NYSBA AUTUMN 2008 | VOL. 21 | NO. 2

International Law Practicum

A publication of the International Law and Practice Section
of the New York State Bar Association

Practicing the Law of the World from New York

COMMENTARIES:

The Legal Profession and the Rule of Law 71
Anne Ramberg

A New York Loan Agreement with a Brazilian Promissory Note: Can this Cross-Border Marriage Survive? 73
Susanna V. Stern and Fabrizio Sasdelli

ARTICLES:

Law & Language in the Global World 76
James Hope

Vietnam in a Nutshell: An Historical, Political and Commercial Overview 82
Andrew L. Odell and Marlene F. Castillo

Investing into a Listed Company in China 92
Tianpeng Wang

Anti-Suit and Anti-Anti-Suit Injunctions in Multi-jurisdictional Proceedings 96
Alexander Shaknes

A Primer on Italian Commercial Agency Law 104
Marco Amorese and Casey W. Halladay

An Introduction to Enforcement in Russia of Foreign Arbitral Awards, and Barriers to Entry to American Courts 109
Daniel J. Rothstein

Obtaining Evidence from U.S. Courts for Use in Cross-Border Disputes 118
Mark H. Alcott

Transborder Law: Application of the European Union Data Privacy Law to Multinational Corporations 124
Elizabeth I. Hook, Cécile Martin, and Suzette Ivanova

The Application of the Sarbanes-Oxley Whistleblower Hotline and No-Reprisal Obligations Under Swedish Law 133
Pia Nyblæus

Letters to the Editor 141

NYSBA

An Introduction to Enforcement in Russia of Foreign Arbitral Awards, and Barriers to Entry to American Courts

By Daniel J. Rothstein

I. Introduction

Since the large-scale entry of foreign businesses into the Russian market in the early 1990s, the normal practice for foreign parties to international business deals in Russia has been to provide, when possible, for dispute resolution to take place outside of Russia and to be governed by other than Russian law. The main reasons for this are fears that Russian commercial law is undeveloped, and that Russian legal institutions are inexperienced in commercial matters, biased in favor of local parties, susceptible to political influence, or corrupt.[1]

In recent years, a similar trend has emerged among Russian businesses, i.e., entities owned by Russian citizens. Russian participants often prefer dispute resolution forums outside of Russia[2] because of the same fears of unpredictability mentioned above. Other factors that have moved many Russian disputes abroad include (i) Russian citizens' frequent use of foreign companies in order to hold Russia-based assets for tax reasons or to shield the ultimate owners' identity from competitors or the public;[3] and (ii) the involvement of foreign lenders and foreign law firms in many significant transactions among Russian parties.

Because of Russia's explosive economic growth in recent years, the number of Russia-related disputes decided abroad has also grown rapidly. This trend has begun to attract considerable attention from lawyers specializing in international dispute resolution. For example, the cover story of the April 2008 issue of *Global Arbitration Review* was devoted to Russia.[4]

The following discussion will introduce two main points of intersection between the Russian legal system and non-Russian forums (in particular the United States) regarding predominantly Russian commercial disputes: (i) enforcement in Russia of foreign court judgments and arbitral awards; and (ii) jurisdictional and similar barriers to entry to courts in the United States.

II. Enforcement in Russia

A. Enforcement in Russia of Foreign Court Judgments

Under Russian legislation, foreign court judgments can be enforced in Russia only if a treaty so provides. As of 2007, Russia had such treaties with only thirty-six countries, including ten members of the Commonwealth of Independent States. However, in some recent cases, even in the absence of a treaty, Russian courts have enforced foreign court judgments under the international law principle of comity. It has been argued that there is little legal basis for using this general norm to support enforcement of a foreign court order.[5] Thus, there are no grounds for confidence that a court judgment from a non-treaty country will be enforced in Russia.

B. Enforcement in Russia of Foreign Arbitral Awards

Russia is a member of the 1958 New York Convention on Recognition and Enforcement of Arbitral Awards by virtue of the USSR's accession to the Convention in 1960 and post-Soviet Russia's assumption of the USSR's international treaty rights and obligations. In 2002, the Russian courts with jurisdiction over most commercial disputes, called the "state arbitrazh courts," were given responsibility for enforcement of international arbitration awards. The state arbitrazh courts' treatment of requests to enforce international arbitral awards has given rise to considerable controversy in recent years, in particular in connection with (1) the application of public policy grounds for non-enforcement of awards, and (2) the exclusion of major areas of commercial law from arbitral competence, in particular in cases involving non-Russian parties.[6]

1. Non-Enforcement of Arbitral Awards on Public Policy Grounds

The most authoritative and comprehensive source of guidance on enforcement of arbitral awards in Russia is the Supreme Arbitrazh Court's *Information Letter No. 96*, issued in December 2005. The Letter consists of summaries and comments on thirty-one cases decided by the arbitrazh courts of various levels, including the Supreme Arbitrazh Court itself, and recommendations to lower courts on deciding future cases.[7] According to one commentator, the choice of cases selected for review, and the manner of presenting them (for example, tendentious presentation of facts in some instances), reveal the Supreme Arbitrazh Court's ambivalence and inconsistency in enforcing international arbitral awards and a greater reluctance to enforce than in the lower courts with the most experience in the area—the courts in Moscow and St. Petersburg.[8]

One case in particular from the Supreme Arbitrazh Court's survey illustrates the Court's strong interventionist tendency and its elastic view of public policy grounds for non-enforcement. In that case, presented in Section 29 of the Court's *Information Letter No. 96*, the arbitration

award provided that a Russian joint venture and one of its founders (apparently also a Russian entity) should pay $20 million to a foreign founder in connection with its withdrawal from the joint venture. The $20 million represented the value of the foreign partner's contribution to the joint venture's charter capital. The Supreme Arbitrazh Court denied enforcement, and noted that the arbitral tribunal's award did not take into consideration the fact that the charter capital contribution, in the form of equipment, had not been imported to Russia by the time the award was rendered. The Supreme Arbitrazh Court remanded the case to the lower court with instructions to consider, among other issues, whether public policy is consistent with "the possibility of returning to a founder its property contribution to the charter capital of a joint venture . . . while also imposing damages in the form of the contribution upon the joint venture itself, as well as one of its founders." The Supreme Arbitrazh Court further instructed the lower court to examine this issue with consideration for "the litigants' equal right to judicial protection." On remand, the lower court refused enforcement, because, as the Supreme Arbitrazh Court reported, the award contradicted Russian public policy, which is "based on the principles of equality of parties to civil-law relations, their good-faith behavior, and the proportionality of civil-law liability to the effects of the breach of duty, taking into account fault." [9]

The Supreme Arbitrazh Court's discussion of this case, which is only three pages long, does not consider how the arbitral award could be justified (for example, the foreign party's position on the asserted deficiencies in the award). Thus, it is difficult to evaluate whether the arbitration award was incorrect under the law governing the arbitration, and, assuming the award was incorrect under the governing law, how the Supreme Arbitrazh Court distinguishes between an award that is incorrect and one that violates Russian public policy. Moreover, as the commentator referred to above points out, the Supreme Arbitrazh Court's imposition of "equality of parties to civil law relations, their good-faith behavior, and proportionality of civil law liability" as guidelines for applying the public policy exception creates wide possibilities, inconsistent with international norms, for substantive review of arbitral decisions.[10]

More recently, another commentator has asserted that "there is no evidence that this 'broad' term in approach to the public policy issue [as presented in Section 29 of *Information Letter No. 96*] has been followed by judges, including at the level of the Supreme Arbitrazh Court. Indeed in several recent cases the Supreme Arbitrazh Court has adopted a narrower interpretation for the public policy ground."[11] In one case cited by this commentator, *Joy-Lud Distributors International Inc. v. JSC Moscow Oil Refinery*, the Supreme Arbitrazh Court ruled, in two decisions in 2006 and 2008, that a $28 million contractual penalty award in favor of Joy-Lud (a New York corporation) in a Stockholm arbitration under Swedish law did not violate Russian public policy. A review of the *Joy-Lud* decisions, however, suggests a less arbitration-friendly stance than that commentator discerns.

In the 2006 decision in *Joy-Lud*, the Supreme Arbitrazh Court rejected the Russian party's argument that the award violated public policy because it was improperly punitive. One of the Court's primary grounds for rejecting this argument was that Russian law allowed for the same kind of penalty as the arbitral tribunal had granted under Swedish law. Thus, the Court stated, citing Section 29 of its *Information Letter No. 96*:

> [Russian] civil law proceeds from the principle of equal rights and obligations of Russian and foreign legal and physical persons and contemplates imposition of a penalty as a possible measure of liability for nonperformance or inadequate performance of contractual obligations. Therefore, this measure is part of the legal system of the Russian Federation, and its imposition does not violate the public policy of the Russian Federation.[12]

The Court also noted that the penalty was not disproportionate to the effects of the breach.[13]

In the 2008 decision in the same case, the Russian party argued that it had new evidence that the claimant had misrepresented its identity to the arbitrators and the courts. Thus, the Russian party argued that enforcement of the award, resulting in enrichment of an entity that was not a party to the transaction, would violate public policy. The Supreme Arbitrazh Court rejected the assertion that the evidence was new, and pointed out that it could have been presented to the Stockholm arbitration tribunal. But the Court also evaluated the evidence presented by the Russian party—that various documents referred to the claimant alternatively as "Joy-Lud" and "Joy Lud" (i.e., with and without a hyphen). On the basis of other evidence, including a declaration from the New York company registration authorities, the Supreme Arbitrazh Court found that Joy-Lud and Joy Lud were one and the same company.[14]

Although the Supreme Arbitrazh Court ultimately upheld the arbitral award in *Joy-Lud*, the Court's repeated, in-depth examination of the substance of the award does not send a clearly pro-arbitration message. In its 2006 decision, the Court's reliance on the similarity between Swedish and Russian law governing contractual penalties raises a question as to whether the Court would have refused to enforce the award on public policy grounds (i) if Swedish and Russian law were not similar, or (ii) if the Court had considered the penalty disproportionate to the breach of contract. (As noted above, the Court found the penalty proportionate.) Also, the 2006 decision's reference

to the equality of Russian and foreign litigants sounds gratuitous, creating the impression that upholding an award for a foreign party is an important occasion, and by implication perhaps an exception.

Similarly, in the 2008 decision, after the Supreme Arbitrazh Court ruled that the Russian party could have presented the evidence of confusion of Joy-Lud's identity to the arbitrators, the discussion of whether there was confusion was unnecessary. Even if the arbitrators had seen the evidence and wrongly concluded that there was no confusion, this would hardly be grounds for invoking the public policy exception. As in the joint venture withdrawal case in Section 29 of *Information Letter No. 96*, the Supreme Arbitrazh Court did not explain the distinction between an erroneous arbitral award and one that violates public policy. Thus, the *Joy-Lud* decisions blur the distinction between error and a violation of public policy, and leave wide room for invoking the public policy exception in future cases.

2. Exclusion of Subject Matter from Arbitral Jurisdiction

Under Russia's Law on International Arbitration, the subject matter of international commercial arbitration is limited to "disputes resulting from contractual and other civil law relations."[15] Russia's law on domestic arbitration contains a similar limitation.[16] Also, Article 248 of the Arbitrazh Procedure Code reserves certain disputes involving foreign parties for the "exclusive jurisdiction" of the state arbitrazh courts, including disputes involving real property located in Russia.[17]

The Supreme Arbitrazh Court has interpreted these provisions as excluding disputes over real estate rights from arbitral jurisdiction. For example, *Information Letter No. 96* discussed a domestic arbitral award that upheld the claimant's contractual right to purchase a building. Specifically, the award "recognized the [claimant's] ownership right" and "required the state registration agency to register that right." The claimant's application to enforce the award was denied, because replacing the owner of real estate in the state registry is a matter of "public and administrative law relations," and thus not the subject of "contractual and other civil law relationships," which are the only permissible subject matter of arbitration, as noted above.[18] In a later case that applied these Supreme Arbitrazh Court guidelines and likewise held that a dispute over real estate rights was beyond arbitral jurisdiction, an intermediate-level appeals court rejected without explanation the argument that the arbitral award required only the parties, not the state registration agency, to take action, i.e., to submit a lease extension agreement to the agency.[19]

Similarly, in another case discussed in *Information Letter No. 96*, the prevailing party was a foreign company, and the arbitral award in its favor included money damages, but also a levy on a building at a price provided for in the award. The Supreme Arbitrazh Court set aside the arbitral award insofar as it concerned the rights to the building. The Court noted that one of the parties was a foreign entity, and upheld the lower court's holding that under Article 248 of the Arbitrazh Procedure Code, the claim involving real estate "could not be reviewed by the arbitral tribunal."[20]

In a recent case involving a lease of a prime Moscow retail site, the state arbitrazh court set aside an award rendered by the International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry. The claimant, a Russian subsidiary of the Finnish department store chain Stockmann, obtained an arbitral award requiring its landlord to renew the lease or pay damages of $27 million. The court set aside the award, because lease rights are established by registration of a lease agreement with the state registration agency, and the issue of whether such rights should be registered is a matter of "public and administrative law relations" and cannot be the subject of arbitral jurisdiction.[21]

A controversial question in Russia is whether a foreign choice of law or forum clause in a shareholders' agreement concerning the operation of a Russian company is valid. In one case involving a contest for control of a major Russian telecommunications company, an appellate court held that a provision in a shareholders' agreement, which called for foreign arbitration under foreign law of challenges to corporate decisions, was invalid. An editorial note in Russia's leading international arbitration periodical agreed with the court's decision, while disagreeing with the court's "public policy" basis for the decision. The editorial note stated that shareholder agreements concerning Russian companies must be governed only by Russian law, and suggested that shareholders in Russian companies should not be "led astray by lawyers in international law firms, who prefer to subject their clients' agreements not to Russian law, but to foreign law, with which they are more familiar."[22] The parties in the telecommunications dispute who challenged the choice of law and forum clause relied on various provisions of Russian corporate, civil, and constitutional law.[23] Parties taking this position could also cite Article 248 of the Arbitrazh Procedure Code, which provides that the state arbitrazh courts have "exclusive jurisdiction" over disputes connected with "the foundation, liquidation, or registration in the Russian Federation of legal entities," and with "challenging the decisions of organs of such legal entities."[24]

Russian law's ambivalence toward international arbitration has been attributed in part to "the short time that has passed since our country rejected a policy of isolationism" and also to a traditional suspicion of a "conspiracy of the West against Russia."[25] Suspicion toward international arbitration is most clearly misplaced when both sides to the dispute are Russian-owned companies. As

Russia's integration into the world economy continues, and Russian companies continue to have their disputes decided in foreign forums, it will be more difficult to identify who is a "Russian" party, and national considerations in enforcement of foreign decisions should play a smaller role.

In light of the resistance of the Russian courts toward foreign arbitration, it is not surprising that anecdotal evidence and empirical data suggest that "Russian courts enforce foreign arbitration awards less often than most signatory states of the New York Convention."[26] However, as discussed below, while courts in the United States, for example, cede jurisdiction to foreign forums quite liberally, this openness cannot be taken for granted, and the Russian courts' more reluctant posture is not as anachronistic as it might seem.

In its 1972 decision in *M/S Bremen v. Zapata Off-Shore Co.*,[27] the U.S. Supreme Court laid down the modern American rule that a forum selection clause calling for litigation in a foreign court should generally be upheld in the context of "a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening."[28] The Supreme Court noted that traditionally, "many courts, federal and state, . . . declined to enforce such clauses on the ground that they were 'contrary to public policy,' or that their effect was to 'oust the jurisdiction' of the court." The Supreme Court rejected this view and stated, "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts."[29]

Although *Bremen* eliminated any remaining general tendency of American courts to reject forum selection clauses in arm's-length international commercial transactions, the courts still examine closely whether a forum selection clause covers all of the plaintiff's claims, whether the foreign forum was unfairly imposed, and whether the plaintiff will be unfairly deprived of a remedy in the foreign forum.[30] In particular, the courts examine whether application of foreign law will result in the loss of a remedy that furthers an important public policy, such as treble damages under the antitrust laws or RICO,[31] or remedies under the securities laws.[32] Similarly, the courts scrutinize the public policy ramifications when consent to domestic arbitration entails waiver of a substantive or procedural remedy, such as treble damages, the class action, or certain pre-trial disclosure.[33]

The pre-*Bremen* resistance of American courts to forum selection clauses is similar to the resistance of Russian courts toward international arbitral awards today. While the *Bremen* approach seems obviously correct today, the pre-*Bremen* era in American courts was not long ago. This perspective on recent American legal history suggests that it is too early to give up hope that the isolation that can be seen in some Russian court decisions on enforcement of international arbitral awards will relax and that Russia will continue to adapt to modern international legal practices.

III. Jurisdictional and Related Barriers to Entry to Courts in the United States

A plaintiff who tries to sue a Russian defendant in the United States over events in Russia will encounter well-established barriers to entry to the courts: limitations on personal and subject-matter jurisdiction; and the doctrine of *forum non conveniens*. Since 1992, when free private enterprise in modern Russia began, there have been about two dozen reported decisions of American courts (including federal appellate courts and two state high courts) dealing with jurisdiction over a Russian defendant or the convenience of the forum for litigating a Russia-based dispute. Several of these decisions involve major Russian companies and illustrate typical circumstances that may lead an American court to keep or dismiss a case.

Personal jurisdiction, subject-matter jurisdiction, and *forum non conveniens* are discussed separately below, but there is substantial overlap among them, and defendants often raise more than one as a reason for dismissing a foreign-centered dispute. For example, in *Norex Petroleum Ltd. v. Access Industries, Inc.*, a dispute over control of a Russian oil company, the case was first dismissed under *forum non conveniens*,[34] remanded by the appellate court for reconsideration of the *forum non conveniens* issue,[35] and dismissed by the trial court for lack of subject-matter jurisdiction,[36] while motions were pending for dismissal for lack of personal jurisdiction.

A. Personal Jurisdiction

Under the U.S. Supreme Court's interpretation of constitutional due process limitations on judicial power, a court will not exercise personal jurisdiction over a nonresident defendant unless (i) the defendant has "continuous and systematic general business contacts" with the forum,[37] or (ii) "the defendant has purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities."[38] Personal jurisdiction based on "continuous and systematic general business contacts" does not require that the claim relate to those contacts, and is called "general jurisdiction." Personal jurisdiction based on the connection between a claim and the defendant's forum-directed activities is called "specific jurisdiction."[39] In deciding whether there is personal jurisdiction, the court may also consider other factors, such as the forum state's interest in the case and the parties' burdens or interests in litigating in the forum.[40]

1. "General" Personal Jurisdiction

In *Archangel Diamond Corp. v. Lukoil*,[41] the Colorado Supreme Court held that Lukoil's ownership of gasoline

stations in Colorado and elsewhere in the United States and the display of its logo on the gas stations supported a finding of general jurisdiction. Thus the claim, which involved a Russian diamond mining venture, was allowed to proceed even though it was unrelated to Lukoil's U.S. activities.

An assertion of general jurisdiction based on incidental property located in the United States was rejected in *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory."*[42] The plaintiff in that case, a Channel Islands trading company, sought to confirm a Russian arbitral award, and in related proceedings sought to satisfy the award through seizure of a shipment of aluminum produced by the defendant. The court held that a single shipment of aluminum to the United States (assuming it belonged to the defendant), together with other occasional activities there (purchase of materials, business negotiations, attendance at trade conferences), did not amount to "continuous and systematic" contacts. The court also noted that the defendant did not have a subsidiary, office, or sales agent in the United States, and did not contract directly with American purchasers.

2. "Specific" Personal Jurisdiction

Minor or incidental business communications with a plaintiff located in the forum do not usually create personal jurisdiction over a foreign defendant for claims arising out of the transaction ("specific personal jurisdiction," defined above). Thus, in the *Archangel Diamond v. Lukoil* case mentioned above, the plaintiff, a Canadian company, asserted specific personal jurisdiction against a second Russian defendant (besides Lukoil) based on its communications directed at the plaintiff's Colorado office. The court declined to exercise jurisdiction over that defendant, because the communications concerned only attempts to resolve the dispute, not negotiation of the original transaction. Similarly, in *Montcrief Oil International Inc. v. OAO Gazprom*,[43] which involved a claim for breach of agreements to cooperate in developing a gas field in Russia, the court held that a defendant's visit to Texas, which was at Montcrief's invitation and during which the agreement was not concluded, did not establish personal jurisdiction.

The place of performance of a contract can be an important factor in exercising specific personal jurisdiction in an action for breach of the contract. In *Indosuez International Finance B.V. v. National Reserve Bank*,[44] a Netherlands plaintiff sued a Russian defendant for failure to pay under a series of forward currency exchange contracts. Although the contracts were not executed in New York, the state's high court upheld specific personal jurisdiction over the defendant because (i) several of the contracts specified performance by payment to New York bank accounts, (ii) in several of the contracts New York was chosen as the forum for dispute resolution, and (iii) prior similar transactions between the parties involved performance by payment in New York.

B. Subject-Matter Jurisdiction

While the inappropriateness of a U.S. forum for a dispute arising abroad is usually argued on grounds of lack of personal jurisdiction (see above) or *forum non conveniens* (see below), occasionally an issue of subject-matter jurisdiction is presented. When a common-law claim (for example, fraud or breach of contract) is brought in a court of general jurisdiction, there are generally no grounds for arguing lack of subject-matter jurisdiction. However, when the claims are statutory, a question of subject-matter jurisdiction question arises: did the legislature intend to apply the statute to conduct abroad?

The complaint in the *Norex Petroleum* case mentioned above was dismissed before any disclosure proceedings were allowed, even on jurisdictional issues. The *Norex* plaintiffs alleged that an oil company was taken over through various illegal acts (for example, fraud, extortion, bribery) under RICO. In dismissing the complaint, the court noted that RICO can apply to a "predominantly foreign transaction" when (i) "material conduct" in the United States directly injures the plaintiff, (ii) the transaction has "substantial effects" in the United States, or (iii) the conduct abroad is intended to and does affect U.S. exports or imports.[45]

The court held that the requirement of showing "material conduct" in the United States, resulting in the takeover, could not be satisfied by evidence that it was "masterminded, operated and directed" from the United States, that money used for bribes was wired from the United States, or that the defendants traveled between the U.S. and Russia in connection with the takeover.

The court also held that the "effects" test could not be satisfied by evidence of harm to U.S. portfolio investments in Russian companies involved in or affected by the takeover, because the harm alleged was not to the plaintiff. Further, the court held that the fact that the plaintiff itself (the victim of the takeover) was a subsidiary of an American corporation did not create subject-matter jurisdiction, because the plaintiff's ultimate owner was a Canadian citizen. Finally, the court held that the cancellation of $10 million in service contracts in Russia and unspecified effects on the world oil market as a result of the takeover were not a significant effect on U.S. commerce. The court noted that U.S. commerce can be affected by almost any limitation on the supply of goods abroad, and that in light of "the international complications" in applying extraterritorial jurisdiction, more serious effects need to be alleged in order to create jurisdiction.[46]

C. *Forum Non Conveniens*

Under the doctrine of *forum non conveniens*, the courts have broad discretion to dismiss a case where despite having jurisdiction, the court finds, upon weighing various private and public interests, that the case should be

decided in another forum. The main factors considered are usually (1) the case's connection to the forum and to another available forum, (2) the availability of evidence in the different forums, (3) the convenience of the parties and witnesses, and (4) the adequacy of the alternative forum.[47] The federal and state courts apply *forum non conveniens* basically the same.[48]

A nonresident plaintiff must overcome an initial barrier in defending its choice of forum. "When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable."[49] The reason for this distinction is that a foreign plaintiff "sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself."[50]

Furthermore, in a predominantly foreign dispute, the first three *forum non conveniens* factors listed above usually point strongly to dismissal. Thus, for example, in two cases that were essentially disputes among Russian and other non-U.S. parties for control of major Russian industrial groups, those three factors were the main reasons for dismissal of the cases in favor of a Russian forum. The two cases were the earlier *Norex Petroleum* decision discussed above, and a second *Base Metal Trading v. Russian Aluminum* case.[51] Furthermore, the *Base Metal* court noted that, while three of the plaintiffs were American corporations, they were not entitled to deference in their choice of forum because they were special-purpose vehicles with no U.S. operations. Thus, the court stated that the record "points to nothing but forum shopping by the plaintiffs."[52]

As for the adequacy of the alternative forum, the lack of procedures available in a foreign forum that would be available in U.S. courts (such as broad pretrial disclosure) will generally not prevent dismissal under *forum non conveniens*, because the plaintiff chose to do business in the other forum and presumably understood the risks of litigating there.[53]

Parties opposing a *forum non conveniens* motion often argue, and almost always without success, that the alternative forum is inadequate because it is corrupt. In the *Base Metal* forum decision, the court commented that the plaintiffs sought to uphold certain Russian judicial decisions but challenged others. In this connection, the court referred to the doctrine of comity and stated: "This Court is not a court of appeals for the Russian legal system and will not act as such .... It is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation."[54]

One court has observed that in *forum non conveniens* decisions, the argument that the alternative forum is corrupt "does not enjoy a particularly impressive track record."[55] The court in that case was "unable to locate any published opinion fully accepting" the corruption argument. However, the decision in that case was a notable exception to the court's general observation. Although the court found that all other factors pointed to dismissal under *forum non conveniens*, the court kept the case, finding Bolivia an inadequate forum on the basis of public statements by the country's Minister of Justice about pervasive corruption in the courts.

Recent statements by President Medvedev (both before and after his election) are similar to the statements that led to the finding that Bolivia was an inadequate forum. Thus, Mr. Medvedev has criticized Russia's "legal nihilism."[56] He has stated that courts make "unjust decisions" as a result of "different kinds of pressure, like telephone calls and—there's no point in denying it—offers of money,"[57] and that corruption has become a "way of life" in Russia.[58] Similarly, in May 2008, a Supreme Arbitrazh Court judge testified in a libel trial that an official in the Presidential administration had pressured her to change a ruling in a dispute over control of a major Russian chemicals company.[59] Such statements might help future litigants keep some Russia-related disputes in U.S. courts. However, as the *Base Metal* case indicates, strong but general evidence of corruption will not necessarily keep a foreign dispute in an American court.

D. Restraint in Exercising Jurisdiction Over Bankruptcy-Related Matters

The restraint of American courts, under the various doctrines discussed above, in exercising jurisdiction over predominantly foreign disputes is well illustrated when the U.S. litigation can affect foreign bankruptcy proceedings.

In a case arising out of Russia's 1998 financial crisis and moratorium on payment of foreign private debt, *Credit Agricole Indosuez v. Rossiyskiy Kredit Bank*,[60] New York's high court had occasion to review American rules governing the preservation of assets to secure a future judgment. The defendant, one of Russia's largest banks at the time, did not contest liability for its default on $30 million of debt instruments that called for resolution of disputes in the New York courts. The plaintiffs requested a preliminary injunction forbidding the transfer of assets that would be needed to satisfy a judgment, and alleged that the defendant was insolvent and had already transferred its main assets to another Russian bank.

Although the trial court granted the preliminary injunction, and the intermediate appellate court affirmed, the Court of Appeals reversed under the longstanding American rule that, "in a pure contract money action, there is no right of the plaintiff in some specific *subject* of the action; hence no prejudgment right to interfere in the use of the defendant's property." Declining to follow the example of the English courts, which since 1975 have granted prejudgment relief to prevent frustration

of a money judgment, the Court of Appeals stated: "the widespread use of this remedy would . . . substantially interfere with the sovereignty and debtor/creditor/bankruptcy laws of . . . foreign countries."[61]

In a recent case of great notoriety, which the Texas bankruptcy court where it was brought called "the largest bankruptcy case ever filed in the United States," the Russian oil company Yukos filed for reorganization by creating a Texas subsidiary and transferring several million dollars to it for the admitted purpose of creating U.S. bankruptcy jurisdiction. The court surmised that Yukos's apparent goal in filing for bankruptcy in the United States was to "alter the creditor priorities that would be applicable" to its tax debt in Russia and in other jurisdictions where Yukos could seek relief or was already seeking relief.[62]

Ruling on a motion to dismiss the case, the court held that it had exclusive jurisdiction over the case by statute, and that this grant of jurisdiction prevented dismissal under *forum non conveniens*. Although the court held that neither comity nor the act of state doctrine provided an independent basis for dismissal of the case, the court noted that these doctrines contributed to its decision to dismiss the case under a judicially created "totality of the circumstances" test, considered together with a statutory basis for dismissal: Yukos's "inability to effectuate" a bankruptcy plan. In this regard, the court stated: "since most of Yukos' assets are oil and gas within Russia, its ability to effectuate a reorganization without the cooperation of the Russian government [the relevant taxing authority and regulator of Yukos's oil production] is extremely limited." This factor "weighed heavily" in the court's decision because of Yukos's "sheer size" (being responsible for twenty percent of Russia's oil and gas production) and its "impact on the entirety of the Russian economy." Finally, the court stated that it was not "uniquely qualified, or more able than the other forums," to interpret the laws of those jurisdictions under which Yukos would be seeking relief.[63]

Yukos did not pursue an appeal of the dismissal of the bankruptcy case.

IV. Summary and Conclusion

Russian courts have shown ambivalence toward foreign arbitration of Russia-based disputes. Because Russia only recently opened itself to private enterprise and international commerce, this ambivalence is not surprising and has parallels in recent American legal history. The ambivalence should diminish with time and experience, especially in light of the frequent choice of foreign arbitration in Russia-based transactions, including those involving only Russian parties.

During this early period (approximately the past fifteen years) of coalescence of holdings of Russian industrial property, disputes over control of several major companies have found their way to American courts because the plaintiffs hoped to find a more favorable forum than Russia. Those cases had little connection to the United States, and the courts dismissed them under settled rules of jurisdiction and *forum non conveniens*.

Endnotes

1. On political influence and corruption in the Russian courts, *see* Part III.C. at the text accompanying notes 57 through 59, *infra*.
2. Vaneev, *Recognition and Enforcement of Decisions of Foreign Courts in Russia* (in Russian) KORPORATIVNYI IURIST, No. 3, at 39 (2007).
3. Cyprus, the Netherlands, and Luxembourg are consistently among the top sources of investment into Russia, and "most of this is Russian capital 'round tripping.'" Vinhas de Souza, *Foreign Investment in Russia*, ECFIN COUNTRY FOCUS, Vol. 5, No. 1, Table 1 & n. 5.
4. *Inside Russia's Arbitration Bar*, GLOBAL ARBITRATION REVIEW, Vol. 3, Issue 2 (2008).
5. Vaneev, note 2 *supra*, at 40-41.
6. *See* Tapola, *Enforcement of Foreign Arbitral Awards: Application of the Public Policy Rule in Russia*, 22 ARBITRATION INT'L 151 (2006).
7. (*Information Letter of the Russian Federation Supreme Arbitrazh Court No. 96* (hereinafter "*Information Letter No. 96*"), 22 December 2005, available in Russian at www.arbitr.ru). For comprehensive discussions of practice before *Information Letter No. 96*, see Spiegelberger, *The Enforcement of Foreign Arbitral Awards in Russia: An Analysis of the Relevant Treaties, Laws, and Cases*, 16 AM. REV. INT'L ARB. 261 (2005); and K. Hobér, ENFORCING FOREIGN ARBITRAL AWARDS AGAINST RUSSIAN ENTITIES (1994).
8. Karabelnikov, *The Supreme Arbitrazh Court of the Russian Federation Does Not Trust Foreign Arbitration* (Parts I and II) (in Russian), *KORPORATIVNYI IURIST*, Nos. 4-5 (2006).
9. *Information Letter No. 96*, Section 29. An English translation of this Section of *Information Letter No. 96* is provided as an appendix to this article.
10. Karabelnikov, note 8 *supra*, Part II, at 43-46.
11. Rachevsky, *Public Policy, Arbitrability, and Enforcement*, in 3 GLOBAL ARB. REV., Issue 2, at 29 (2008).
12. *Decree of Presidium, Supreme Arbitrazh Court*, Case No. 5243/06, at 5 (19 September 2006).
13. *Id.*
14. *Decree of Presidium, Supreme Arbitrazh Court*, No. 5243/06, at 6-8 (22 January 2008).
15. Russian Federation Law on International Commercial Arbitration, art. 1.2.
16. Russian Federation Law on Arbitral Tribunals in the Russian Federation, art. 2.
17. Arbitrazh Procedure Code, art. 248.2. *See generally* Hertzfeld & Ivanov, *Disputes Regarding Immovable Property (Real Estate) in the Russian Federation: the Competence of Arbitral Tribunals*, STOCKHOLM CHAMBER OF COMMERCE ARB. INST. NEWSLETTER (Jan. 2009).
18. *Information Letter No. 96*, Section 27.
19. *OAO Moskva-Krasnye Kholmy v. ZAO Hewlitt Packard*, Case No. KG-A40/83370-07 (Federal Arbitrazh Court, Moscow Circuit, 3 Sept. 2007), *reported in MEZHDUNARODNYI KOMMERCHESKII ARBITRAZH*, No. 1/2008, pp. 158-64.
20. *Information Letter No. 96*, Section 28.
21. *ZAO Kalinka-Stockmann v. OOO Smolenskii Passazh*,Case No. A40-28757/08-25-228 (Moscow City Arbitrazh Court, 14 Aug. 2008).
22. *MEZHDUNARODNYI KOMMERCHESKII ARBITRAZH*, No. 3/2007, p. 98.