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EXECUTING THE DECISIONS OF FOREIGN COURTS AND THE QUESTION OF SOVEREIGNTY IN RUSSIA*

The author examines the theoretical difficulties of implementing decisions and awards of foreign courts in Russia. Along with the normative conditions of recognizing and enforcing foreign decisions, the author draws attention to the educational background of legal professionals – especially judges – in Russia. It is suggested that the statist conception of law inherited from Soviet legal science implicitly leads the contemporary Russian legal doctrine of negating the obligatory force of decisions from foreign courts. In the opinion of the author, the core of this conception resides in the traditional concept of sovereignty, which excludes the direct effect of legal acts made by foreign states, private arbitrations, and international organizations. Nevertheless, some signs of changes in the attitude of the Russian judiciary can be marked in several precedential rulings of the commercial courts. The author concludes that there are tendencies that are symptomatic of a different concept of law developing in the mentality of legal professionals in Russia.

JEL Classification: K1.

Key words: commercial courts, execution, arbitral awards, court decisions, court judgments, sovereignty, supremacy, public policy.

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Introduction

In order to better integrate itself in the worldwide economic system, Russia has recently joined the WTO and thereby agreed to open its markets to wider international economic competition. Internationalizing the country's economy and entering into a globalized market economy not only means that trade and customs barriers will be lifted, but, in the long run, it will also inevitably lead to a shrinking of legal public regulation in those fields where international business has its own rules and private arbitration remedies, leaving room for these rules and remedies. Thus, opening Russian economic markets can also involve the globalization of the Russian "legal market", as well the internationalization of a municipal judicial system that nowadays is still too vigilant in cooperating with foreign and international judicial organs, even if such cooperation was much more limited during the years of the "Iron Curtain". Among other aspects, this vigilance also concerns the enforcement of arbitration awards and the decisions of foreign state courts that affront similar difficulties in implementation.

In our opinion, these difficulties are connected not only with gaps and deficiencies in Russian legislation, but also with the state-centred and paternalist attitude of many judges who treat foreign decisions and awards as something possibly infringing upon state sovereignty. The logic of this vigilance resides in the conviction that municipal and international law builds two different legal entities (the dualist conception), and that no acts of any other legal power can have a direct obligatory effect on a given territory where a sovereign state exists. The acts of this alien legal power must be incorporated into the state legal order before obtaining binding force on the state's territory. Such incorporation is not made in an automatic manner, but rather involves the consent of the legislative body first and foremost. This consent comes via the adoption of a law ratifying the corresponding treaty. Second comes the consideration of these acts by a municipal court regarding the extent that they can affect public policy and are reconcilable with the law and order of the country.

Following this logic, cases on the execution of foreign decisions and awards are often considered in Russian courts as if the matter were about bringing new norms into the municipal law and not just facilitating the implementation of legal acts accomplished abroad. In fact, Russia participates in a set of international agreements and treaties on this matter – a situation that leads to many rules being incorporated into the Russian legislation that are universal and common to other countries of the world. But at the level of law enforcement, a practising lawyer can feel the difference between the attitudes of Russian judges and, say, European judges regarding the recognition of foreign judgments and awards.³ Experiencing this difference in practice, an academician can be tempted to give an analytical account and theoretical explanation of his observations. This temptation was the main incentive for the author to undertake this research. In this aspect, our paper does not pretend to be a practical guide in technical legal nuances for the lawyers engaged in enforcement of foreign decisions and arbitral awards, but rather a theoretical reflexion about the connection between a certain legal *Weltanschauung* prevalent in Russia and a certain state of affairs in Russian judicial practice regarding the enforcement of foreign decisions and arbitral awards. We are aware of the limits of such reflexions and do not assert that our conclusions would either have a universal character or explain everything about the matter, every particular case, or the mentality of each judge. Rather, we would sketch an ideal type⁴ as an organising principle around which comparative legal scholars could build their work and make comparisons. In the spirit of the Weberian construction of an ideal type, we will accentuate only

³ In this paper, we intentionally are not concerned with the question of the difference between Russian and Western legal mentalities, as this issue requires separate independent research.

⁴ For Max Weber, an ideal type is "formed by the one-sided accentuation of one or more points of view and by the synthesis of a great many diffuse, more or less present and occasionally absent concrete individual phenomena, which are arranged according to the one-sidedly emphasized viewpoints into a unified analytical concept." (Max Weber, "Objectivity in the Social Science and Social Policy", in Max Weber, *The Methodology of the Social Sciences*. Free Press, 1949, p. 90).

a selection of philosophical assumptions, abstracting them from other conditions (economical, institutional, etc.) that doubtlessly also have an impact on the situation with recognition and enforcement in Russian commercial courts.⁵

Theoretical background

From a comparative standpoint, it could be an interesting theoretical enterprise to examine the links between the mentalities of legal professionals in various countries and the juridical practice these professionals exercise. Surely this kind of investigation is doomed to remain purely theoretical and speculative – we can hardly expect to discover any casual relation or to find any empirically substantiated facts when trying to connect the wording of a judgment with the mentality of legal professionals of the given country, let alone with the habits and mental states of a given judge.⁶ While undertaking such an analysis in this paper in terms of an ideal type, we dare not claim any universality for our conclusions and do not aim at providing any universal criteria for examining the parallels between the mental paradigms of lawyers and the acts they accomplish in their legal orders. Nevertheless, the abundant literature on comparative law where the authors draw attention not only to a comparison of legal texts, but also to the diverse mentalities of legal professionals from different countries,⁷ reassures us that such aspects are not devoid of scientific interest. As René David stresses, it is the “psychology of those to whom the law applies and those who are charged with its application” that really matters in comparative law.⁸ This psychology can be perceived as just a multitude of differently oriented mental and emotional movements and attitudes, or it can be abstractly organized around one or several axes. The first approach allows for the gathering of vast empirical material, but to conceptualize it one needs a theoretical framework that can be gained only from the second approach. Even while impoverishing an endlessly diverse reality, such an approach can yield a perspective for linking together and explaining the peculiar attitude of Russian judges towards foreign judicial acts.

When trying to reassess judicial practice in Russia with regard to the considered matter, some issues arise concerning not only the techniques of producing norms, but also the *Weltanschauung* of several generations of lawyers that have been raised and nurtured with a fixed set of theoretical ideas. The average Soviet lawyer had several conceptual credos about law: law is always produced by the state; no law can subsist without the state; and, finally, “one state, one law”, meaning that, in this statist perspective, the decentralization and internationalization of law signify the decline and degeneration of both law and the state. The sacred definition of law that had been endemic throughout Soviet textbooks and legal literature claimed, “Law is a system (or order) of social relationships, which corresponds to the interests of the dominant class and is safeguarded by the organised force of that class.”⁹ Cosmetically renovated, this definition still governs the mentality of the Russian legal community and is still omnipresent in legal textbooks. Theoretically, the main assumption of most of those who write on legal matters, decide cases,

⁵ In the Russian legal parlance, “arbitration court” (*arbitraznyi sud*) literally means a state judicial organ competent to consider economic disputes between legal entities and sometimes between public organs and private individuals. In other words, it is a commercial court. The private organs for dispute resolution are literally called “reference courts” (*treteiskii sud*). There is no unanimity in using these terms in the English-language scientific literature about the Russian court system and procedures. To avoid confusion, we opt for the international tradition and will hereinafter apply the term “commercial court” to the Russian state courts for economical disputes (*arbitraznyi sud*), and the term “arbitration court” will be applied to the private arbitration bodies (*treteiskii sud*).

⁶ Although such attempts have been undertaken in the history of legal philosophy, the most marking examples being the realist approach to law (Karl Olivekrona, Axel Hägerstrom, Alf Ross, and others in the Scandinavian countries; and Jerome Frank, Karl Llewellyn, Oliver Holms and others in the USA).

⁷ Cf.: Werner F. Menski, *Comparative Law in Global Context* (Cambridge University Press, 2000); Pierre Legrand, Roderick Munday, *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press, 2003); Mathias Reimann, Reinhard Zimmerman, *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006).

⁸ René David, “*Methods of Unification*”, 16 *American Journal of Comparative Law* (1968), 13 (13-27); René David, John E.C. Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (Free Press, 1978), 11.

⁹ Peter Stuchka, *Selected Writings on Soviet Law and Marxism* (M.E. Sharpe, Inc., 1988), 143-44.

and adopts laws in Russia states that law always (1) is appropriated by the state, (2) establishes a social order, and (3) protects certain interests. From this vantage point, allowing for the direct enforcement of decisions of foreign courts and of arbitral awards runs into difficulty at the level of basic theoretical assumptions because (1) these decisions are not made by the state, if made by private arbitration, or, if rendered by the courts of foreign state, made not by “our” state), (2) introducing and acknowledging elements of “alien” legal systems in Russia endangers the unity of “our” state law and threatens law and order in the country, and (3) some interests that are destructive for the Russian national legal system can penetrate through these “alien” decisions and awards.

These canonical representations about legal centralization are still perceptible in Russian legislative and judicial policies.¹⁰ One paradigmatic issue concerns the out-dated conception of sovereignty – the idea of an absolute sovereign authority that cannot be bound by other powers, unless it be the will and consent of this absolutely sovereign authority. This concept still reigns in Russian legal doctrine and has an impact on different spheres of law enforcement in Russia. This should not be surprising because the new Russian legal system has been in existence for only 20 years and one can hardly expect that this mentality could be cardinally changed so fast.¹¹

On the one hand, the Russian legal system shares much in common with countries that have civil law, namely code-based law, a system of judicial review, as well as basic concepts and theoretical schemes dating from the pandect jurisprudence of the 19th century. So, the distance between legal regimes is not that large. On the other hand, if we compare the contemporary legal system of Russia with that of the USSR, we can note several major coincidences that differentiate Russian law from that of Western systems. In 1969 John Hazard pointed out that the particularities of the Soviet legal system compared to the West include private law being subordinated to public law; “strong, even unchallengeable political leadership, fortified by law in maintaining its distinct position”; and “law as mechanism of mobilization for total social involvement.”¹² Remnants of this system are still evident in modern Russian society and are manifest in the rhetoric of the country’s political leaders, especially considering the economic dominance of state-owned corporations, the one-party governance of United Russia, and traditional Russian paternalism¹³ as the ideology of legal and political development).

These particularities have remained with Russian legal ideology over time, in spite of fundamental political and economic changes, and they inevitably have repercussions on the courts. Typically, Anton Ivanov, the Supreme Commercial Court Chairman, in a recent speech of his at the St. Petersburg International Legal Forum in 2012, stressed what he called an “unfair competition” between Russian and foreign courts.¹⁴ In his opinion, the fact that many Russians – both individuals and companies – prefer to file their lawsuits in foreign courts, rather than in Russian courts, “breaches the principle of legal certainty, and also encroaches upon the sovereign immunity” of Russia. Ivanov is confident that “Russia must protect its citizens and legal entities from unfair competition among foreign judicial systems”, and he even proposes “protective measures”, such as blacklisting, blocking bank accounts, and so forth, to protect the national jurisdiction from competition with Western judicial systems. With different references, this

¹⁰ Kathryn Hendley, “Are Russian Judges Still Soviet?”, 23 (3) *Post-Soviet Affairs* (2007), 240-274; Kathryn Hendley, “Assessing the Rule of Law in Russia”, 14 *Cardozo Journal of International and Comparative Law* (2006), 347-391.

¹¹ Peter Solomon, Todd Foglesong, *Courts and Transition in Russia. The Challenge of Judicial Reform* (Westview, 2000); Peter Solomon, “Judicial Power in Russia: Through the Prism of Administrative Justice”, 38(3) *Law and Society Review* (2004), 549-582.

¹² John N. Hazard, *Communists and their Law: A Search for the Common Core of the Legal System of the Marxian Socialist States* (University of Chicago Press, 1969), 523-524.

¹³ The paternal nature of the Russian judicial system has been masterfully described by Harold Berman (Harold Berman, *Justice in Russia* (Harvard University Press, 1982), 383ff.), and this characteristic, in our opinion, is still fully valid for the system under question.

¹⁴ These citations are made according to the site: http://www.rapsinews.com.judicial_analyst/20120525/263259093.html

rhetoric nevertheless shows the striking similarity with the “ideology of the Great State” (*velikoderzhavnaia ideologiia*), which stretches beyond the Soviet period and all the way back to the times of Imperial Russia. So, drawing an ideal type of legal mentality inherent to the Russian judicial system can be a useful tool in explaining the underlying factors of evolution in this system.

This paradigmatic¹⁵ issue can be examined in the aspect of recognition and enforcement of foreign judicial acts, where the Russian courts often tend to protect sovereignty, rather than protect the interests of the private individuals engaged in commercial disputes. One anecdotic example for this attitude has been given in a case where the lower courts refused to enforce the judgment of an English court only because it was not based on Russian law. This decision’s being overturned by the Supreme Commercial Court in Ruling No 106pv-2000 of 20.12.2000 (*Vysshi arbitrazhnyi sud*) is nonetheless symptomatic for the excessive vigilance of Russian courts. Going beyond commercial arbitration and turning to constitutional issues, a typical example can be found in the case of Markin and its two competing judgements from the Constitutional Court of Russian and the European Court for Human Rights, together with the extremely negative reaction of the Russian judicial community to the decision of ECHR of 07.10.2010.¹⁶ These cases are not accidental for law enforcement in Russia and, among others reasons, they can be explained by the basic ideas cultivated in Russian and Soviet legal education.

Modality of enforcement and defences

If we estimate the impact of difficulties in Russia with enforcing foreign judgments in civil matters, we first of all notice that these difficulties are an important concern for foreign investors doing business in Russia. In fact, there are two major solutions: A creditor will either need to seek a judgment from a Russian court directly, or obtain a judgment from a foreign court or arbitration tribunal that will be enforced by the Russian courts. The first solution does not always seem attractive to foreign investors who feel uncertainty about the Russian legal and judicial systems and about the impartiality of Russian judges in cases where vast sums of money are at stake. When discussing the terms of contracts, investors prefer dispute-resolution forums outside of Russia because of the fear of unpredictability in Russian courts. If this solution is adopted, foreign investors reassure themselves to have gained ground, but the final success is not evident at all, even with a positive court decision at hand.¹⁷

A Russian defendant who loses his case abroad will have supplementary defences against the recognition and enforcement of the adverse judgment in Russia. These procedural defences are set out in article 244.1 of the Commercial Procedure Code (*Arbitrazhnyi protsessual’nyi kodeks*) of Russia. They include defences relating to the question of whether the foreign judgment has entered into force in its state of origin; whether the defendant received proper notification of the hearings; whether the subject matter of the judgment was not within the exclusive jurisdiction of

¹⁵ Paradigm is defined by Kuhn as a set of received beliefs that exert a deep hold on minds and acts as a conceptual box for classification of all future information (Thomas Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press, 1996), 10). If we presume with Kuhn that “no body of facts can be interpreted in the absence of at least some implicit body of intertwined theoretical and methodological beliefs that permits selection, evaluation, and criticism” (Ibid., 16-17), then we can postulate such a body of beliefs that is common to the contemporary Russian judiciary (surely, we do not admit that this paradigm is accepted or even perceived by every judge) in working with legal texts, facts, findings.

¹⁶ For the discussion that followed the decision of ECHR, cf.: Valerii Zor’kin, “*Apologiia Vestfal’skoi sistemy* (Apology of the Westphalian system)”, *Rossiiskaia gazeta* (22 August 2006); Valerii Zor’kin “*Predel ustupchivosti* (The limit of compromise)”, *Rossiiskaia gazeta* (29 October 2010). About the theoretical implementations of these polemics, cf.: Michael Antonov, “Theoretical Issues of Sovereignty in Russia and Russian Law”, 1 *Review of Central and East European Law* (2012), 95-113.

¹⁷ Cf.: Ilya Nikiforov, “*Litigating in Europe: Is the System of Enforcing Judgments Effective? - Enforcement of Judgments in Russia*”, 1 *Dispute Resolution International* (2007) (http://www.ibanet.org/Publications/publications_DRI_December_2007.aspx).

the Russian courts; whether the judgment conflicts with a judgment made in Russia, or with a case already under consideration by Russian courts;¹⁸ whether the limitation period for enforcement has expired; and whether enforcement would violate public policy.

In order to commence enforcement proceedings, the party seeking enforcement has to file an application with the state commercial court at the place of the debtor's domicile (legal address), or, if such place is unknown, at the location of his assets. The time to initiate such proceedings is limited to three years after the decision is rendered, although under certain circumstances this term may be extended. As the formal list of grounds for refusal shows, the recognition and enforcement of decisions must be a rule and denial, rather than an exception. Another rule of court procedure requires that the burden of proof for these various defences be borne by the party resisting enforcement. In spite of the clear rules, these formal grounds are interpreted by the commercial courts quite broadly, and often in the opposite sense. Such interpretation in fact allows for a reconsideration on merits, which is formally forbidden.¹⁹ However, in Russian practice, it is the plaintiff who must provide all the relevant proofs to persuade the enforcement court that there are no procedural defects in the judgment that the plaintiff seeks to enforce. In determining the existence of one of the above-mentioned defences, the enforcement courts are not bound by the facts established by the foreign courts and may reconsider them.²⁰ So, the enforcement procedure can turn into a new court battle.

As court practice shows, the reasons for refusing to recognize and enforce foreign decisions vary from an invalid arbitration agreement and the insufficient notification of a party, procedural defects and violation of public policy, to disputes that are not arbitrable abroad (e.g., registration or liquidation of Russian entities; registration of intellectual property rights or rights to real estate property). Certainly, Russian courts are very particular about formalities, and often refuse to enforce a decision on the grounds that the arbitration institution was not named precisely, or because translated texts were not notarized in due way, or because of defects in the apostil certifying foreign documents, and so forth. In reality, when deciding whether these formal omissions are material or not, judges usually enter into the matter of litigation and reassess the case from standpoint of Russian law, namely, how a case with such formal defects would be ruled by a Russian court, and who would win the case. It is not of small importance that there are no special judges or panels to make decisions regarding recognition and enforcement – these cases are considered by ordinary judges who regularly adjudicate similar civil matters according to Russian laws.²¹ Evidently, the judge in such a situation cannot stand a psychological incentive in his mind to reconsider a foreign decision or award on its merits through the lens of the municipal law, even if this reconsideration formally cannot influence the decision he delivers on the matter of enforcement. But nothing excludes that this virtual reconsideration would in fact affect the resolution of the judge about enforcement.

Another major issue in recognition and enforcement of foreign arbitral awards and court decisions is the application of the public policy rule (*ordre public*) by Russian state courts. It is almost impossible to arrive at a uniform interpretation of this rule, as it usually touches at the

¹⁸ This is often used by unscrupulous lawyers who can initiate collateral legal action in a Russian court while the principal lawsuit is considered in foreign court or in arbitration. Russian law does not provide for injunctions or other legal defences against such collateral actions; moreover, Russian courts cannot reject or suspend a lawsuit for the reason that the same case is being examined in a foreign jurisdiction. That is why starting such collateral actions still serves as an efficient means to fight against the enforcement of foreign decisions (cf.: Diana Tapola, "Analysis of Grounds for Refusal in Enforcement of Foreign Judgments in Russia", 18 *Mealey International Arbitration Report* (2007), 150-166).

¹⁹ William R. Spiegelberger, "The Enforcement of Foreign Arbitral Awards in Russia: An Analysis of the Relevant Treaties, Laws and Cases", 16 *American Review of International Arbitration* (2005), 261-314.

²⁰ Prohibition to reassess the case on its merits does not clearly interdict to evaluate (within the scope of the defences allowed against enforcement) new facts that were not considered before, or even to reconsider already established facts in the light of newly found facts.

²¹ Tatiana Neshataeva, "International Civil Procedure in the Russian Federation: Sources and Issues", 2 *Review of Central and East European Law* (2002-3), 137-165.

issues subject to entirely subjective evaluation. Even if Russian courts are not formally allowed to go beyond the above-mentioned exclusive defences and reconsider the case on its merits (rule of *res iudicata*), in many cases, under the guise of “public policy”, courts reevaluate the facts on which foreign decisions are based. It is symptomatic that the clause of the New York Convention about public policy in Russian procedure codes has been transformed and enlarged by “sovereignty” and “public safety” as additional criteria. For example, in the wording of point 5 of article 412 of the Civil Procedure Code (*Grazhdanskii protsessual’nyi kodeks*): “The court refuses enforcement if execution of a foreign judgment can impair the sovereignty of Russia or endanger the safety of Russia or contradict the public policy of Russia.” In our day, courts almost never use the clause of sovereignty, but in fact this clause is often implied in reasoning about public policy where judges mix the question of *ordre public* with that of national sovereignty and safety.²² *Ordre public* in Russian translates as “the fundamentals of public law and order” or “the fundamental principles of the Russian legislation”, if we follow the wording of Supreme Soviet Decree No 9131-XI of 21.06.1988 “On Recognition and Enforcement in the USSR of the Judgments of Foreign Courts and Arbitrations”, which act is still formally valid inasmuch as it does not contradict later laws).

Generally, violating the public policy rule is understood as a contradiction to fundamental constitutional principles. But sometimes the courts apply this defence to big companies, enforcement against which can ruin the economical situation in small towns, or can even threaten the national security. An example of this can be seen in the judgments of lower courts that are reconsidered by the Supreme Commercial Court (Ruling No 9899/09 of 13.09.11 in case A56-60007/2008) where the St. Petersburg commercial court denied enforcement because of the strategic interests of the state – the possible insolvency of the Baltic factory threatens the strategic industry for St. Petersburg. Only as a last resort did the Supreme Commercial Court allow enforcement. This is also an important shift in the orientation of the Russian courts, as several years ago the official doctrine would have been the complete opposite (the case of *United World v. Krasnyj Jakor*, Federal Commercial Court of the Volgo-Vyatsky Circuit. Ruling of 17.02.2003, Case No. A43-10716/02-27-10).

Another issue for discussing public policy in Russian courts can be limits of liability. For example, in the cases where interests are calculated on financial interest or when requested punitive damages are far beyond the price of the contested goods, Russian courts have had a tendency to intervene and reconsider the judgment either fully or partially, still referring to “public policy” when cutting penalties or interests. In fact, such application of the “*ordre public*” clause constitutes the evident reassessment of foreign judgment on its merits. It is remarkable that this understanding of public policy has been supported in paragraph 29 of Information Letter of the Supreme Commercial Court No. 96, from December 22, 2005. The Court declared that public policy implies *inter alia* “consistency with the public order based on the principles of equity, parity, fairness, proportionality of penalties to real damages and to the extent of intentional guilt”. For a better understanding of the public policy doctrine developed by the Russian commercial courts, we can draw on the Ruling of the Federal Commercial Court of the North-Western Circuit from 10.03.2011, case No A05-10560/2010. This Ruling establishes that a foreign decision can be considered as contradicting the public policy of Russia when

During the execution of this decision, any illegal acts can be carried out, or any acts that endanger the sovereignty and safety of the state can be performed, that touch the interests of large social groups and that are incompatible with the principles of economic, political, and legal systems of the state, which affect the constitutional rights and freedoms of

²² Cf. Dmitry Davydenko, Eugenia Kurzynsky-Singer, “Substantive *ordre public* in Russian Case Law on the Recognition, Enforcement and Setting Aside of International Arbitral Awards”, 2 (20) *American Journal of International Arbitration* (2010), 209–233.

citizens, or which contradict the fundamental principles of the civil law, such as parity of parties, inviolability of property, and freedom of contract.

Public and private interests are disproportionately mixed in this reasoning, which once again demonstrates that the Russian commercial courts have not fully abandoned the paternalist attitude of *Gosarbitrazh*, the former Soviet arbitration that adjudicated disputes between state enterprises in the Soviet period, now exercised under the guise of protection of sovereignty. The courts still reconsider private commercial disputes from the standpoint of public interests, and in doing so they extend “public interests” to such circumstances and facts that normally are to be subject only to the discretion of private parties to a civil contract.²³

Nevertheless, things have begun to change, and, as a sign of a new approach, in the ruling of the Federal Commercial Court of the Moscow Circuit from 27 August 2009, case No KG-A40/8155-09, one reads:

An argument that the amount of awarded damages does not correspond to the principle of adequacy of civil liability, as a measure of the consequences of the breach, falls into the merits of the resolved case, and does not pertain to the grounds for refusal of recognition and enforcement of a foreign judgment and a foreign arbitral award.

Normative requirements

As in many countries, in order to secure the enforcement of a judgment rendered by a foreign court, Russian law requires that the judgment be formally recognized by a Russian court and that a writ of execution be issued – that a procedure of *exequatur* be fulfilled. The only exception to this rule concerns decisions issued by the courts of member-countries of the Commonwealth of Independent States, consisting of the former USSR, with the exception of Georgia and the Baltic countries. These decisions are recognized without referring to special validation procedures, though enforcement still requires additional judicial acts.²⁴ For other countries, the general rule is that Russian courts will only recognize a judgment that is supported by a relevant international treaty between Russia and the country where the judgment was delivered. This is a simple application of will theory, where the state freely obligates itself, without any prejudice to its sovereignty, and the dualist theory of relations between international and municipal laws remains intact.

The first fact to be established by lawyer is that there are normative grounds for enforcement in the legal order of Russia. Enforceability of a foreign decision depends on whether the judgment is issued by commercial arbitration or by a foreign state court. In the first situation the matter is more or less clear. Russia is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, pursuant to which international arbitral awards are, although subject to limited defences, enforceable through local courts in signatory states in the same manner as internal arbitral awards. Russia’s main domestic law on international arbitration is its law “On International Commercial Arbitration”, article 35 of which 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.”

²³ Cf.: Antonio F. Perez, “The International Recognition of Judgments: The Debate between Private and Public Law Solutions”, 19 *Berkeley Journal of International Law* (2001), 44-89.

²⁴ Cf.: Kiev Treaty on Settlement of Commercial Disputes of 20.03.1992, Minsk Convention on Legal Assistance and Legal Relations in Civil, Family, and Criminal Matters of 22.01.1993.

On the contrary, the problem of a missing treaty persists when the matter regards the execution of a judgment delivered by a foreign state court. This situation leads to controversies about the limits of sovereignty and of lawmaking force that other states and their legal orders have in Russia. There is no single applicable convention governing the execution of the decisions of foreign state courts (like, say, the New York Convention does for commercial arbitration), and Russian law does not contain a definitive response as to whether foreign decisions can be executed without a relative bilateral treaty.

One of the major factors is that Russia is not a signatory of the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters of 1971. Consequently, when Russian courts decide on the recognition and enforcement of a foreign judgment, these decisions must be based on an international treaty, the parties of which are Russia and the country of the court that issued the judgment to be recognised. If there is a treaty, things are easier, and the Russian court must only check some formal aspects – which aspects can sometimes become material for a case, as suggested above – and then allow enforcement. Despite a lack of direct regulation, Russian courts may recognize and enforce foreign court judgments also on the basis of international comity and reciprocity, though there is not any definitely established doctrine.²⁵ At the same time, municipal legislation does not contain direct norms allowing international comity as criterion of recognition.²⁶ This fact gives rise to the question as to the respective force of foreign judgments for public agencies of another state – judges and bailiffs, for example, in the situation where Russia has not concluded a treaty with the relevant country. If we adopt the speculative language of the Russian legal theory, then it is a question of delimiting the sovereign's state powers through the legal acts of foreign countries.

The traditional approach of the Russian courts to enforce foreign civil judgments is to rely upon article 241 of the Commercial Procedure Code, which denotes that the judgments of foreign courts will be recognised and enforced in Russia where provided for “by international treaty of the Russian Federation and the federal law.” There have been and still remain disputes around this formulation. Moreover, these disputes are motivated by some contradictory statements of the Supreme Commercial Court of Russia. It must here be noted that a similar problem can be seen in the New York Convention: When signing this agreement, Russia made the reservation that it would apply the Convention only in as much as non-contracting states would grant reciprocal treatment to Russia. But, considering the fact that most countries are signatories of the Convention, this legal impediment is not extremely practical.²⁷

Until recently, article 241 of the Commercial Procedure Code had been interpreted by courts to preclude enforcement of foreign judgments in Russia in the absence of a reciprocal treaty for the enforcement of judgments with the particular state where the judgment had been delivered. It is true that the literal meaning of this article is clear: No treaty, no law, no execution. This understanding matches with the statist conception of law inherited by the Russian legal community from Soviet legal theory: “One state, one law, no law without a state.” If we stand on firm positivist grounds, such an approach is not surprising; the extent of lawmaking and judicial force of the state is set up according to territory and delimits the sovereignty of the state. Thence, foreign decision can be executed in a country only if allowed by its authorities. A question emerges as to whether this “competent authority” must be a legislative power that ratifies

²⁵ Cf.: Gene M. Burg, “Comity in Cases Involving the Russian Element”, The Russian-American Symposium on Private International Law, 29.04.2004; available at: <http://www.docstoc.com/docs/51079658/Comity-in-Cases-Involving-Russian-Element>.

²⁶ The only law containing relevant rules on comity is the Law “On Insolvency (Bankruptcy)” (point 6 of article 1 of this federal law No 127-FZ of 26.11.2002) which establishes that judgments awarded in insolvency matters may be recognized and enforced in Russia based on the concept of reciprocity.

²⁷ Cf.: Boris Karabelnikov and Dominic Pellet, “Enforcement of International Arbitral Awards in Russia – Still a Mixed Picture”, 19 (1) *ICC International Court of Arbitration Bulletin* (2008), 65-85.

treaties, or whether it can be a judicial power. In other words, are courts also competent to rule on the admissibility of foreign legal acts in a given legal order? A key negative finding for the Russian legal practice on this point has been made by the Constitutional Court in the case of Adamova (Ruling No 575-0-0 as of 17.07.2007), in which the Court concluded that a foreign court's decision does not bring any legal consequences in Russia if there is no treaty between Russia and the state where the decision was made. Courts cannot provide for the enforcement of a decision in the absence of a treaty because it goes beyond the competences of the judiciary to change or introduce laws,²⁸ and runs contradictory to the separation of powers. The principles of comity and other principles of international law were held by the Court to be irrelevant in this category of disputes.

The statist approach to this issue is based on the dualist concept of international law.²⁹ Nevertheless, this dualist concept becomes obsolete in a contemporary world that adheres more and more to a monist concept, implying that both municipal and international law constitute one system, thereby leading to one hierarchy of norms and principles.³⁰ When a municipal norm contravenes the general norms and principles of international law, this norm must be overruled. This approach is laid down in article 15 of the Russian Constitution, which states that “commonly recognized principles and norms of international law and international treaties of the Russian Federation shall be a component part of its legal system,” and questions the correlation between the strict rules of Russian procedural codes (no treaty, no execution) and the principle of comity and reciprocity that is basic for international law, including respect for the official acts of other states and equal treatment to the acts of other states as a response to the respect these states pay to the acts of the concerned state. Also, from a legal standpoint it is certainly not irrelevant that on 24.06.1994 Russia entered into the Partnership and Cooperation Agreement Establishing a Partnership between the Russian Federation and the European Communities and Their Member States, whereby the Russian Federation, among other things, obligated itself to respect the legal acts delivered in European countries.³¹

During the last several years, Russian commercial courts have made some dissenting decisions in this aspect, sometimes upholding the principle of comity and allowing for execution in absence of an international treaty. One of these decisions is the ruling of the Supreme Commercial Court 13688/09 from 07.12.2009, where the Court upheld the decision of one of Russia's lower courts, which recognized a court decision delivered in the Netherlands. In spite of there being no Russian-Dutch treaty on recognition and enforcement, the Court reasoned that Russian judgments are enforceable and some of them were in fact enforced in the Netherlands. Due to the principles of comity, as the Court continued, the decision of the Netherlands cannot rest unexecuted in Russia. Particularly stressed in the wording of the decision was the fact that the Russian legal order does not tolerate refusal to recognize and execute judicial acts delivered by a competent court pursuant to valid legal norms, and this principle does not make discrimination between the domestic and foreign judicial acts. This change in the approach of commercial courts has been a very important indicator of the Russian judicial system becoming more flexible and less formalist. But, to our knowledge, to date it is the only decision of the Supreme Commercial Court in favour of the principle of comity in cases on enforcement. The situation with this principle of international law must be a constituent part of the Russian law, but in the

²⁸ In Russia, a treaty is ratified by adopting a federal law.

²⁹ National and international law have different competence areas and are not part of a single system.

³⁰ Fiona De Londras, “Dualism, Domestic Courts, and the Rule of International Law”, in Mortimer Sellers and Tadeusz Tomaszewski (eds.), *Ius Gentium: the Rule of Law in Comparative Perspective* (Springer, 2009); available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1393293.

³¹ Anton Burkov, “Improvement in Compliance of the Russian Judicial System with the International Obligations Undertaken by the Russian Federation”, EU-Russia Centre, 28 June 2010; available at: <http://www.alleuropa.ru/improvement-in-compliance-of-the-russian-judicial-system-with-the-international-obligations-undertaken-by-the-russian-federation>.

absence of municipal laws it is not applied by the Russian courts as illustrative for the enforcement problem discussed in this paper.

Some indices of the changing mentality of the Russian courts can be marked. Among these indices is the confirmation by the Supreme Commercial Court of the power of commercial courts to freeze assets and grant other interim security measures in support of foreign arbitration proceedings.³² Another, even more illustrating case is a statement given by the Constitutional Court in reply to an inquiry message of the Supreme Commercial Court about the possibility of granting arbitral awards in cases about the rights on real estate property. All the involved parties, including the General Attorney, the Russian Registry, and the representative of President in the Constitutional Court, agreed with the argumentation of the Supreme Commercial Court, which insisted that arbitration courts cannot decide on rights with regard to real estate, as these decisions would involve the obligation of the state – namely the Russian Registry – to register the rights established by non-state (arbitration) courts. This can infringe on the sovereignty of the state, in as much as state power would be subject to another power.³³ But the Constitutional Court dissented and allowed the arbitration tribunals to adjudicate real estate property for the simple reason that there are no formal interdictions in the current legislation, and that sovereignty will not be impaired if the state would cooperate with such institutes of civil society as arbitration tribunals.³⁴

Conclusion

Russian courts have shown ambivalence toward foreign arbitration. Because Russia has only recently opened itself to private enterprise and international commerce, this ambivalence is not surprising. Moreover, this ambivalence seems to diminish with time. The court doctrine is becoming at least more predictable, as there are several ruling precedents, some of which are collected in the cited Information Letter of the Supreme Arbitration Court No. 96, and several precedential cases have been considered in recent years. The frequent choice of foreign arbitration in Russia-based transactions shows that many transactions are likely to involve difficult and complex matters where the domestic state courts are not as competent – and, therefore, not as impartial – as one would wish. In this perspective, it is vital to better understand not only the particular court decisions on recognition and enforcement, but also the legal mentality that underlies these decisions and the trend toward transforming this mentality in contemporary Russia. Hardly any “protective measures” (like those suggested by Chief Justice Ivanov) can improve the attitude of Russians towards their judicial system without “paradigmatic shifts” in the legal mentality of the judiciary.

³² Ruling of Supreme Commercial Court No 17095/09 dd. 20.04.2010.

³³ http://rapsinews.ru/judicial_analyst/20110526/252653242.html.

³⁴ Statement of Constitutional Court No 10-II of 26.05.2011.

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