

RECENT DEVELOPMENTS IN RUSSIAN COURT PRACTICE

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To Our Clients and Friends:

Recently, a number of important developments in Russian court practice took place. We provide below highlights of recent court decisions that are expected to have a major influence on the Russian courts' approach to important procedural issues, such as recognition and enforcement of foreign judgments and awards, as well as reversal of Russian court decisions based on guidelines and judgments issued by the Higher Arbitrazh (Commercial) Court of the Russian Federation.

A NEW OUTLOOK FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN RUSSIA

The Russian Arbitrazh Procedure Code provides that a judgment rendered by a foreign court is only subject to recognition and enforcement in Russia if such recognition and enforcement are “*envisaged by a treaty entered into by the Russian Federation and federal law*”¹. Apart from a number of treaties with the CIS countries, the Russian Federation has entered into only a few treaties providing for mutual recognition and enforcement of foreign judgments (e.g. with Italy and Spain). No such treaties are available in respect of judgments issued in most European countries, the U.K. or the U.S. The absence of a treaty with the country in which a judgment is rendered has traditionally been seen as a nearly insurmountable obstacle to recognition and enforcement of such a judgment in Russia². Although there have been a few examples where Russian courts granted recognition, or at least acknowledged the possibility of recognition, of foreign judgments in absence of a treaty, such possibility has remained highly questionable and uncertain. However, the Russian courts' approach to recognition of foreign judgments in absence of a supporting treaty is becoming more flexible, as the recent case *Rentpool B.V. v. Podjemniye Tekhnologii* demonstrates.

In that case, a Dutch claimant (*Rentpool B.V.*) sought recognition and enforcement in Russia of a decision rendered by a court in The Netherlands, in absence of a supporting

¹ Item 1, Art. 241 of the Arbitrazh Procedure Code.

² This does not apply to recognition and enforcement of foreign arbitral awards, which are available on the basis of a number of bilateral and multilateral treaties, notably the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NY, June 10, 1958).

international treaty. On June 8, 2009, the Arbitrazh Court of Moscow Oblast rendered a decision supporting the recognition and enforcement of the judgment, which was subsequently upheld on appeal by the Federal Arbitrazh Court of Moscow District on July 29, 2009, and also supported by Russia's highest state commercial court, the Higher Arbitrazh (Commercial) Court of the Russian Federation, in its ruling of December 7, 2009. Notably, the Higher Arbitrazh (Commercial) Court supported the findings of subordinate courts 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 and certain international law documents. Since the Higher Arbitrazh (Commercial) 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 Russia in absence of a treaty.

RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: PUBLIC POLICY MATTERS

Though recognition and enforcement of foreign arbitral awards are available in Russia on the basis of a number of international treaties³ and Russian legislation, Russian procedural laws allow respondents to oppose such recognition in certain limited circumstances, for example by invoking public policy arguments. The notion of public policy is not clearly defined in Russian law, and Russian courts have on a number of occasions refused to grant recognition and enforcement of foreign arbitral awards due to the alleged contradiction with public policy, which in such cases is often interpreted very broadly. In this context, the recent *Stena RoRo* case discussed below, which demonstrates a higher scrutiny of public policy arguments, may be important for the evolving practice of arbitral award enforcement in Russia.

In September 2008, the Arbitration Institute of the Stockholm Chamber of Commerce issued a EUR 20 million award to *Stena RoRo AB* (Sweden) against *OJSC Baltic Plant* (St. Petersburg, Russia) for damages resulting from a failure to perform certain shipbuilding contracts. *Stena RoRo* applied to the Arbitrazh (Commercial) Court of St. Petersburg and Leningrad Oblast for recognition and enforcement of the award; however, on February 20, 2009, that request was rejected by the court on public policy grounds. The court came to the view that enforcement of the award against a Russian strategic entity might lead to the Russian company's bankruptcy and thus affect security of the state, which the court believed to be contradictory to public policy. The court also held that the shipbuilding agreements between the parties had not entered into force, as the Swedish party did not provide proper evidence of the approval of the agreements by its board (such

³ *The principal treaty being the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NY, June 10, 1958).*

approval being one of the conditions precedent to entry into force of the agreements in question) and concluded that the arbitration clause contained in such agreements therefore was not effective. The appeals court upheld the decision on appeal on April 24, 2009, on the grounds that seeking contractual damages where the contract had not entered into force violated Russia's public policy (interpreted this time to include the key principles of Russian civil law, e.g. principles of contractual liability). On September 11, 2009, the Higher Arbitrazh (Commercial) Court determined that the case is to be reviewed by the Presidium of the Court, that is, there exist proper grounds for the continued review of the case. In particular, the court held that the subordinate courts were precluded from reviewing the availability of entry into force of the shipbuilding contracts in question, since those issues had already been addressed by the arbitration tribunal and substantive review of the award by Russian courts was not permitted in recognition proceedings. The court also confirmed that enforcement of an award for damages does not, as such, contradict Russian public policy, since such a remedy is available under Russian civil law. The Higher Arbitrazh (Commercial) Court suspended the case pending the results of the respondent's appeal against the award in the courts of Sweden. The final court decision in this case is expected to have a major impact on further Russian court practice regarding these public policy issues.

HIGHER ARBITRAZH (COMMERCIAL) COURT'S INTERPRETATION OF LAW IS BINDING AND MAY BE GROUNDS FOR REVIEW OF PRIOR COURT DECISIONS

In its decision issued on January 21, 2010, the Constitutional Court of the Russian Federation reviewed the provisions of the Russian Arbitrazh Procedure Code relating to retrial of cases by Russian arbitrazh (commercial) courts due to "newly established circumstances."⁴ The Constitutional Court decision provides important guidelines for interpretation of the rulings and guidelines, which the Higher Arbitrazh (Commercial) Court issues on a regular basis.

Due to its dual role as supervisor of the arbitrazh (commercial) court system and as the ultimate court of appeal,⁵ the Higher Arbitrazh (Commercial) Court has powers to issue both

⁴ *The procedural provisions in question provide for the possibility of overturning court decisions due to subsequent discovery of new material facts, annulment by the Constitutional Court of the pieces of legislation on which that decision was based, discovery of the falsification of evidence and similar extraordinary circumstances that occur after the issuance of a court decision and undermine its grounds.*

⁵ *The Higher Arbitrazh (Commercial) Court acts as an appeals court in the "supervisory appeal" procedure (пересмотр дел в порядке надзора) envisaged by the Arbitrazh Procedure Code.*

general guidelines for particular practice areas⁶ and case-specific rulings.⁷ Though none of such guidelines and rulings is formally deemed a source of law in the Russian legal system, such documents and the legal positions specified therein are generally binding on subordinate arbitrazh (commercial) courts⁸.

On February 14, 2008, the Higher Arbitrazh (Commercial) Court amended its previous guidelines on the Arbitrazh Procedure Code provisions regarding retrials based on “newly established” circumstances, noting that the appearance of new interpretation of law in a Higher Arbitrazh (Commercial) Court’s ruling may serve as the legal grounds for reversal of existing arbitrazh (commercial) court decisions based on a difference interpretation. Such a far-reaching interpretation of the Arbitrazh Procedure Code by the highest commercial court was one of the issues considered by the Constitutional Court.

The Constitutional Court confirmed the authority of the Higher Arbitrazh (Commercial) Court to issue binding guidelines and interpretations of law, including those found in the court’s rulings (judgments) issued in particular cases. The Constitutional Court also confirmed that new interpretations of law by the Higher Arbitrazh (Commercial) Court may have retroactive effect; that is, the issuance of such new interpretations may serve as the legal grounds for re-trial of existing court decisions based on a differing interpretation of law by the courts. Such retroactivity is only possible if a number of conditions are satisfied, including the following:

- retroactivity only applies if it is explicitly provided in the Higher Arbitrazh (Commercial) Court decisions (guidelines);
- retroactivity may only apply within the limitations of general constitutional principles, e.g., it may not apply where it impairs the position of a private party in a dispute with the state; and
- the re-trial of existing court decisions due to the issuance of new interpretation of law by the Higher Arbitrazh (Commercial) Court is not automatic: the concerned party must

⁶ “Information Letters” (case law summaries) issued by the Plenum and Rulings issued by the Presidium of the Higher Arbitrazh (Commercial) Court acting as appeals court.

⁷ Rulings of the Plenum of the Higher Arbitrazh (Commercial) Court.

⁸ In particular, this is due to the Higher Arbitrazh (Commercial) Court’s statutory power to overturn subordinate courts’ judgments on appeal for “inconsistency with the uniform interpretation and application of law by arbitrazh courts.”

request such a re-trial within the timeframe and following the procedure set forth in the Arbitrazh Procedure Code.

This Constitutional Court ruling paves the way for an increased role of court precedents in the Russian legal system⁹.

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We would be glad to answer your questions regarding the above and other issues related to Russian court practice.

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⁹ Notably, the Higher Arbitrazh (Commercial) Court is actively promoting the Russian judiciary's move towards a precedent system, as is apparent, for example, in the recent article by the court's Chairman, Anton Ivanov, published in the Russian business daily *Vedomosti* on March 19, 2010 titled "Civil Law. Let's Talk about Precedents."