RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN RUSSIA

RECENT TRENDS

Anna Grishchenkova*

I. Introduction

The importance of a clear and effective system of recognition and enforcement of foreign judgments cannot be overestimated.

Theoretical and practical issues of recognition and enforcement have been extensively described in legal literature. Therefore, this article contains an analysis of recent court cases on the topic.

When analysing recent trends, it is necessary to note that the Russian court system is currently facing periods of restructuring and nobody can now predict what will be the result of this restructuring in the area of recognition of foreign judgments. Until recently, the courts of Russia, besides the Constitutional court of the Russian Federation, have included the arbitrazh (commercial) courts with the Supreme Arbitrazh Court of the Russian Federation (SAC) as their head and the

* Head of dispute resolution practice at FBK Legal.

† The author, as a practising litigation lawyer, strongly believes that readers are more interested in recent trends in terms of Russian judicial practice, especially refusals to recognise and enforce foreign judgments.

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courts of common jurisdiction with the Supreme Court of the Russian Federation as their head.

The arbitrazh (commercial) courts\(^2\) deal with most cases of recognition of foreign judgments because they have jurisdiction over commercial and economic disputes between legal entities. Courts of common jurisdiction deal mostly with family law and successions disputes, as well as disputes between individuals; therefore, they rarely consider applications for the recognition of foreign judgments.

The SAC and the Supreme Court are generally courts of last instance and consider cases on a discretionary basis. They also produce some guidelines for the courts of lower instances on particular issues and areas of law.

In Russia, it is common that lower instance courts refuse to recognise foreign judgments and awards. They usually do this claiming that foreign judgments contradict so called “public policy” of the Russian Federation, and the SAC overrules these decisions, ordering enforcement. In 2013, the SAC produced very progressive guidelines regarding the rule of “public policy”, thereby decreasing the number of cases where this rule was applicable.

However, under the amended Russian legislation, the SAC has been merged with the Supreme Court of the Russian Federation, such that both arbitrazh courts and courts of common jurisdiction have the Supreme Court of the Russian Federation as their head.

Consequently, there is a doubt as to whether the Supreme Court of the Russian Federation, due to the amount of cases it has to deal with, will be able to provide the same degree of attention, as the SAC, to cases on recognition and enforcement of foreign judgments.

Another important change is the ongoing procedure of improvement of Russian legislation regarding arbitration procedures in Russia. So far, probable changes in legislation cover only Russian arbitration courts and exclude international arbitration; they also do not affect proceedings before foreign state courts. Nevertheless, the most recent trend is to refuse to enforce awards of “doubtful” arbitration institutions and these changes might reflect the shifting attitude of Russian courts in face of increased disputes under the exclusive jurisdiction of Russian state courts.

In light of this situation, it is interesting to summarise the trends to date in the area of recognition and enforcement of foreign judgments, and to use these trends, as far as possible, in practice.

\(^2\) Russian arbitrazh courts are not arbitration courts; their name does not mean that these courts deal only with arbitration matters. The Arbitration Procedural Code governs the procedure of litigation in these courts and enforcement and recognition both of foreign judgments and arbitral awards.
II. Brief Note on the Legal Grounds for Recognition and Enforcement of Foreign Judgments and Foreign Arbitral Awards

The procedure for the recognition and enforcement of foreign arbitral awards in Russia is quite similar to the procedure for the recognition of foreign judgments. The same rules are generally applied and the same Russian courts are competent. Moreover, some court precedents on recognition and enforcement of foreign arbitral awards provide useful rules regarding the enforcement of any type of foreign decision, whether judicial or arbitral. This is why the procedure for the recognition of arbitral awards is covered briefly below.

A. Basic Grounds for Recognition and Enforcement of Foreign Judgments

Generally, foreign judgments can be recognised and enforced in Russia if bilateral or multilateral international agreement exists. Countries which have such agreements with Russia include, among others, CIS countries, Greece, China, Iraq, and Macedonia. Where a judgment emanates from a country which does not have a relevant treaty with Russia, the rule of reciprocity will be applied.

The first Russian case in which reciprocity was applied was a case on the recognition of a decision of the High Court of Justice in Northern Ireland (the “High Court”) in favour of Moscow Common Bank Limited (London). The adverse party was the Russian entity Interindustrial Scientific-Technical Complex “Microsurgery of eye named of S. Fedorov”.

The Russian court found that recognition of the High Court’s decision could not be refused based on the absence of a bilateral agreement. The courts added that the possibility of recognition could be justified by rules of an Agreement between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Russian Federation on economic co-operation dated 9 November 1992, as well as the Agreement on partnership and cooperation between the Russian Federation and the European Union. According to these treaties, private parties of each country have access to the procedure of litigation in any court within the territory of the other country, as well as access, free from discrimination, to the competent courts for the defence of their individual rights. At the same time, the Russian court noted that it was necessary to check whether courts of the other country had reciprocally enforced judgments of Russian courts.

Similar principles were used by Russian courts in many subsequent cases.


4 Rulings of the Federal Arbitrazh court of Moscow Region case number KG-A40/8581-05-II dated as of 12 October 2005, case number KG-A40/698-06-II dated as of 22
At present, there are no clear, settled criteria regarding checks on the reciprocity rule by Russian courts. Determination is generally done on a case-by-case basis. In some cases, no evidence of reciprocal enforcement is presented to the court.\(^5\) Sometimes Russian courts will accept legal memoranda of recognised law professors and letters from courts of other countries that confirm the possibility of enforcement of Russian decisions in the foreign country.\(^6\) In other cases, the courts refuse to enforce foreign judgments and explicitly mention that the claimant has not presented evidence that decisions of Russian courts were enforced in the other country (e.g. Israel\(^7\) and the United States\(^8\)).

The latter practice can lead to an endless circle – if a decision of a foreign court is not enforced in Russia due to the lack of enforced decisions of Russian courts in the foreign country, then the foreign country may refuse to enforce a Russian decision the next time because of Russia’s previous refusal. In order to avoid this, we believe it is crucial to enforce foreign decisions based on the reciprocity rule even where there are no enforced decisions of Russian courts in the foreign country.

B. Basic Grounds for Recognition and Enforcement of Foreign Arbitral Awards

Russia is a party to the Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”). Apart from arbitral awards that are recognised and enforced under the New York Convention, arbitral awards and foreign judgments may be recognised and enforced in accordance with Russian procedural legislation.

C. Recognition of Foreign Judgments and Foreign Awards under Russian Procedural Legislation: Grounds for Refusal

National legislation contains rules for the recognition and enforcement of both foreign judgments and foreign arbitral awards. These rules regulate applications for recognition, including jurisdiction, terms of applying, duration of court procedure, etc.

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\(^6\) In case number A40-53839/05-8-388, courts of the Moscow region accepted a legal memorandum and a letter from the High Court of Justice of England and Wales as proof, and stated that Russian decisions can be enforced in accordance with English law.

\(^7\) Ruling of the SAC dated as of 19 May 2008 N 5105/08 case number A40-73830/06-25-349.

\(^8\) Ruling of the Federal Arbitrazh court of Moscow Region dated as of 09 September 2008 KГ-А40/7229-08 case number A40-7480/08-68-127.
Recognition and enforcement are made by means of a court order of the competent Russian state court. The enforcement of foreign judgments is possible for three years after the judgment is rendered.

General rules to determine which state court has jurisdiction for applications of this nature are as follows:

(1) If parties to the dispute are legal entities, commercial (arbitrazh) courts have jurisdiction and the rules of the Arbitration Procedural Code\(^9\) (chapter 31) will be applied.

(2) If one of the parties is a natural person (without any special status as an entrepreneur) courts of common jurisdiction are appropriate and the rules of the Civil Procedural Code (chapter 45) will be applied.

(3) Both in arbitrazh courts and in courts of common jurisdiction, the procedure of recognition usually starts in the court of first instance.\(^10\) The venue usually depends on where the defendant resides or has property. Procedural rules contain exhaustive reasons for which recognition of the judgment or award can be refused.

In accordance with Article 244 of the Arbitration Procedural Code of the Russian Federation, “[t]he commercial court refuses to recognise and enforce a foreign court judgment fully or in part, if:

1) the judgment has not entered into force, according to the law of the state where it was adopted;

2) the party against whom the decision was adopted was not properly notified of the time and place of the case, or could not give its explanations to the court for other reasons;

3) according to an international treaty of the Russian Federation or a federal law, the consideration of the case falls under the exclusive competence of a court in the Russian Federation;

4) in the Russian Federation there exists an effective court decision, rendered in a dispute between the same persons on the same subject matter and on the same grounds;

5) there is a dispute between the same persons on the same subject matter and on the same grounds under consideration by a court in the Russian Federation, which commenced prior to the institution of proceedings in a foreign court, or if a court in the Russian Federation was the first to accept an application concerning the dispute between the same persons on the same subject matter and on the same grounds for its consideration;

\(^9\) See *supra*, note 1.

\(^10\) Generally, cases in Russia are tried by the court of first instance, then by the appellate court and then by the court of cassation. There were also higher courts – the Supreme Arbitrazh Court and the Supreme Court – which are now merged into one court (the Supreme Court).
6) the term for the enforcement of the foreign court judgment has expired, and this term was not restored by the commercial court;

7) the enforcement of the foreign court judgment would contradict the public policy of the Russian Federation.”

Article 412 of Civil Procedural Code contains a similar list of grounds for refusal of recognition and enforcement of foreign judgments. Analysis of Russian court practice shows that improper notification and violation of Russian public policy are the most frequent reasons for refusal of enforcement of foreign acts.

III. Analysis of Reasons for Refusal to Recognise and Enforce Foreign Judgments in Russia

A. Refusal to Recognise Preliminary Decisions

In general, only final awards can be enforced. The main consequence of this principle is the refusal of Russian courts to enforce preliminary injunctions (interim measures) such as the seizure of property of the debtor or the prohibition to act in some way.12

The position of Russian courts usually makes state court procedure in other jurisdictions less efficient, as it is difficult to win against a Russian debtor without interim measures. Until enforcement, the debtor can sell all of its assets, making actual enforcement impossible. The SACis, thus, attempting to explicitly allow parties to proceedings abroad to seek injunctions in Russian commercial courts.13

A pre-condition for applying for interim measures to preserve the rights of a party to proceedings pending before a foreign court is effective jurisdiction of the Russian court. Effective jurisdiction is present if an applicant requests interim measures before the court in the venue where the debtor is registered or has property or money subject to interim measures, or where rights of the applicant have been violated. When considering the possibility of granting interim measures, a Russian court must check that the foreign court has jurisdiction to try the case and that the dispute in the foreign court does not fall into a category of disputes under the exceptional jurisdiction of Russian courts.

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11 This translation is available at <http://www.arbitr.ru/law/perevod_apk/>.


13 Paragraphs 29, 30 of Information Letter of the Supreme Arbitrazh Court of Russian Federation N158 dated as of 9 July 2013.
B. Exclusive Jurisdiction of Russian Courts and Lack of Arbitrability

Generally, Russian courts have exclusive jurisdiction in the following cases:

– disputes regarding rights to real property situated in Russia;
– disputes regarding the existence, validity of status and procedure of dissolution of legal entities registered in Russia (and the validity of decisions of authorities of such legal entities);
– disputes regarding correctness of records in official registries which are kept by Russian authorities in Russia;
– disputes regarding infringement of patents, trademarks, and other intellectual property rights, which lead to the invalidation of registration in Russia;
– disputes arising from carriage contracts where carriers are situated in Russia;
– divorce cases where both spouses have their residency in Russia; and
– cases challenging the acts of Russian authorities (“public disputes”).

In some situations, the exclusive jurisdiction of Russian courts is rather clear; in other cases, it is not.

The most controversial is with respect to the limits of the Russian courts’ exclusive jurisdiction over disputes which lead to registration in Russian registries. For example, in a recent case, Russian courts refused to recognise a decision of a Cypriot court invalidating a decision of a Cypriot legal entity. The reasoning was as follows: since invalidation of the decision of a Cypriot entity affects a Russian LLC and the structure of participation in the Russian LLC, and since the structure of participation in the Russian LLC is recorded in a special Russian registry (the Unified Registry of Legal Entities), Russian courts have exclusive jurisdiction over such a dispute and a decision of a Cypriot court cannot be enforced.

Such a broad approach to the jurisdiction of Russian courts can be found in arbitration decisions as well. The reasoning of Russian courts in these cases is similar to that demonstrated in enforcement cases for foreign judgments.

Although there are disputes which are invariably non-arbitrable, such as bankruptcy cases, there are many disputes which are not explicitly non-arbitrable, but can be deemed as such by Russian courts. The difficulty is that courts in different regions and at different levels have opposite views which make the position of the parties to arbitration even more unpredictable.

14 For example, the Unified Registry of Real Property, where all rights and transactions regarding real property are recorded, the Unified Registry of Legal Entities, where all legal entities and information about them (date of registration, name of officers, participants, information about type of services, licenses, bank accounts) are recorded.

15 Ruling of the SAC dated as of 23 October 2012 N 7805/12 case number A56-49603/2011.
Generally, to distinguish arbitrable and non-arbitrable disputes, it is necessary to understand whether the subject matter of such disputes is in the area of public relations or in the area of commercial relations. In the latter case, the dispute is non-arbitrable, whereas in the former, it can be resolved through arbitration.

However, recently there has been a tendency to broaden the scope of non-arbitrable disputes. Usually courts provide the following reasoning: “[i]f the relationship is connected with making a record to a state registry of the Russian Federation, which is carried out by competent state authorities, then all economic disputes following from such a relationship are tried exclusively by state courts of the Russian Federation”.

Many practitioners in Russia do not agree with this reasoning because it makes almost all disputes relating to corporate matters (as far as rights to shares and stock are recorded in special registries), real property, and loan recovery (as far as it is linked to a mortgage since real property rights are also recorded in state registries) non-arbitrable.

Interestingly, the Constitutional Court of the Russian Federation supported concerns described above and stated that not all disputes regarding real property can be tried only by state courts. The reasoning of the Constitutional Court was very promising. It stated that the consideration of commercial disputes as public disputes does not take into account their constitutional nature. The public nature of disputes which leads to their non-arbitrability is not related to the kind of property (real (immovable) or movable) but to the specificity of the relationship between the parties to the dispute. The requirement of registration of real property is connected neither with the parties, nor with the nature of their relationship. Therefore, state registration cannot be deemed as a substantial element of the relationship in dispute, the nature of which is still private. The “public effect” will arise only after verification by a state of results of the transaction or other legal acts.

Thus, the necessity of state registration cannot be deemed a criterion for prohibiting the resolution of a dispute regarding real property by arbitration.

The same kind of reasoning might have been applied to disputes regarding shares. Unfortunately, state commercial courts did not support this position of the Constitutional Court and continue to hold that such disputes are non-arbitrable and assigned to the exclusive jurisdiction of Russian state courts. For example, in a famous case, \textit{NLMK v. Maksimov}, NLMK filed suit in a state court alleging the invalidity of a share-purchase agreement and requesting recovery of the purchase price. The court did not consider the case, as the parties had agreed that their disputes would be resolved by the International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry. The Court of cassation, overruling the decision of the court of the first instance and ordering a new trial, provided guidance to the lower court, which had to check whether the dispute was in relation to corporate matters and thus within the exclusive jurisdiction of the

\[16\text{ A.V. ASOSKOV, Possibility of solving corporate disputes in international commercial arbitration, in A.A. Kostin (eds) \textit{Compilation of articles dedicated to 80 anniversary of the International Commercial Arbitration Court at the RF Chamber of Commerce and Industry}, Москва, Статут, 2012, p. 7.}

\[17\text{ Ruling of the Constitutional Court of Russian Federation number 10-II dated as of 26 May 2011.}\]
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Russian state courts.18 During the new trial, the state court found that it had exclusive jurisdiction. As a result, even a dispute regarding the price of shares may be deemed non-arbitrable (or as falling outside the jurisdiction of the foreign state court) and foreign decisions in this area may be unenforceable.

Another recent trend to broaden the scope of non-arbitrable disputes is to use the “public element” criterion. For example, in a very recent case, the SAC ruled that a dispute between private parties regarding the recovery of a penalty under a contract was not arbitrable and that the arbitral award could not be enforced. The reason for the refusal was that the contract between the parties had been concluded under the procedure of the State Procurements’ Act, the main goal of which was in the public interest. Therefore, “such a high concentration of public interest made it impossible to resolve such a dispute in arbitration, instead of in a state court.”19

Such court practice should be taken into account at the forum selection stage of proceedings. If a speedy decision is needed, it is better to file a suit in Russian state courts because decisions emanating from a foreign court are unlikely to be enforced in Russia and parties may have to face a new trial there. The same is true even if the parties have entered into an arbitration agreement.

C. Improper Notification

Notification of Russian participants to proceedings abroad should be made in accordance with the Hague Convention20 to which the Russian Federation is a State Party. Issues of improper notification are brought to Russian courts very frequently and Russian courts generally do not accept letters from the foreign court or arbitrator as proof of proper notification. Moreover, Russian courts require postal evidence.21

As a general rule, sufficient notification is achieved where the participant is notified of the start of proceedings in which he or she is named as a party. By contrast, wrongful information about the particular date and place of the hearing does not in itself constitute improper notification leading to a refusal of enforcement or default judgment.22

The courts can analyse not only the existence of notification, but also its sufficiency to allow the party to participate in proceedings. For example, a notifi-

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18 Ruling of the Federal Arbitrazh Court of Moscow Region case number A40-26424/11-83-201 dated as of 6 December 2011.
19 The text of the main ruling of the SAC dated as of 28 January 2014 is not published yet. The preliminary ruling is available at <http://kad.arbitr.ru/Card/e940b0c1-bbe0-403e-af51-6864647297c8>.
cation in a foreign language without translation, made on the same day as a hearing, has been considered insufficient and improper notification.23

An interesting case on point was recently decided by the SAC,24 which analysed whether effective notification of the party, made in violation of official procedural rules, was sufficient for enforcement of the award.

An English company had filed suit before the High Court of Justice of England and Wales against a Russian party. The plaintiff asked the court for notification of the defendant and such notification was made in accordance with the procedural rules of the High Court.

After receiving a default judgment in his favour, the plaintiff applied to the Arbitrazh Court of Moscow (Russia) for recognition of the judgment. The defendant objected to recognition, alleging improper notification. Although the Russian courts determined that notification of the defendant was made in accordance with the procedure of the High Court and that two originals of the court documents had been delivered to the defendant’s professional and personal address, the Russian courts refused to enforce the judgment. The SAC supported the ruling of the lower instance courts and stated that notification was insufficient and should have been done in accordance with the Hague Convention. The SAC found that only official notification could be deemed sufficient notification for the purposes of enforcement.

D. Violation of Public Policy

Until recently, alleged violations of Russian public policy by foreign arbitral awards or foreign judgments were the most frequently mentioned objection by debtors against enforcement. Debtors used any slight difference between Russian legislation and foreign legislation to show that the public policy of the Russian Federation had been violated. Unfortunately, Russian courts usually found in favour of debtors and refused to enforce awards. For example, for a long time, Russian courts refused to enforce awards on liquidated damages or excessive (from a Russian court’s point-of-view) penalties and costs. However, in 2013 the SAC issued very detailed and important guidelines describing what constitutes a violation of public order and what does not.25 As a consequence, the list of possible violations was substantially shortened, and the discretion of the courts in this area substantially decreased.

The SAC explicitly mentioned that courts must not decide cases a second time, and that the following situations, therefore, did not constitute violations of public order:

23 Ruling of the SAC number ВАС-11330/12 dated as of 28 August 2012 under case N А67-487/2012.
24 The text of the main ruling of the SAC dated as of 28 January 2014 is not published yet. The preliminary ruling is available at <http://kad.arbitr.ru/Card/1a688295-488b-4724-bdea-13db22ca26bc>.
25 Information letter of the SAC number 156 dated as of 26 February 2013.
– the recovery of damages amounting to twice the real damages in accordance with the foreign law applicable to the dispute;
– the recovery of damages based on a liquidated damages agreement between the parties, which was not admitted under Russian law; and,
– the absence of corporate approval for an agreement in accordance with the personal law of the foreign entity.

These guidelines cite other situations in which public order is not deemed to be violated, and only two situations where public policy is deemed violated: (1) where the agreement in dispute was concluded as a result of bribery; and (2) where arbitrator(s) were not impartial (for instance, as a result of their contact with one of the parties to the arbitration).

The adoption by the SAC of these guidelines demonstrates that the SAC has tried to reduce the use of “public policy” as a basis for the refusal of enforcement of foreign judgments and awards where this result is unjust. Whether or not Russian state courts will follow these guidelines remains to be seen, particularly in light of the restructuring procedure of the SAC and the overall situation with arbitrazh courts.

Some recent cases demonstrate that the “public policy” ground for refusal continues to be applied.26 For example, courts of the Moscow region recently refused to enforce an arbitral award, stating that agreements under dispute in arbitration were considered invalid by Russian state courts. The foreign creditor objected to that and stated that only one of the agreements was invalid while the other was valid. However, the Russian courts did not find in favour of the creditor and declared that the partial enforcement of the arbitral award based on the valid agreement was impossible as far as this would lead to another decision of the case. Thus, recognition of the whole award was refused.27

E. Violation of Rights of Third Parties

The violation of rights of third parties by foreign judgments is not mentioned in procedural rules as a basis for refusal of enforcement of such judgments. However, in practice, such violation can be the basis for challenging such judgments28 and can lead to the impossibility of enforcement of the judgment, as courts sometimes treat the violation of third party rights as violations of public policy. For example, in a recent case, the Russian courts refused to enforce a decision of a Cypriot court, which violated third party rights, and in particular, those of a Russian entity that

28 This possibility was mentioned, for example, in the ruling of the Federal Arbitrazh Court of the Moscow region number KT-A40/2810-03 dated as of 3 June 2003.
had not accepted the jurisdiction of the Cypriot court and was not a participant of the litigation in Cyprus.29

To justify their position, the Russian courts cited Article 6 of the European Convention on Human Rights, 1950 and stated that everybody is entitled to a fair hearing and to be heard by a proper court. Therefore, the decision of the Cypriot court on the rights and obligations of third parties, made without the participation of such parties, was found to violate Russian public policy, including the right to a fair trial.

IV. Conclusions

According to official statistics of the SAC, Russian courts have considered few applications for enforcement of foreign judgments and foreign awards: 145 in 2010, 174 in 2011, and 179 in 2012.30 Official statistics do not contain information about how many foreign acts were recognised and enforced, but based on the analysis carried out in this article, as well as the personal experience of the author, it is clear that the enforcement of foreign judgments and awards is still problematic and can vary a lot according to the opinion of a particular judge.

Taking into account recent guidelines of the SAC, we believe that the situation will improve and are hopeful that court precedents mentioned in this article will help readers to better understand current trends and avoid some of the complications that arise in practice.

29 Ruling of the SAC dated as of 23 October 2012 number N 7805/12 under case number А56-49603/2011.