which enforcement is being sought. The actual enforcement of the judgment within the framework of the domestic enforcement proceedings are governed by the rules of the 1997 Federal Law on Enforcement Proceedings.
- Article 242 CPC provides that a petition for recognition and enforcement of a foreign court judgment or arbitral award is filed by the award creditor with an arbitrazh court where the debtor has his domicile or residence, a petition may also be filed with a court where the debtor's property is located.
- Article 243 CPC states that a petition is considered by a single judge in front of the parties within one month. The failure of the parties to appear, however, does not prevent a hearing of the petition. The facts forming the basis of proof are established depending on whether the question concerns recognition and enforcement of a foreign court judgment or a foreign arbitral award.
- Article 243 (4) CPC provides that *arbitrazh* courts are not entitled to review the merits of a foreign court judgments or foreign awards, since it is final and entered into legal force.
- Article 244 CPC enumerates the general conditions for a refusal (in whole or in part) of recognition and enforcement of a foreign court judgment. These apply unless

³² Maxim Kulkov, *Enforcing International Arbitration Awards in Russia*, The Moscow Times, Mar. 13 2007. Available at http://www.apostille.us/news/enforcing_international_arbitration_awards_in_russia.shtml.

³³ *Id.*

1. The judgment, according to the law of the state on whose territory it was rendered, has not entered into legal force;
2. The party against whom the judgment has been rendered was not informed on a timely basis or in the proper manner of the time and place of the hearing or was, for other reasons, unable to submit its evidence (testimony) to the court;
3. The consideration of the case, in accordance with an international treaty of the Russian Federation or a federal law, falls under the exclusive competence of a court in the Russian Federation;
4. There exists a judgment of a Russian court that has entered into legal force on a dispute between the same parties on the same cause of action;
5. Proceedings in a Russian court in a dispute between the same parties on the same cause of action was initiated prior to initiation of proceedings in a similar action in a foreign court, or the Russian court was the first to accept a petition in the dispute between the same parties on the same cause of action;
6. The statute of limitations on enforcement of a foreign court judgment has expired and has not been reinstated by an arbitration court;
7. The enforcement of a foreign court judgment would contravene public policy in the Russian Federation. Specifically, the Supreme *Arbitrazh* Court stated that awards issued in violation of the principles of good faith and equity or based on counterfeit documents will be not be enforced and may be dismissed.³⁴

Under Article 245 of the APC, as a result of consideration of a petition for recognition and enforcement of a foreign court judgment or arbitral award, an *arbitrazh* court renders a ruling according to the provisions of Chapter 20 of the CPC. An *arbitrazh* court is entitled either to satisfy the petition in question or to deny it insofar as it is not entitled to review the merits thereof.

A ruling of an *arbitrazh* court, rendered as a result of hearing a petition for recognition and enforcement, may be appealed only through a cassation procedure. In case of satisfaction of a petition following the issuance of a ruling to this effect, the same *arbitrazh* court issues the claimant with a writ of execution in accordance with Article 246 (1) of the CPC. Article 246 (2) of the CPC provides for a three year statute of limitations period for filing a claim to enforce foreign court judgments and arbitral awards. This period covers both the time necessary for applying for a writ of execution and for consideration by a commercial court of a petition for recognition and enforcement, as well as time for the claimant to take recourse to the Court Bailiffs' Service to commence enforcement proceedings.

³⁴ Informative letter No. 96 (sections 29-31).

b. Specific Procedures Applicable to the Enforcement of Foreign Awards

Arbitral awards can be enforced through the bailiff (court officials) service after the awards are recognized and ordered to be enforced by *arbitrazh* courts or the civil sections of the courts of general jurisdiction.³⁵ The party relying on an award or applying for enforcement must supply:

1. The duly authenticated original award or certified copy;
2. Original arbitration agreement referred to in Article 7 of the ICA Law or a certified copy;
3. A duly certified translation of the above documents into Russian.³⁶

Articles of association or constitutional documents of the applicant, power of attorney, and receipt certifying payment of the filing fee should also be translated into Russian and submitted with the application for enforcement.³⁷

A request for enforcement of an award should be submitted within three years of the date when such a final award was rendered.³⁸

A court ruling on enforcement may be appealed against in the court of cassation. The ruling of the court of cassation is final and comes into force immediately.

When a ruling on judgment recognition and enforcement is obtained, the court issues a writ of execution. If the debtor does not voluntarily execute the judgment, the claiming party initiates an execution procedure, which is equivalent to one for execution of domestic judgments. This is done through the bailiff service as set forth in the law of execution procedure. Bailiffs are responsible for searching for, attaching and selling the debtor's assets.

On average, it might take from 6 to 20 months from submission of the request for enforcement to the time the claimant actually receives money, depending on the number of court instances the claimant passes through and the condition of the debtor's assets.

4. Prior History Of Enforcement

Russia is a civil law country, thus the statutory texts and procedural codes are stronger indicators of enforcement than prior cases. Court decisions themselves are not a source of law

³⁵ ICA Law, Article 35(2).

³⁶ *Id.*

³⁷ Questionnaire for ILN Transnational Litigation Practice Group, Legas Legal Solutions, Moscow, Russia (Sep. 11, 2006) Available at http://www.iln.com/articles/pub_267.pdf.

³⁸ Maxim Kulkov, *Enforcing International Arbitration Awards in Russia*, The Moscow Times, Mar. 13 2007. Available at http://www.apostille.us/news/enforcing_international_arbitration_awards_in_russia.shtml.

under the Russian legal system. However, in practice court decisions can have persuasive force. Significant courts decisions include:

1. *Presidium of the Supreme Arbitrazh (Commercial) Court of the Russian Federation (Jan. 22, 2008)*, in which the Moscow *Arbitrazh* Court rejected enforcement on a public policy ground as the award was of a punitive, rather than compensatory character. The Supreme *Arbitrazh* Court overturned this decision, based on the notion of contractual penalty for the breach of contract, which is known in the Russian legal system.
2. *Moscow District Court (Civil Department) (Apr. 21, 1997)*, in which a Canadian company assigned an arbitration agreement to its related Cypriot company, who prevailed in arbitration against a Russian company in ICC arbitration. They sought to enforce the award in the Russian Federation; however the Moscow District Court refused the enforcement, which was confirmed by the Supreme Court. According to the New York Convention, the party applying for recognition and enforcement shall supply a duly authenticated arbitration agreement. The Cypriot company failed to supply such an agreement. Furthermore, the Canadian company did not validly assign the arbitration agreement to the Cypriot company, indicating that there was no valid arbitration agreement in place between the Cypriot company and the Russian company. Consequently, there were no grounds for the enforcement of the award.
3. *Resolution No. 9772/01 of the Presidium of the Supreme Arbitrazh Court of the Russian Federation (Aug. 6, 2002)*, where the court overturned refusal to enforce, and ordered a new hearing. Ukrainian Company requested recognition and enforcement of an award of International Commercial Arbitration Court of Ukraine against a Russian entity. The court of first instance dismissed the claim, referring to the fact that the Award provided for payment in US dollars, and not in Russian rubles, which was deemed contrary to the public policy. Supreme Arbitrazh Court overturned decision of lower court, stating that the Civil Code and Federal Law “On currency regulation and control” do not prohibit the use of foreign currency as means of payment.
4. *Federal Arbitrazh Court of Far Eastern Circuit, Case No. F03-A51/01-1/2425a (Dec. 4, 2001)*, in which the court overturned a decision to enforce and ordered a new hearing. The court generally stated that the lower court disregarded the fact that the party against which enforcement was sought had provided evidence showing the existence of grounds for non-enforcement under Art. V of the New York Convention. The court also mentioned that since bankruptcy proceedings were opened with respect to the party against which the enforcement was sought, enforcement of the award might contradict the public policy of the state.
5. *Resolution No. 106pv-2000 of the Presidium of the Supreme Court of the Russian Federation (Dec. 20, 2000)*, where the court overturned a refusal to enforce, and ordered a new hearing. The court rejected the reasoning of lower court that arbitration clause was invalid since it did not comply with requirements of the Law “On

International Commercial Arbitration.” Since the place of arbitration was abroad, according to Art. V of the New York Convention and Art. 36 of the Law “On international Commercial Arbitration” the court should have applied English law, as the Contract, and the arbitration clause, were subject to the English law.

6. *Federal Arbitrazh Court of Far Eastern Circuit, Case No. F03-A51/00-1/1830 (Oct. 10, 2000)*, in which the court overturned a decision rejecting application for enforcement on the ground that the lower Court did not have a right to demand submission of documents other than those which are required by Art. IV of the New York Convention (reference to which is contained in the Decree № 9131-XI of 21.06.1988), i.e. 1) the duly authenticated original award or a duly certified copy thereof; and 2) the original arbitration agreement or a duly certified copy thereof; and 3) certified translation of the documents 1 and 2. In this instance, lower court demanded the following documents: confirmation by arbitral body that the award came into force and evidence of proper notification of the party against which enforcement was sought.

Further, it is worth noting that the number of cases submitted to Arbitrazh courts has significantly increased. According to official statistics, in 2002 such courts dealt with 41 applications for the recognition and enforcement of foreign arbitral awards, in 2003 – with 111 applications. In 2003, for instance, the Moscow City Arbitrazh Court ruled to grant some 90% of requests for the recognition and enforcement of foreign arbitral awards.³⁹

An analysis of the 30 cases involving claims for enforcement of foreign arbitral awards after September 1, 1992 reveals Russian defendants rely mostly on the following grounds: (i) transfer of the burden of proving lack of proper notice of the arbitration proceedings (Article V.1(b) of the New York Convention) from defendant to claimant; (ii) public policy (Article V.2(b) of the New York Convention); (iii) creation of the conflict between enforcement of the international arbitral award and a local court judgment in a related action involving the same subject matter; and (iv) application of the exclusive jurisdiction of state *arbitrazh* courts to limit the range arbitrable disputes.⁴⁰

³⁹ The complicated issues dealing with enforcing and recognizing foreign court judgment and arbitral awards have been examined in a survey of the practice of arbitrazh courts that involve enforcement and recognition, the appeal of arbitration tribunals and the issuance of documents for the compulsory enforcement of the awards of Arbitration tribunals. (Information Letter No. 96, Supreme Arbitrazh Court of the Russian Federation from December 22, 2005; published in *Vestnik of Supreme Arbitrazh Court* (2006) No. 3.)

⁴⁰ Boris Karabelnikov and Dominic Pellet, *Enforcement of International Arbitral Awards in Russia – Still a Mixed Picture*, ICC International Court of Arbitration Bulletin, Vol. 19/No. 1 – 2008.

Recently, a number of important developments in Russian court occurred that will probably have a major influence on the Russian court's approach to recognition and enforcement of foreign judgments and awards.

The Russian courts' approach to recognition of foreign judgments in absence of supporting treaty is becoming more flexible. In the recent case *Rentpool B.V. v. Podjemniye Tekhnologii*, a Dutch claimant sought recognition and enforcement in Russia of a decision rendered by a court in The Netherlands, in absence of a supporting international treaty. The Supreme Arbitrazh Court in its ruling from December 7, 2009 supported the decisions of the arbitrazh court of Moscow region and the Federal arbitrazh court of Moscow district that, in absence of a treaty, recognition and enforcement of a foreign court's decision may be granted on the basis of international comity and reciprocity principles. Since the Supreme Arbitrazh Court's interpretation of law is binding on subordinate courts, there are now better prospects for the recognition and enforcement of foreign courts' judgments in Russian in absence of a treaty.⁴⁰

In context of recognition and enforcement of foreign arbitral awards the recent case *Stena RoRo AB (Sweden) v. OJSC Baltic Plant (Russia)* demonstrates a higher scrutiny of public policy argument. On February 20, 2009 arbitrazh court of St. Petersburg and Leningrad district rejected a request for recognition and enforcement of award in the amount of EUR 20 million issued against OJSC issued by the International Institute of the Stockholm Chamber of Commerce on public policy grounds. The court held that the enforcement of the award against a Russian strategic entity might result in the bankruptcy of the company's bankruptcy and hence affect the security of the state. On April 24, 2009 the court of appeal confirmed the decision stating that seeking contractual damages when the contract had not entered into force violated Russia's public policy. On September 11, 2009 the Supreme Arbitrazh Court finally held that the case should be reviewed by the Presidium of the Court. In particular, the court found that subordinate courts could not review the availability of entry into force of the contract because these issues had already been addressed by the arbitration tribunal and substantive review of the award by Russian courts could not substantively review an Award in recognition proceedings. Importantly, the court also confirmed that enforcement of an award for damages does not by itself contradict Russian public policy because this remedy exists under Russian civil law.⁴¹

Another case that reflects positive trends in the practice of enforcement of arbitral awards in Russia is *Venture Global Engineering LLC (USA) v. OJSC Avtotor-Holdong Group (Russia)*. In this case the US Company applied for recognition and enforcement of an ICC International Arbitration Court award of December 22, 2008 ordering the Russian OJSC to pay a debt and the

⁴⁰ See White & Case LLP, *Enforcement in Russia – Supreme Arbitrazh Court Decision Brings New Hope*. April 2010, available at: http://www.whitecase.com/files/Publication/dfc7f03c-8d54-4d33-9374-9c09c2514ed1/Presentation/PublicationAttachment/409fe395-b8e7-490d-bcb6-a6eefe25cac9/Article_Enforcement_in_Russia_Supreme_Arbitrazh_Court_Decision.pdf

⁴¹ See Debevoise & Plimton LLP, *Recent Developments in Russian Court Practice*, www.debevoise.com, April 21, 2010, available at: <http://www.debevoise.com/files/Publication/8d05c8e5-246c-48f8-a09d-00162dd2fa06/Presentation/PublicationAttachment/f09d1602-8287-4f9b-a7f4-1022553a605e/RecentDevelopmentsinRussianCourtPractice.pdf>.

agreed 8% annual interest rate penalty. The Russian Company objected to enforcement, claiming that the 8% penalty is against public policy, since it violates the proportionality principle of the Russian civil law. The Federal Arbitrazh Court of North-Western Circuit, the court of cassation, rejected all the objections and upheld the decision of the arbitrazh court of Kaliningrad region, the court of first instance. The court clearly stated that any objections concerning recognition of specific facts of the case established by the arbitral tribunal are irrelevant in the case on the recognition and enforcement of the arbitral award. The court also analyzed the public policy argument, stating that differences between Russian and foreign laws cannot themselves be a basis for invoking public policy as a ground for refusing enforcement, otherwise foreign laws would never be applied in Russia.⁴²

Finally, in the case *Joy-Lud Distributors International (USA) v. Moscow Oil Refinery (Russia)*, the Stockholm arbitral tribunal on June 14 2005 awarded Joy-Lud 28 million USD in damages based on the fine specified in addendum to a contract for the supply of diesel oil by the Refinery. The Russian courts refused to enforce this award on the ground that the fine was greater than the real loss, since it violates the proportionality principle of Article 333 of the Russian Civil Code. The Presidium of the Supreme Arbitrazh Court concluded that the application of a contractual fine could not in itself amount to breach of Russian public policy since such fines are expressly permitted under Article 330 of the Russian Civil Code. On September 19, 2006 the Presidium enforced the award without retuning the file to a lower court for reconsideration.⁴³

5. Conclusions And Practical Steps To Increase Likelihood of Enforcement

The Russian legal system has a number of provisions that facilitate the enforcement of foreign judgments and awards in Russia. These include the New York Convention and the ICA Law.

Russian law allows foreign arbitration awards to be enforced in Russia, even if there is no reciprocal treaty between Russia and the country where the order was issued. Russia is a member of the International Center for the Settlement of Investment Disputes and accepts binding international arbitration.

The following practical steps to increase likelihood of enforcement have been suggested by Boris Karabelnikov and Dominic Pellew.⁴⁴

⁴² See Dmitry Davydenko, *A Recent ICC Award Enforcement in Russia: are Russian Courts Really Becoming More Arbitration-Friendly?* March 9, 2010, <http://kluwarbitrationblog.com/blog/2010/03/09/a-recent-icc-award-enforcement-in-russia-are-russian-courts-really-becoming-more-arbitration-friendly>.

⁴³ See Herbert Smith LLP, *A Change in Approach to Enforcement of Arbitral Awards*, March 24, 2010, <http://www.lexology.com/library/detail.aspx?g=1928bb1a-2d30-4ade-a9aa-db159e37bcca>

⁴⁴ Boris Karabelnikov and Dominic Pellew, *Enforcement of International Arbitral Awards in Russia – Still a Mixed Picture*, ICC International Court of Arbitration Bulletin, Vol. 19/No. 1 – 2008.

At the stage of signing the contract: (i) avoid, where possible making agreements that are contrary to any provisions of Russian law that may be viewed as mandatory by the Russian Courts; (ii) obtain as many documents as possible demonstrating that the Russian signatory or signatories have the necessary authority to conclude the contract on the company's behalf; (iii) obtain certified copies of the contract at the moment of its execution or shortly thereafter; (iv) obtain certified copies of corporate approvals of the contract issued by the board of directors and the general assembly of shareholders of the Russian counterparty if there is any risk that the transaction in question could be characterized as a major or interested party transaction; (v) obtain any available documents likely to prove that the contract in question was concluded at a fair market price and at arm's length and therefore did not harm interests of the Russian counterparty or its shareholders.

At the stage once the dispute has arisen practical steps are: (i) obtain and keep receipts of delivery of the notice of arbitration and other key documents to the Russian counterparty by courier or registered mail; (ii) always call for an original, or certified copy, of the power of attorney granted by the Russian company to its lawyer, and make sure that it covers all the actions carried out by the lawyer and it is valid for the entire duration of the proceedings; (iii) formulate the relief requested in such a way as to generate the least possible hostility in the mind of the Russian court of enforcement, that seems to impinge on the 'exclusive jurisdiction' of the arbitrazh courts set out in Article 248 of the Commercial Procedural Code; (iv) if you know your Russian counterparty has initiated or will initiate an indirect claim in the Russian courts, consider applying for an anti-suit injunction, either from the arbitral tribunal or the courts at the seat of arbitration, against both the defendant and the shareholder/claimant in the Russian proceedings.

Overall, available case-law indicates that when a party followed the proper procedure, Russia's courts have granted enforcement of the award. It is important that parties file for enforcement within three years of the award.⁴⁵ However, the enforcement of international arbitral awards still ultimately requires action from Russian courts and follow-up by bailiffs, which has yet to become a consistently effective enforcer of court judgments.

It should also be recognized that Russian courts are sometimes subject to political pressure. According to numerous reports, corruption in the judicial system is also widespread and takes many forms, including bribes to judges and prosecutors and fabrication of evidence.⁴⁶ In addition, court decisions are at times not executed. The bailiffs, who are charged with enforcing court judgments, report to the Ministry of Justice rather than to the courts. They sometimes fail to enforce those judgments due to legal restrictions and limited trained personnel.

⁴⁵ Questionnaire for ILN Transnational Litigation Practice Group, Legas Legal Solutions, Moscow, Russia (Sep. 11, 2006) Available at http://www.iln.com/articles/pub_267.pdf.

⁴⁶ 2008 Investment Climate Statement for Russia published by the U.S. Department of State. Available at: <http://www.state.gov/e/eeb/ifd/2008/101005.htm>

The traditionally broad manner in which the public policy exception is held to apply has resulted in the rejection of the enforcement of foreign judgments.⁴⁷ In these cases, Russian courts rejected enforcement of foreign judgments by insisting that it is contrary to Russian public policy. Since the grounds for refusing enforcement is limited by the New York Convention, contravention of public policy often serves as the *ultima ratio* for rejecting enforcement. In some instances, public policy is understood by the courts too vaguely. On a practical matter, to avoid the risk, the contractual provisions, even if governed by a foreign law, should be reviewed by compliance with mandatory Russian Law.

Further, Russian courts take a very formal approach to evidence. The judges are quite reluctant to accept e-mails, copies of documents not notarized, or witness evidence. For example, in the case *Forever Maritime Ltd. v. Mashinoimport*, the court denied enforcement of the foreign arbitral award on the grounds that defendant was not notified properly of the time and place of the hearing. The court rejected copies of correspondence between the parties proving the fact of proper notification because the translation of those letters into Russian was not notarized.⁴⁸ To avoid such problems, it is advisable to focus considerable attention on formalities when entering into an arbitration agreement and during the course of arbitration.

There is also a problem of slow execution on the part of the bailiffs in collecting information about the debtor's assets and selling the assets. To speed up the process, the collecting party should always monitor the procedure and assist the bailiffs in searching for the debtor's property.

⁴⁷ "Recognition and enforcement can be subject to difficult hurdles," among which are the "extremely formalistic approach" in some cases of the Russian courts or a tendency of some courts to "confuse the concept of public policy with that of the public interest" locally. Vladimir Khvalei, *Recognition and Enforcement of Foreign Arbitral Awards in the Russian Federation*, STOCKHOLM ARBITRATION REVIEW 1 (2005)

⁴⁸ Judgment by the Federal Arbitrazh Court of the Moscow Circuit in Case KG-A40/9235-03 dated Dec. 15, 2003.