Enforcement of Arbitration Awards in Russia and Ukraine: Dream or Reality?
Table of Contents

1. Arbitral Proceedings-Enforcement in Russia and Ukraine  
   Steven Gee QC

2. Enforcement of International Arbitral Awards in Russia  
   Maxim Kulkov

3. Selected Issues and Case Studies for Enforcement of Arbitration Awards in Russia and Ukraine  
   Gene M. Burd

4. Convention on the Recognition and Enforcement of Foreign Arbitral Awards

5. Enforcing Arbitration Awards under the New York Convention

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


8. Selected Issues and Case Studies for Enforcement of Arbitration Awards in Ukraine  
   Irina Nazarova

9. Law of Ukraine (Translations)


11. ABA Section of International Law Russia/Eurasia Committee Newsletter (Summer 2008)

12. Decree No. 13 of the Plenum of the Supreme Court of the Ukraine (October 24, 2008)
Online Resources

Eastern Europe Leads the Charge in Arbitration
http://www.thelawyer.com/eastern-europe-leads-the-charge-in-arbitration/105377.article

Major Investor in Russia Sees Wide Fraud Scheme

High Commercial Court Tramples International Agreements

Sovereign Immunity as a Bar to the Execution of International Arbitral Awards
http://www.law.nyu.edu/ecm_dlv2/groups/public/@nyu_law_website__journals__journal_of_inter
national_law_and_politics/documents/documents/ecm_pro_062469.pdf

Additional Resources

Criminal Corporate Raiding in Russia (42 INTLLAW 1207)

Parsons and Whittemore Overseas Co. v. Societe Genrale De L’Industrie Du Papier
(508 F. 2d 969)

OJSC Ukrnafta v. Carpatsky Petroleum Coporation (2009 2877156 (D. Conn.))


El Paso Corporation v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa
(2009 WL 2407189 (C.A.5 (Tex.))

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ABA –arbitral proceedings-enforcement in Russia and Ukraine.

Steven Gee QC

1. **Grounds for an injunction:**
   a. ancillary to a substantive cause of action – e.g threatened breach of contract to arbitrate by bringing proceedings abroad – most usually respondent’s home jurisdiction.
   b. the Mareva injunction - a form of asset preservation relief, often granted with an order requiring disclosure of assets
   c. a measure to protect the court’s own process or which can be granted under its inherent jurisdiction- e.g where there are London proceedings and someone brings proceedings elsewhere which might interfere with the London proceedings or enforcement of a London judgment.
   d. jurisdictions conferred by statute other than the Supreme Court Act 1981: e.g.
      (i) an injunction in aid of *proceedings anywhere in the world* (normally court proceedings) under section 25 of the Civil Jurisdiction and Judgments Act 1982;
      (ii) an injunction in support of *arbitral proceedings wherever they may be* under section 44 of the Arbitration Act 1996.

2. Section 44 might be used in aid of London arbitration and could result in a worldwide freezing injunction especially in cases of alleged fraud. However in general the English court will be reluctant to grant a worldwide order pre-award. If a State is involved there could also be problems of State immunity.


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1 Author of Commercial Injunctions (5th ed), Head of Chambers, Stone Chambers, New York Bar.
2 Other statutory categories are to protect people from harassment and to restrain breach of planning control. In these cases what order can be granted, and in what circumstances are shaped by the statute.
Convention and Rules is that provisional measures might be sought only from the tribunal itself, and not from national courts, unless the parties agreed otherwise.

4. **The Anti-suit Injunction and Arbitration:** The anti-suit jurisdiction in support of a contract to arbitrate depends simply upon proof of the arbitral agreement and a threat by another person (often the other party to that contract) to act in breach of or inconsistently with the arbitration agreement:

   a. English Court may grant it as a court exercising supervisory jurisdiction over the arbitration.
   b. It reduces the possibility of conflict between the arbitration award and the judgment of a national court.
   c. It saves a party to an arbitration agreement from having to keep a watchful eye upon parallel court proceedings in another jurisdiction, trying to steer a course between so much involvement as will amount to a submission to the jurisdiction and so little as to lead to a default judgment.

5. **West Tankers:** In England it is regarded as an important protection for agreements to arbitrate in London. However the ECJ in *Allianz SpA (formerly Riunione Adriatica di Sicurtà SpA) v West Tankers Inc* (C-185/07) [2009] 3 WLR 696. (“West Tankers”) has decided that Anti-suit injunctions cannot be granted by the courts of one EC Member State (e.g England) against civil proceedings in another which are subject to the Judgments Regulation. This decision has produced much concern about the possibility of conflict between judgments in the EC and Arbitration awards. This has resulted from a desire to leave the New York Convention to operate but also to have free circulation of judgments in Europe. There are problems to be addressed about how to produce a practical solution which avoids a clash between the two systems. The courts have been left to grapple with a Judgments Regulation which gives no clear solutions about avoiding or resolving the tensions and clashes.

6. **The Anti-Suit Jurisdiction:** applies to: (i) the contracting party, (ii) a person who invokes rights which are themselves subject to an agreement to arbitrate, even though
he is not a party to the arbitration agreement- e.g assignees of the underlying contract or the claims, subrogated insurers and those who rely upon a statutory provision enabling them to enforce the underlying contract to which the arbitration agreement applies. (iii) a person who induces or facilitates breach of the contract to arbitrate; (iv) non-parties who are aiding or abetting a breach (this could apply to a subrogated insurer or an insurer conducting a defence of a claim subject to an arbitration agreement, but not to a person who exercises his own cause of action in his own name which is not subject to a contract to arbitrate).

7. The anti-suit jurisdiction for an injunction arises under section 37(1) of the Supreme Court Act 1981. There is also a separate jurisdiction under section 44(1)(e) of the Arbitration Act 1996. These are parallel jurisdictions. The jurisdiction under section 44 is confined to making orders as between parties to the arbitration and does not extend to non parties.

8. Urgency: Section 44 can only be invoked, without agreement of the other other side or the tribunal: (i) in cases or “urgency” and (ii) for the period of the “urgency” e.g. cannot go to the tribunal to obtain their agreement because not appointed or need ex parte injunction. The court when exercising its jurisdiction under section 37(1) will operate the same policy of tribunal autonomy underlying under section 44.

9. Kompetenz- Kompetenz: promotes a policy that arbitration should so far as possible be a one stop jurisdiction:

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3 The court exercising jurisdiction at the seat of the arbitration (normally where the proceedings are agreed to be held).
4 West Tankers v Ras Riunione [2005] 2 Ll. Rep. 257 following Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH (The Jay Bola) (CA) [1997] 2 Lloyd's Rep 27 and distinguishing Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Association Co Ltd (CA) [2005] 1 Lloyd's Rep 67 in which the Jay Bola had not been cited, and which would probably have been decided differently if it had been.
6 The court when exercising its jurisdiction under section 37(1) will take into account the policies underlying the constraints of the statutory regime under section 44, including the limited exception to tribunal autonomy made by the urgency gateway.
7 For example the requirements of urgency in section 44(4) and the need for permission of the arbitrators once there is a tribunal appointed: see Elektrim SA v Vivendi Universal SA (No 2) [2007] 2 Lloyd's Rep 8 and Starlight Shipping Co v Tai Ping [2008] 1 Ll. Rep. 230.
a. The tribunal cannot decide finally its own jurisdiction but it has the power to pronounce upon it. Under section 32 of the Act there is a provision preventing a respondent, except for one “who takes no part” in the arbitral proceedings, or the claimant, from going straight to the court on the question of jurisdiction.

b. It also respects the point that a person who has not agreed to arbitrate cannot have his legal rights affected by a decision of the tribunal. Under English law section 72 confers a right of immediate access to the courts of a person who claims not to be bound by an arbitration agreement, but once he takes some part in the arbitral proceedings then under English law he must wait until the tribunal has pronounced on its own jurisdiction. Unless he has entered into an ad hoc agreement to confer jurisdiction on the tribunal to decide its own jurisdiction, and after the Arbitration Act 1996 these are not found simply through a respondent taking steps in the arbitration, he can then go to the court under section 67 and have a rehearing. English law allows re-litigation of the same issue between the same parties.

c. A case in which a foreigner is threatening to pursue foreign proceedings in breach of an arbitration clause where it is urgent for the claimant to seek an anti-suit injunction. In the foreign proceedings the claimant has to walk a delicate line to avoid these going in default against him, and submitting to the jurisdiction. In such circumstances section 32 should not bar the claimant from seeking immediate anti suit relief, and in due course final relief.

10. What is the position when the threatened arbitral proceedings are abroad and the claimant has brought proceedings on the underlying merits before the English court? In this case a question can arise about preserving the integrity of the English proceedings. The same question of whether there is a relevant arbitration agreement may be raised both before the court in the form of a stay application, and the foreign

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8 Section 72(1).
10 Section 32 bar the asking of a question whether there is jurisdiction but does not apply when there is a need for an injunction.
arbitral tribunal. Who should decide it? It depends on the circumstances. These may point towards the English court not intervening at all and allowing the foreign arbitral tribunal to proceed\(^\text{11}\). In one case the claimant in proceedings on the merits in England was confronted with an agreement including an arbitration clause which he said had been forged\(^\text{12}\). The issue was about complete nullity of the alleged arbitration agreement, and there was some evidence of forgery. In those circumstances the claimant was able successfully to invoke the jurisdiction of the English Court to protect the integrity of its own proceedings concerning the merits by granting an injunction preventing the foreign arbitral proceedings going forward, and asserting its own jurisdiction to decide the forgery issue.

11. **Damages:**

   a. Damages can be awarded for breach of the contract to arbitrate against the other party to that contract but not against someone who is not a party to the contract;

   b. Damages can also be Section 50\(^\text{13}\) which is not so limited. It allows damages to be awarded in cases where an application for an injunction is made. It is an ancillary jurisdiction to the injunction jurisdiction of the court, allowing damages to be awarded whenever the court has jurisdiction to entertain an application for an injunction. For example the court may act to protect its own orders by granting an injunction to restrain a threatened contempt of court.

12. This injunction may be granted against a non party against whom there is no substantive cause of action. Damages may be awarded under section 50 to a claimant who suffers loss through a contempt, against a contemnor who might have been restrained by injunction granted in the proceedings before he committed the contempt of court. Likewise an injunction may be granted against a defendant seeking to litigate abroad an issue over which the English court is already seized or has already

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\(^{13}\) Supreme Court Act 1981
determined on the merits. Damages can be awarded under section 50 for loss caused by the foreign proceedings to the English claimant.

13. It applies to losses incurred during the relevant proceedings, which could have been avoided had the injunction sought (or which could have been sought) been granted when the proceedings were commenced.

14. In practice the court normally can be expected to leave damages to be decided only by the arbitral tribunal exercising its jurisdiction to award damages for breach of the arbitration clause. Under the contractual claim for breach of the arbitration clause it is well established that the wasted costs incurred in defending the proceedings brought in breach of the arbitration agreement are recoverable as damages for breach of contract. One would expect the court to be prepared to award these damages in its discretion under section 50.

15. The court will usually award costs of the anti-suit proceedings before it, caused by breach of the arbitration agreement, on an indemnity basis.

16. In the context of purely English domestic court proceedings the defendant could have applied for a stay under section 9 of the Arbitration Act 1996, and it was the omission to ask for the mandatory stay, and not the breach of the arbitration clause, which has led to the court judgment. This would seem to negative causation. It is difficult to conceive that an English court or an arbitral tribunal sitting in England could properly award damages based on the contention that an English court judgment, which has not been set aside, or successfully appealed, has caused loss through being wrongly decided. The remedy, if any, is to apply to set aside the judgment or to appeal. If that is barred then the judgment is in England conclusive.

17. What happens if foreign court proceedings are brought in breach of an arbitration clause and the foreign court allows them to continue and renders a money judgment in

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them against the defendant? Can the defendant to the foreign proceedings obtain damages in England for the loss it has been caused by the granting of the foreign judgment because that judgment is inconsistent with the result reached or which would have been reached in arbitration? In principle this is possible.18

18. The argument here starts from the proposition that the foreign court proceedings were brought in breach of the arbitration clause and the foreign judgment was a product of that breach. It would then be said that the foreign judgment was for more than what was due (if anything) had the case been decided in London arbitration. In practice there could be problems of issue estoppel, res judicata or judgment recognition which might preclude the claimant from even getting such a case off the ground in England. This could be because the foreign money judgment is conclusive on the merits in England or because there has been a foreign judgment which precludes assertion that there is a valid arbitration agreement. One also has to have regard to questions of causation and remoteness of loss. For example if the cause of the foreign judgment was a witness being believed in a civil law jurisdiction where he could not be cross-examined one would question whether that impediment was sufficiently connected with the breach of the arbitration clause to have been caused by it, or whether this type of loss was too remote to be fairly recoverable for breach of the clause. On the other hand one can envisage a case where the foreign court granted judgment because a defence which would have been conclusive in London arbitration was simply not available in the foreign court. Here selection of the forum would have been crucial.

17 Fletcher Moulton L.J in Dolemann v Ossett [1912] 3 K.B. 257 at pp. 267-268
18 CMA CGM SA v Hyundai Mipo Dockyard Co Ltd : Hyundai Mipo Dockyard Co Ltd (Applicant) v CMA CGM SA (Respondent) [2009] 1 Lloyd's Rep 213
ABA Teleconference Handout

Enforcement of International Arbitral Awards in Russia

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Outline of the procedure

Foreign arbitral awards are recognized and enforced in Russia by virtue of international treaties of Russia or according to the reciprocity or comity principle. Since the vast majority of countries have joined the 1958 New York Convention, the most common way to enforce a foreign award in Russia is under said convention.

The RF Arbitration Code provides for application for recognition and enforcement of a foreign arbitral award to be filed with an ‘arbitrazh’ court1 at the place of the debtor’s domicile or, if it is not known, at the place where the debtor’s assets are located.

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

The court ruling on the enforcement may be appealed in the court of cassation, which may uphold the ruling or pass another one or remand the case for reconsideration by the initial court. The ruling of the court of cassation is final and comes into force immediately. It should be noted that there is also the possibility of challenging the ruling before the Supreme Arbitration Court of Russia, but the Supreme Court accepts cases for reconsideration in very exceptional circumstances.

When the ruling on judgment recognition and enforcement is obtained, the court issues a writ of execution. If the debtor does not voluntarily execute the judgment, the claiming party initiates an execution procedure, which is equivalent to one for execution of domestic judgments. Basically, this

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1 Foreigners tend to make a common mistake about Russian court system. They confuse arbitration courts with arbitral tribunals in Russia. This is because Russia has a system of courts called, in Russian, ‘arbitrazhniye soudy’. This Russian term is often translated into English as ‘arbitration’ or ‘arbitrazh’ courts. The translation might be misleading, since the ‘arbitration courts’ system is not a system of arbitration within which the parties consent to have their claims heard by chosen arbitrators. It is a system of federal commercial courts with jurisdiction over commercial and some administrative disputes.
should be done through the bailiff service according to the Law on Execution Procedure. The bailiffs are responsible for searching for, attaching and selling the debtor’s assets.

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

The following legal acts and cases serve as most common source of law on enforcement issues:

- the RF Arbitration Code;
- the 1958 New York Convention;
- the 1993 Law on International Commercial Arbitration
- the RF Supreme Arbitrazh Court’s Information Letter No. 96, dd 12 December 2005

**Grounds for Enforcement Denial**

*Public policy*

Since the list of the grounds for refusing enforcement is limited by the New York Convention, contravention of public policy often serves as the *ultima ratio* for rejecting enforcement. In some instances, public policy is understood by the courts too vaguely. One notorious court case has been mentioned so many times among lawyers and in the mass media that it has virtually become a joke. In the *United World Ltd. v Krasny Yakor (Red Ancor)* case, the court denied enforcement of an arbitral award in the amount of less than USD 40k on the grounds that its enforcement would lead to bankruptcy of Red Ancor and would consequently cause serious damage to the regional economy where the debtor was domiciled and to the economy of Russia, so such damages were in contravention of Russian public policy. In many other cases, public policy has not been understood in such a strange way, but some courts tend to consider contravention of mandatory Russian rules as contravention of Russian public policy. To avoid said risk, the contractual provisions, even if governed by a foreign law, should be reviewed for compliance with mandatory Russian laws.

One of the quite common arguments within the public policy ground is that the award is improperly punitive. In clause 29 of the RF Supreme Arbitrazh Court’s Information Letter No. 96, the court hold that the award “should observe the principle of proportionality of the civil law liability to the consequences of the law violation”. This gives a good ground to reject the enforcement of awards which provide, for instance, for treble damages.
**Non-Arbitrability**

The RF Arbitration Code provide for cases when Russian courts have exclusive jurisdiction over certain types of dispute. Among these disputes are any kind of case relating to:

- administrative and public order issues (e.g., disputes with government bodies regarding tax, competition issues, etc);
- bankruptcy;
- incorporation and liquidation of legal entities;
- disputes between a company and its shareholders;
- protection of goodwill.

If one of the parties to the dispute is a foreign entity, the list for exclusive jurisdiction is extended to include:

- disputes over state property, including its privatisation;
- disputes over real estate located in Russia;
- disputes over registration of trade marks and patents in Russia;
- disputes on invalidation of entries in the state registers (e.g., the real estate register).

For example, in *Kalinka-Stockman v Smolenskii Passazh*, the court denied enforcement of the award requiring the landlord to renew the lease. The court decided that enforcement of such award leads to registration of the renewed lease with the State Registry, therefore fall within “public and administrative law relations”.

**Procedural violations**

In general, Russian courts take a very formal approach to evidence. The judges are quite reluctant to accept emails, unnotarised copies of documents, witness evidence, etc. For example, in the *Forever Maritime v Mashimport* case, the court denied enforcement of the award on the grounds that the defendant was not notified properly of the time and place of the hearing. The court rejected copies of the correspondence between the parties proving the fact of proper notification because the translation of those letters into Russian was not notarised.

In another case, *Sophocles Star Shipping Inc v Technopromexport*, a mistake in the name of the claimant contained in the award and in the time-charter contract (Sophocles Star Shipping Co Ltd) caused enforcement to be refused by the Moscow court and the Moscow Court of Cassation. The courts held that the contract containing the arbitration clause was concluded with Sophocles Star Shipping Co Ltd,
while the request for enforcement was brought by Sophocles Star Shipping Inc. Since the latter was not a party to the arbitration agreement, the agreement was deemed invalid. Only when the case came to the Supreme Court the court held that the question of the agreement’s validity was beyond the scope of consideration during an enforcement procedure under the New York Convention.

In *Lugana Handelsgesellschaft v Ryazan Plant of Metal-Ceramic Equipment (RPMCE)* the court of cassation upheld the decision of the lower court rejecting the enforcement of the arbitral award issued under DIS (the German Institution of Arbitration) Arbitration Rules in the absence of the written arbitration clause.

The exclusive distributorship contract between the parties contained the arbitration clause providing for arbitration in Stockholm, Sweden. Shortly before initiating arbitration Lugana Handelsgesellschaft wrote to RPMCE asking to agree to the Arbitration rules of the German Institution of Arbitration in Berlin. In its reply RPMCE did not expressly object, but offered to include a reference that set-off claims can also be considered by arbitrators.

The Arbitration court of Ryazan region ruled that there is no sufficient evidence on the record that the parties agreed to modify the initial arbitration clause. Respondent’s active participation in the subsequent arbitration proceedings without objecting to the jurisdiction of the tribunal constituted under the Arbitration Rules of the German Institution of Arbitration was not relevant for determining the existence of the valid arbitration clause. Even though the respondent submitted the reply to the statement of claim, this can not be considered a valid fulfilment of the writing requirement. Consequently, the award can not be enforced.

To avoid such problems, it is advisable to focus considerable attention on formalities when entering into an arbitration agreement and during the course of arbitration (e.g., to make sure that the documents contain the right names of the parties and the arbitral tribunal, and to duplicate procedural notifications by registered post).

**Invalidation of contracts containing an arbitration clause**

It is a quite common tactic for the defendant to use a third party to invalidate a contract containing an arbitration clause through the ‘arbitrazh’ court. By Russian law, in some instances, a third party whose rights are violated by somebody’s contract can challenge this contact in court.

In *Uralskiye Zavody (Ural Plants) v Quality Steel and Bummash*, the claimant – a shareholder in Bummash challenged the contract between Quality Steel and Bummash as a transaction violating the
Ural Plants shareholder’s rights. Quality Steel’s argument that the contract contained an arbitration clause and could not, therefore, be litigated was rejected because Ural Plants was not a party to the agreement. Such invalidation of a contract may in some cases be used later on as grounds for refusing enforcement of an arbitral award, since referral of the dispute to arbitration was made in the invalid contact.

Conclusion

The enforcement of international arbitral awards is still a big issue in Russia. However, notwithstanding the above one can notice that the overall trend is in the direction of more friendly approach towards foreign awards the majority of which are recognized and enforced nowadays. Moreover, it seems that reluctance of some judges to enforce the awards based more on their incompetence in such matters and suspicious against any non-state tribunals rather then on unfriendly attitude towards foreigners. This could be drawn from the fact that the same grounds for denial of enforcement are used with regard to both foreign and domestic companies.
I. INTRODUCTION

A. Central and Eastern European Related Arbitrations are on the Rise

Tremendous political changes in the Eastern and Central Europe throughout the 90’s, development of the free market system, globalization and privatization have produced an ever-growing number of parties to international transactions, with all the disputes and litigious phenomena this entails. The number of Central and Eastern European parties involved in arbitrations increased by 68 per cent in 2001, according to an International Chamber of Commerce survey. No more recent statistics available.

There is a breakdown and asphyxia of the court systems in many parts of the world. This, more than ever, forces international business to resort to arbitration which, contrary to many preconceived ideas, is faster than court litigation with its congestion, two or three instances and often procedural idiosyncrasies. Arbitration is also cheaper in the overall balance than litigation before State courts. Although one will have to pay the arbitrators and possibly the arbitral institution, legal fees will be lower because of the more concentrated, shorter proceeding, the foreign party does not need to instruct local counsel and the shorter the proceeding, the less time is spent by management, an important cost factor.

B. Topics Summary

- General Enforcement Framework under the New York Convention
- Russian and Ukrainian Specific Issues
- Representative Cases
- Discovery in the United States for use in international arbitration pursuant to 28 USC §1782.
II. RECOGNITIONS AND ENFORCEMENT UNDER THE NEW YORK CONVENTION

A. Advantage of the Arbitration

New York Convention is an international body of law which facilitates recognition and enforcement in both common law and civil law countries.

Initially executed in 1958 – over 50 years ago – now ratified by 144 countries.

Both Russia and Ukraine signed and ratified New York Convention.

There is no developed framework for enforcement of court judgments.

United States is not a party to any treaty for recognition of foreign judgments in commercial proceedings but is a party to the New York Convention.

B. Is there an Issue of Enforcement and Recognition

According to the International Chamber of Commerce 90% of the awards are spontaneously complied with absent further proceedings\(^1\).

A survey from a sample of 205 arbitrations found at least 118 awards were fully or partially complied with\(^2\).

Although there are no reliable statistics, general consensus is that the overwhelming majority of international arbitral awards are voluntarily complied with\(^3\).

It does not appear to be any statistical research on enforcement of arbitration awards involving Russia or Ukraine.

C. The Enforcement Framework

Under the Convention, an arbitration award issued in any contracting state can generally be enforced in any other contracting state (save that some contracting states may elect to enforce only awards from other contracting states - the "reciprocity" reservation), only subject to certain, limited defenses.


\(^3\) Catherine A. Rogers, The Vocation of the International Arbitrator, 20 Am. U. Int'l L. Rev. 957, 1007.
These defenses are:

- a party to the arbitration agreement was, under the law applicable to him, under some incapacity;
- the arbitration agreement was not valid under its governing law;
- a party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present its case;
- the award deals with an issue not contemplated by or not falling within the terms of the submission to arbitration, or contains matters beyond the scope of the arbitration (subject to the proviso that an award which contains decisions on such matters may be enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those matters not so submitted);
- the composition of the arbitral tribunal was not in accordance with the agreement of the parties or, failing such agreement, with the law of the place where the hearing took place (the "lex loci arbitri");
- the award has not yet become binding upon the parties, or has been set aside or suspended by a competent authority, either in the country where the arbitration took place, or pursuant to the law of the arbitration agreement;
- the subject matter of the award was not capable of resolution by arbitration; or
- enforcement would be contrary to "public policy".

D. Complications in Russia and Ukraine

1. Award Enforcement Issues could be similar to so-called “Corporate Raiding”

Russian Raiding differs greatly from U.S. hostile takeover practice in that it relies on criminal methods such as fraud, blackmail, obstruction of justice, and actual and threatened physical violence.

According to statistics compiled by the Ministry of Internal Affairs (“MVD”), raiding generates approximately 120 billion rubles (over $40 million) a year in illegal profits, and, considering that this statistic is based only on the rare cases actually investigated by the MVD, the true amount is certainly far higher. Ivan Novitskii, a deputy of Moscow City Duma (a municipal legislative body in Moscow), claims that 300 Moscow businesses are raided every year and that thousands more are at risk. In a recent study by Price Waterhouse, businesses operating in Russia identified “asset misappropriation” as their top criminal problem. Businesses

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4 See gen. Thomas Firestone, Criminal Corporate Raiding In Russia, 42 International Lawyer 1207.
of all sizes, from the smallest to the largest, have been victimized. The prevalence of raiding is also demonstrated by its popularity as a subject for television and movie dramas, while bookstores are full of manuals on how to protect business against illegal raids.

2. *Russian Judicial Corruption Price List (no implication that there is no such list in Ukraine)*

- altering a target company's corporate documents: 10,000 euros and up;
- notarizing documents: from 3,000 to 10,000 euros;
- obtaining a court ruling: from 30,000 to 200,000 euros;
- “neutralizing” of police and prosecutors: from 30,000 to 60,000 euros;
- effecting a forcible seizure of a business: 300.00 to 500.00 euros for each armed attacker.

3. Court Structure

The biggest loophole facilitating complications may be the very structure of the Russian court system. Russia has a tripartite court system consisting of (1) arbitrazh, or commercial, courts that have jurisdiction over disputes between legal entities and between the state and legal entities; (2) courts of general jurisdiction that are empowered to hear criminal cases, as well as civil disputes between individuals and legal entities; and (3) the Constitutional Court that is authorized to hear challenges to the constitutionality of certain statutes. The split between criminal and commercial courts creates a “ping pong” effect in raiding cases in which victims are told by arbitrazh courts that their conflict is essentially criminal and should be heard in a court of general jurisdiction. At the same time criminal cases (investigations) can be initiated based on the allegations that have been resolved by the arbitrazh courts.

4. Inadequacy of the Criminal Law

While the Criminal Code contains articles on fraud (Article 159); extortion (Article 163); bankruptcy fraud (Articles 196 and 197); securities fraud (Articles 185 and 186); illegal collection of commercial information (Article 183); commercial bribery (204); and organization of a criminal society (Article 210), there is no article specifically addressing raiding. In the few cases that are brought, raiding is generally charged as fraud under Article 159. This article is a poor substitute for one directly on point.

5. Criminal Investigations

While highly formalized, it lacks checks and bounds causing a fertile ground for abuse. The system of criminal investigation can also be used as a means of pressuring by threatening to implicate innocent participants in the criminal prosecutions. There is also ability of individual investigators to conduct searches and seizures in corporate offices with none or very little court supervision.

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5 Id.
E. Representative or Extreme? Cases

1. Joy-Lud v. Moscow Oil Refinery (Russia)

   a. Background

   Pursuant to a long-term (until 2004) contract executed in 1995, MOR has been purchasing oil products from MOR.

   In 2003 JL instituted ad-hoc arbitration in Stockholm against MOR under UNCITRAL rules alleging breach of contract.

   On June 14, 2005, the tribunal entered an award in favor of JL in the amount of USD 28,041,975 plus interest in the amount of Swedish reference rate plus 8% from June 30, 2005 until paid in full plus costs.

   Currently, the total value of the award is in excess of $40 million.

   b. The 2003-2006 Collateral Proceedings

   Certain MOR shareholders attempted to invalidate the original 1995 agreement. If the Russian court ruled that the JL/MOR contract was invalid, MOR would then be able to argue that the arbitration agreement is invalid and JL is not entitled to recovery in the arbitration. The shareholders’ claim was denied.

   c. The 2005-2007 First Round of Objections

   MOR argued that the enforcement would be contrary to “public policy” because liquidated damages awarded by the tribunal do not relate to actual damages and constitute “punitive” damages contrary to Russian law. The High Arbitrazh Court held that the award is enforceable.

   d. The 2007-2008 Second and Third Round of Objections

   MOR asserted inter alia that JL does not exist as a legal entity and is fraudulently attempting to obtain money. MOR claimed that the company which was a party to the contract and the arbitration proceedings was named differently (comp. Joy Lud Distributors International Inc. and Joy-Lud Distributors International, Inc. – note the difference in hyphen). The case was heard in the High Arbitrazh Court twice and both times, the court recognized the award and issued a writ of execution which was delivered to the bailiffs for execution.

   e. The 2007-2009 Investigation

   MOR raised its fraud accusations before Russian investigative authorities, which conducted a number of searches at the JL’s Russian representative office and interrogated JL employees.
In March 2008, investigative authorities seized the original documents including the writ of execution. Citing the absence of the original documents, bailiffs refuse proceeding with the execution proceedings.

2. Telenor v. Storm (Ukraine/Russia)

Telenor, a Norwegian cell phone operator and Storm, a subsidiary of the Russian Alfa Group entered into a shareholders’ agreement with respect to Kyivstar, a Ukrainian cell phone operator. The agreement provided for arbitration in New York under UNCITRAL rules.

In 2006, Telenor instituted arbitration in New York alleging that Storm violated certain provisions of the shareholders agreement. Telenor asked, among other relief, an order for Storm to participate in the governance of Kyivstar.

Meanwhile, Alpern, a Cyprus shareholder of Storm, also a subsidiary of Alfa Group, instituted Ukrainian court proceedings against Storm to declare that the Telenor/Storm shareholders agreement was invalid. Telenor was not notified of the proceedings. Storm registered an oral opposition but the court in a 20-minute proceeding satisfied the claim. The arbitration tribunal refused to recognize the holding of the Ukrainian court and Storm applied to the State court in New York requesting an injunction. Following the removal, the federal court refused to review the arbitrators’ order as interlocutory.

A Ukrainian court then, upon Alpern application enjoined Strom from participation in arbitration.

Following the evidentiary hearing, the district court issued an anti-suit injunction against Storm and its related entities, writing that “there is no doubt that [the Ukrainian] litigation has been designed to, and has had the effect of, interfering in the arbitration process”- indeed, that it was “conducted in the most vexatious way possible”. Storm LLC v. Telenor Mobile Commc'ns 2006 WL 3735657, at *8-*9 (S.D.N.Y. Dec.18, 2006).

In the summer 2008, Farimex, which holds 0.002 percent in Russia’s VimpelCom, according to Telenor a front for Alfa Group, brought a case against Telenor in Siberia that found the Norwegian company liable for damages for delaying VimpelCom’s expansion in Ukraine, leading to a $1.7 billion fine.

According to Telenor, Farimex was also behind an investigation launched by the Anti-Monopoly Committee of Ukraine against Telenor and Kyivstar in 2009.

The Telenor matter has been reportedly settled.
III. DISCOVERY IN AID OF ARBITRATION UNDER 28 USC §1782

A. The Statute

§ 1782. Assistance to foreign and international tribunals and to litigants before such tribunals

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. …

B. Possible Use

Trace US Dollar denominated transactions made via correspondent accounts in the US banks.

Obtain documents from third parties such as investment bankers, lenders, suppliers, and customers otherwise unavailable through limited disclosure of the arbitration process.

Compel witnesses to provide testimony which is normally not available in a conventional arbitration.

C. What Does “Tribunal” Mean?


Mexican television broadcasting company, which had initiated arbitration proceeding in Mexico under auspices of International Chamber of Commerce, resisted discovery directed to its investment bankers and advisors by NBC, and NBC cross-moved to compel discovery. The District Court denied discovery, and NBC appealed. The Second Circuit held that statute authorizing district courts to assist discovery efforts of litigants before “foreign or international tribunals” does not apply to proceedings before private arbitral panels.

The court found that opening the door to the type of discovery sought by NBC in this case would likely undermine the expedience and cost-efficiency of the arbitration, which is one of its significant advantages, and thus arguably conflict with the strong federal policy favoring arbitration as an alternative means of dispute resolution.
In comparing 28 USC §1782 with the Federal Arbitration Act, the court found that broad discovery in proceedings before “foreign or international” private arbitrators would stand in contrast to the limited evidence gathering provided by the Federal Arbitration Act.


Kazakhstan sought to compel a third-party witness to submit to a deposition and submit documents in support of a proceeding before the Arbitration Institute of the Stockholm Chamber of Commerce. The district court ordered the requested discovery and denied Biedermann's request for reconsideration and motion for emergency stay.

The Fifth Circuit elected to follow Bear Stearns and held that § 1782 did not apply to discovery for use in a private international arbitration.


In Intel, the Supreme Court held that the Commission of European Communities qualified as a “tribunal” within the meaning of § 1782 and that a district court was not categorically barred from ordering discovery for use in a proceeding before the Commission, even though the proceeding was not yet pending or imminent.

Quoted Hans Smit, International Litigation: “[t]he term ‘tribunal’ ... includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts”.


The question of whether a private international arbitration tribunal also qualifies as a “tribunal” under § 1782 was not before the Court. The only mention of arbitration in the Intel opinion is in a quote in a parenthetical from a law review article by Hans Smit. That quote states that “the term ‘tribunal’ ... includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts.” Nothing in the context of the quote suggests that the Court was adopting Smit's definition of “tribunal” in whole.

The court held that the decision in Biedermann is controlling since the Supreme Court did not directly address the issue whether arbitration is a tribunal within the meaning of 28 USC §1782.

The court also noted that, in any case, because the Swiss arbitral tribunal “prohibited almost all discovery,” the district court should not exercise its discretionary authority to order discovery, “out of respect for the efficient administration of the Swiss arbitration.”

Following settlement in German corporation's action against American corporation alleging interference with German corporation's sale of assets to Japanese corporation, German corporation sought to compel American corporation to satisfy discovery requests related to anticipated private, foreign arbitration between German and Japanese corporations under the ICC rules.

The court held that ICC arbitrations qualify as “tribunal” under 28 USC §1782.


Norfolk sought to compel former counsel of reinsurer to provide testimony in a deposition in Chicago, for private arbitration in London relating to insurance losses in connection with train derailment.

The court held that 28 USC § 1782 did not apply to compel witness to testify because the statute applied to state-sponsored arbitral bodies that were subject to reviewability (for example UNCITRAL), and private arbitration was alternative to formal litigation that was final and binding on parties. 28 U.S.C.A. § 1782.


Ukrnafta sought ex parte discovery from a third party for use in an arbitral proceeding before the Arbitration Institute of the Stockholm Chamber of Commerce. The dispute arose out of a joint venture agreement between Ukrnafta and Carpatsky Petroleum Corporation, a Texas company, which relates to an oil and gas field in Ukraine. A Delaware company, also named Carpatsky Petroleum Corporation, has brought claims against Ukrnafta, in Stockholm pursuant to the UNCITRAL rules asserting that it is the valid successor of the Texas company. Ukrnafta disputed that the Stockholm tribunal has jurisdiction over these proceedings and sought a declaration from the Swedish District Court to this effect.

The court held that it has the authority to order discovery because the arbitration tribunal acted as a “first-instance” decision-maker subject to the court review. The court distinguished UNCITRAL rules of arbitration as “international-government sanction tribunal” from other international arbitration such as the one in *In re Arbitration in London* where the reviewability of the tribunal decision was limited and noted that in this case, parties did not waive review by courts.
UNITED NATIONS CONFERENCE
ON INTERNATIONAL COMMERCIAL ARBITRATION

CONVENTION
ON THE RECOGNITION AND ENFORCEMENT
OF FOREIGN ARBITRAL AWARDS

UNITED NATIONS
1958
CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term “arbitral awards” shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforce-
ment shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive
any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories of the country for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting
State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

**Article XIV**

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

**Article XV**

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signatures and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

**Article XVI**

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.
Enforcing Arbitration Awards
under the
New York Convention

Experience and Prospects

This volume contains the papers presented at "New York Convention Day". That colloquium was held in the Trusteeship Council Chamber of the United Nations Headquarters, New York on 10 June 1998 to celebrate the 40th anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards concluded on 10 June 1958.
I. The birth: forty years ago ......................................................... 1
Chaired by Dumitru Mazilu
Ambassador, Ministry of Foreign Affairs, Romania

Opening address commemorating the successful conclusion of the 1958 United Nations Conference on International Commercial Arbitration ............................... 1
Kofi Annan
The making of the Convention .................................................. 3
Pieter Sanders
From New York (1958) to Geneva (1961) — a veteran’s diary .............. 5
Ottoarnudt Glossner

II. The value: three assessments .................................................. 9
Chaired by Tang Houzhi
Vice-Chairman, China International Economic and Trade Arbitration Commission

Philosophy and objectives of the Convention ................................... 9
Robert Briner
The Convention’s contribution to the globalization of international commercial arbitration ................................................................. 11
Fali S. Nariman
Benefits of membership ............................................................... 14
Emilio J. Cárdenas

III. The effect: enforceability of arbitration agreements and arbitral decisions ... 17
Chaired by Haya Sheikha Al Khalifa
Attorney, Bahrain

New developments on written form .............................................. 17
Neil Kaplan
Third parties and the arbitration agreement .................................... 19
Jean-Louis Delvolvé
Provisional and conservatory measures ................................******* 21
V. V. Veeder
Court assistance with interim measures ................................******* 23
Sergei N. Lebedev
Awards set aside at the place of arbitration .................................... 24
Jan Paulsson

IV. The bench: judicial application of the Convention .......................... 27
Chaired by Howard Holtzmann
Honorary Chairman of the Board and of the International Arbitration Committee, American Arbitration Association

Question 1
Judge M. I. M. Aboul-Enein ......................................................... 27
V. The future: what needs to be done. .............................................................. 37
   Chaired by Muchadeyi Masunda
   Executive Director, Commercial Arbitration Centre, Harare, Zimbabwe

   Improving the implementation: a progress report on the joint UNCITRAL/IBA project. ................................................................. 37
   Gerold Herrmann

   Enhancing dissemination of information, technical assistance and training. .......... 39
   Jose Maria Abascal Zamora

   Striving for uniform interpretation. ............................................................... 41
   Albert Jan Van Den Berg

   Considering the advisability of preparing an additional Convention, complementary to the New York Convention. .................................. 44
   Werner Melis

   Possible issues for an annex to the UNCITRAL Model Law. ............................ 46
   Gavan Griffith

   Notes. ........................................................................................................ 51
III. The effect: enforceability of arbitration agreements and arbitral decisions

Chaired by Haya Sheika Al Khalifa
Attorney, Bahrain

New developments on written form

NEIL KAPLAN
Chairman, Hong Kong International Arbitration Centre

The New York Convention requires an arbitration agreement to be in writing. Article II (2) of the Convention states:

"the term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams." (emphasis added)

The concept adopted 40 years ago is thus one of signature or exchange.

It appears to be common ground that the definition of writing contained in article II (2) does not conform with international trade practices. Excluded from the definition would be Bills of Lading, certain Brokers Notes, salvage situations, the "battle of the forms" and the general concept of tacit acceptance.

I hasten to add that one is not here dealing with the wider issue as to why the agreement to arbitrate must be in writing, whereas the underlying contract is frequently made orally. Rather the issue is why, if a written contract containing an arbitration clause is sent by A to B, and B does not sign nor engage in an exchange, but fully complies with all other contractual terms, B should be taken to agree to everything except the arbitration clause? As Dr. Blessing put it in his recent ICCA paper, "it is absurd to conclude that B accepted all minus one term". It is interesting also to observe that Professor Sanders thought that this problem might arise, because he made a proposal to the Convention drafters that would have covered this very situation. He wanted to add, "confirmation in writing by one of the parties without contestation by the other party". Unfortunately his sensible suggestion was not accepted.

When drafting article 7(2) of the UNCITRAL Model Law, there was an opportunity to go further, especially as in 1981 the UNCITRAL Secretariat raised the issue of a more precise and detailed definition "in view of the difficulties encountered in practice". However, article 7(2) retained the dual concepts of signature or exchange. This was despite some very powerful and authoritative statements that the Model Law definition would continue to exclude many forms of conducting international business. Even with the benefit of hindsight, I think it was a shame that article 7(2) did not deal with this problem.

However, in this regard, States have taken a lead. A number of arbitration Statutes passed during the last 10 years or so have included a wider definition of the
writing requirement. Time does not permit me to mention more than just a few of the jurisdictions where this has occurred.

Article 1021 of the Netherlands Arbitration Act 1986 provides that the arbitration agreement shall be proved by an instrument in writing, but importantly adds, "For this purpose an instrument in writing which provides for arbitration or which refers to standard conditions providing for arbitration is sufficient provided that this instrument is expressly or impliedly accepted by or on behalf of the other party." (emphasis added)

Article 1781 of the Swiss Private International Law Act, whilst requiring an arbitration agreement to be in writing, makes no mention of signature or exchange.

The Singapore International Arbitration Act 1991, whilst adhering to article 7(2) of the Model Law, includes a specific reference to Bills of Lading.

Both the English and Hong Kong Statutes of 1996 provide a very expansive definition of what is an agreement in writing. These definitions, it is considered, will encompass most methods of concluding an arbitration agreement, which may not be covered by article II (2) of the Convention. A common example is when parties conclude a contract on the basis of one party’s standard terms and conditions, which include an arbitration clause, which is not signed by one party nor is there any exchange of documents, which could bring the transaction within the definition. Here a contract has clearly been entered into and both statutes recognise that in this situation the writing requirement has been fulfilled.

Similarly, it is sufficient under this definition if the agreement is evidenced in writing. Salvage agreements will also be covered if they are made orally by reference to written terms containing an arbitration agreement.

Section 1031 of the 1998 German Arbitration Law deems compliance with the writing requirement, "[...] if the arbitration agreement is contained in a document transmitted from one party to the other party or by a third party to both parties and—if no objection was raised in good time—the contents of such document are considered to be part of the contract in accordance with common usage."

The issue then has to be raised as to whether a problem exists when the award has been rendered under a law providing for an expansive definition, but is brought for enforcement to a jurisdiction which does not.

It is to be hoped that enforcing courts will have full regard to the international nature of the arbitration and will respect the fact that the parties have agreed to arbitrate under a law which provides a more expansive definition of "agreement in writing". This conclusion should be more likely if the first time that objection is taken to the written form is when the award is taken to a third country for enforcement. The doctrine of estoppel may also be reverted to.

If the arbitration has been held under the Model Law, non-compliance with the writing requirement of article 7(2) may be cured by submission to the arbitration proceedings i.e. by taking part in the arbitration proceedings without raising this jurisdictional plea as required by article 16(2).
Some commentators have observed that the problems identified with the scope of article II (2) of the Convention do not appear widespread and they have expressed the view that no change is necessary. To this I would counter that there have indeed been cases where a stay of proceedings has been refused because the facts of the case could not be brought within the confines of the article II (2) writing requirement. In other cases, judges have strained their construction in order to fit the facts of individual cases within the definitions.

Furthermore, I would imagine that other cases do not even get to the starting blocks because of the narrowness of the definition.

One reason why the problem may not be so widespread is because more and more judges in various jurisdictions are recognizing the existence of an international arbitration culture and are increasingly taking a more liberal and international approach to the problems thrown up by international commercial arbitration cases coming before them. This is an indication of the enormous influence that both the Convention and the Model Law have had over the last few years. Furthermore, the provisions of article VII of the Convention are attracting more attention these days.

As Pieter Sanders said this morning, the future lies to a great extent in harmonization. Later in these proceedings others will be discussing the possibility of an additional or parallel convention. If this proposal gains support, I hope and expect that article II (2) will be high on the agenda for inclusion.

Third parties and the arbitration agreement

JEAN-LOUIS DELVOLVE
Attorney, Paris

"Even the most beautiful girl can only give what she's got ..."

In the same way, whatever the virtues of an arbitration agreement and however highly it might be regarded, especially in international arbitration, it will sometimes be rejected out of a feeling that it cannot deliver justice that is as certain, impartial or effective as that provided by a State's courts of law. Some people, or even States, reject arbitration altogether and would not under any circumstances allow themselves to be judged by arbitrators.

This rejection of arbitration is quite legitimate. It derives from the "right to a judge", i.e. the fundamental right of the parties to enjoy the guarantees of a fair trial that State justice is supposed to provide. This is the intention, for example, of article 14(1) of the United Nations International Covenant on Civil and Political Rights, and of article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Which is why no one may be forced to arbitration against his will.

The requirement of an agreement in writing, as stipulated in article II of the New York Convention, implicitly gives effect to this principle. If there is no written agreement between the parties, an arbitral award cannot be subject to the rules of the New York Convention.
But documents do not stay in one place. The arbitration clause—the agreement on submission to arbitration—is a contractual document. It can be transferred to third parties, generally in connection with the transfer of the principal contract or as a consequence of such transfer. One can but cite some examples: universal transfer of assets (successions, mergers, demergers and acquisitions of companies) or specific transfer of assets (transfer of contract or assignment of receivables or debts, novation, subrogation, stipulation in favour of a third party); or, in the case of multiple parties, or groups of contracts or groups of companies, implicit extension of the application of the arbitration agreement to persons who were not expressly parties thereto. Thus, third parties may suddenly find themselves involved in an arbitration agreement, or even an arbitration proceeding which is already under way.

The situation can then arise where there are two competing claims: that of the third party, who may no longer be a third party, claiming his "right to a judge"; and that of the other party, claiming his "right to an arbitrator" on the strength of the arbitration agreement which he invokes, a right to an arbitrator which he bases on the principle of freedom of contract, itself derived from the principle of freedom of trade and commerce.

The New York Convention does not resolve this conflict and was not intended to do so.

However, the Convention has another intention. This is indirectly to set forth, in article V, essential safeguards which will assure alleged third parties that the arbitral justice which they appear to dread offers as much protection of their rights as the State justice which they invoke. Indeed—and this is reflected in the UNCITRAL Model Law as well as modern arbitration law (for example, French, Dutch, Swiss, English, German or Italian law)—it provides for the enforcement of an award to be refused where either:

(a) the freedom of a party not to be forced to arbitration against his will has not been respected by the arbitrators (article V(1)(a) indicates that the arbitration agreement is not valid in respect of that party in the absence of his consent) or

(b) the equality of the parties in the arbitration proceeding has been infringed (article V(1)(d)).

Thus, the New York Convention has the immense merit of demonstrating that arbitral justice offers the parties advantages and safeguards that are no less than those offered by ordinary justice.

Consequently, the State courts responsible for verifying the validity of awards at the time of their pronouncement or enforcement should not base their decision on a mere point of dogma whereby the award has to be overturned simply on the ground that the supposed third party was not a party to the relevant written agreement from the outset. They should rather seek to establish whether, in accordance with the traditional contract law applicable to the transfer of the arbitration clause or agreement, the arbitration agreement is transferable under the applicable law and whether the transfer has actually occurred pursuant to that law, in the full knowledge that such transfer has no prejudicial effect, in terms of the justice to be delivered, on the right of any of the parties to be fairly judged.

Moreover, excessive formalism could harm the true interests of the parties inasmuch as arbitral justice is sometimes better equipped than ordinary justice to state what is true and fair in matters of international trade.
Provisional and conservatory measures

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The problem is old. An arbitrator is not a State judge, superman or wonder-woman; and an arbitration award is not self-executing like the order of a State court. An award is enforceable at law by a State court by reference to its national law or as a foreign award under the New York Convention. Such awards are blessed; but for too long, there have been difficulties enforcing an arbitrator's order for interim measures, both abroad and domestically.

An order for interim measures is essentially temporary in nature; it is not an award which is always final; but an interim order can be at least as, or even more important than, an award. In the absence of an enforceable interim measure, it is sometimes possible for a recalcitrant party to thwart the arbitration procedure—completely and finally. An enforceable interim measure can maintain the status quo until the award is made and it can also secure assets out of which an award may be satisfied where a recalcitrant debtor is deliberately dissipating assets to render itself eventually judgment-proof.

Patchwork reforms to national laws have resolved many obstacles blocking the enforcement of a domestic order for interim measures; and that is not the subject of my remarks. I am concerned now with the remaining difficulties for enforcing an order for interim measures abroad, outside the seat of the arbitration. These difficulties have grown with the success of international commercial arbitration. The arbitral seat is now more often a neutral place with no legal or financial links to the parties and court enforcement at the arbitral seat of an interim order can be an empty remedy. And where the legal remedy is empty, there are signs that arbitrators are reluctant to order interim measures at all.

This absence of any international legal order for enforcing abroad an arbitration tribunal's provisional and conservatory measures now strikes at the heart of an effective system of justice in transnational trade. This problem was not addressed in the League of Nations' Protocol on Arbitration Clauses (Geneva, 1923) and Convention for the Execution of Foreign Arbitral Awards (Geneva, 1927); and of course it could not be resolved under articles 9 and 17 of the UNCITRAL Model Law. The only relevant instrument is the New York Convention; but we know now that it provides no or no safe solution to the problem. The better view of its application excludes any provisional order for interim measures from enforcement abroad as a Convention award, however urgent or necessary to safeguard the arbitral process. The decision to that effect of the Australian Court in Resort Condominiums International (1993)¹ is persuasive; and commentators who criticize the judgment have never done so with equal persuasiveness, still less when they cite domestic cases; and Professor van den Berg says only this in his forthcoming second edition: "It is arguable that an award for interim relief can be enforced under the New York Convention." Can arguments suffice? In a matter of such importance, I suggest not. The preferred solution lies in a supplementary convention to the New York Convention on the enforcement by State courts of an arbitral tribunal's interim measures of protection.

There are four aspects to this solution.
First, the international system of commercial arbitration plainly requires the assistance of State courts for the enforcement of an arbitral order for interim measures. Like an award, such an order is not self-executing; and arbitrators lack the sanctions of State courts for the enforcement of their orders.

Secondly, the choice of a neutral seat for the arbitration means in practice that the courts of that seat may have no effective jurisdiction over the party against whom interim measures are to be enforced. This proposed solution necessarily involves a State court enforcing a foreign award made outside the territory of that State.

Third, even where a foreign court will now render assistance to an arbitration elsewhere, it does so by way of an original jurisdiction and not by enforcing the arbitration tribunal’s interim order. That approach is not wrong in itself; but inevitably it invites the foreign court to review the merits of the parties’ dispute. Where those merits have been reviewed by the arbitration tribunal and an order for interim measures made, the foreign court’s primary task should be to enforce the interim order and not to perform the same task twice, with the risk of delay and expense. And of course, there are still countries where courts lack any jurisdiction or powers to assist a foreign arbitration or where any court application for interim measures is treated as a breach of the parties’ arbitration agreement.

Lastly, the widespread use and ever-increasing popularity of commercial arbitration requires an international solution. International commercial arbitration is here falling behind international litigation. In 1996, the International Law Association (ILA) published at its Helsinki meeting its resolution on Provisional and Protective Measures in International Litigation which is currently being considered at the Hague Conference. More immediately, the European Court of Justice may soon declare new powers for State courts in its forthcoming judgment in The Van Uden Case, a reference from the Dutch Hoge Raad. If the recent opinion of its Advocate-General Philippe Leger is followed by the Court, article 24 of the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (Brussels, 1968/1978) could there be interpreted to allow an aggrieved party to by-pass its arbitration agreement (and the Convention) and to seek enforcement of court-ordered interim measures within the European Union. If so, that judicial approach will have been provoked by the perceived weaknesses in the Convention.

For the transnational trader everywhere the present position is unsatisfactory. If an award can be enforced under the Convention, then why not an interim order made by the same arbitral tribunal for the sole purpose of ensuring that its award is not ultimately rendered nugatory by the other party? It defies logic and practical common-sense.

If the international will were there, the drafting of a supplementary convention could follow with relative ease. Enforcement would be subject to a court’s discretion broader than article V of the Convention; it would include the court’s power to enforce the order in different terms; and an application for enforcement could be made subject to the prior leave of the arbitral tribunal making the interim order, with reasons to be given for both interim order and leave. It might also be necessary to exclude an interim order for payment to the creditor from the list of qualifying interim measures, as does the ILA’s Helsinki resolution. These are details subsidiary to the overall solution. Whatever further qualifications could be required for court enforcement for a foreign order for interim measures, it could only improve the present position.
Seventy-five years after the Geneva Protocol and 40 years after the Convention, it is not now too soon to find and implement a simple, effective and practical solution which is needed by international trade. And like Oliver Twist holding out his empty bowl of porridge we ask only: Please Sir, may we have another United Nations convention?

Court assistance with interim measures

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In the context of one of the most important questions of international trade law, namely the settlement of disputes arising in contractual relations, the twentieth century has been marked by universal recognition of the institution of arbitration as a mechanism of private justice established by the contracting parties themselves, where they normally belong to different States. Judging by the well-documented experience amassed in the area of international commercial contracts of widely varying types, it may be expected that arbitration, which is progressively evolving both in terms of practical application and in terms of normative regulation, will maintain its leading position among the alternative (extrajudicial) means of dispute settlement in the twenty-first century.

From the normative point of view, together with the development of national legislation, an important role is played by international harmonization efforts and the advances made in that direction, including in particular one of the most "felicitous" (from the point of view of universal adoption) private-law conventions, namely the New York Convention, and the UNCITRAL Model Law, which has been, and is continuing to be, adopted by an ever greater number of countries as codifying legislation within their own domestic law.

The prospects for the development and simplification of international commercial arbitration regulations in the light of practical needs depend on how new problems are tackled *de lege ferenda*, one such problem, in my opinion, possibly being mutual assistance between courts and arbitrators with regard to interim measures of protection in aid of claims which, by consent of the parties, are to be settled in arbitration proceedings. It is very often the case that the hearing of a dispute is set to take place in one country, whereas enforcement of the award, if it is not executed voluntarily, is to take place in a different country, where the debtor's property may be located. In such a situation, to what degree is it possible to implement measures of protection in aid of the claim pending pronouncement of the arbitral award (e.g. through the securing of a bank guarantee)?

It is worth recalling that substantial and detailed work was carried out with success on a comparative basis under the auspices of the Committee on International Civil and Commercial Litigation of the International Law Association which, at its 67th Conference in Helsinki in August 1996, adopted a set of Principles on Provisional and Protective Measures in International Litigation. The Conference decided to send that document to UNCITRAL and to the Hague Conference on Private Litigation.
International Law "for consideration". It can be assumed that the experience of the
ILA may be of value in tackling the corresponding questions related to the proce­
dures for implementing interim measures of protection in aid of claims to be settled
in arbitral proceedings, which give rise to special issues and problems of their own
compared with judicial proceedings, the problems involved being even more urgent
in nature.

Arbitrators do not possess powers of the same quality as those enjoyed by
judges, and their possibilities are limited. The provisions of arbitration rules (such as
article 26 of the UNCITRAL Rules and similar provisions from a number of insti­
tutional arbitral tribunals) and even of laws (such as article 17 of the Model Law)
concern possible dispositions in relation to the "subject-matter of the dispute" only,
rather than protection of the claim *stricto sensu*. The functions of arbitrators do not
cover third parties, such as banks, where the assets of one of the parties may be held.
The question of interim measures of protection in aid of a claim may arise before the
arbitral tribunal has been established, whereas an urgent response to the question
may be necessary before, for instance, the financial assets are spirited away into a
"black hole".

The legislation of a number of countries includes provisions on judicial meas­
ures of protection in aid of claims to be considered in arbitral proceedings designated
to take place in the country of jurisdiction of the court (*saisie conservatoire*, attach­
ment, injunction, arrest, etc.). However, comparative analysis of the provisions re­
veals substantial differences in the way these interim measures of protection are
implemented. Only in a very few countries are the functions of a court of justice
deemed to also cover cases where arbitration is to take place in a foreign State. In
a number of countries, however, there is no possibility whatsoever of applying to a
court for measures of protection in aid of a claim if, by agreement of the parties, such
claim is to be considered in arbitral proceedings, even in cases where the arbitration
proceedings have already begun.

Research within the framework of UNCITRAL on issues relating to measures of
protection in aid of claims to be settled in arbitral proceedings could lead to the
development of new normative solutions, possibly in the form of additions to the
Convention or the adoption of a new convention on the subject, or else in the form
of an addition to the Model Law, or in some other form.

**Awards set aside at the place of arbitration**

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Broadly speaking, the New York Convention was intended to make it easier to
enforce an arbitral award rendered in one country in the courts of other countries.
Therefore, the Convention focuses squarely on imposing certain obligations on the
judge at the place of enforcement. It does not create obligations for the courts at the
place of arbitration—that would have been beyond the scope of the Convention. So
each country remains free to make whatever rules it wishes with respect to the
grounds on which they might invalidate an award rendered in their territory.
This creates a problem, in an indirect way, in the application of the Convention, because article V(1)(e) makes it possible for courts to refuse to recognize or enforce foreign awards if they have been set aside by the courts in the country where they were rendered. As has been recognized for many years, this exposes a potential weakness in the Convention system, by making the reliability of an award subject to local peculiarities of the country where the award was rendered—including eccentricities, or whims, or even xenophobia.

This poses an obvious danger to the harmonization of the legal regime of international transactions.

One can imagine a situation where the courts of the place of arbitration apply criteria for the annulment of awards which are clearly contrary to the contemporary international consensus, such as allowing review of the merits of awards or invalidating awards for failure to abide by pointless formalities, which neither party had raised during the arbitration. That is bad enough. But one can also imagine criteria which would be internationally intolerable, such as invalidating awards because all the arbitrators were not of a certain religion, or were not of the male gender.

Under what circumstances should an enforcement judge operating under the Convention disregard the annulment of an award by a foreign court, and enforce the award notwithstanding that annulment?

Three different solutions have been advanced.

The first solution is to ignore article V(1)(e) entirely, on the basis that the Convention allows each country under article VII to adopt a more liberal regime in favour of enforcement. This solution would therefore entirely displace the control function of the enforcement jurisdiction or jurisdictions. If an award meets the criteria of the enforcement jurisdiction, the judge there simply would not be required, nor indeed entitled, to give any weight to what a foreign court may have done to an award; that would be a matter of purely local consequence in that country.

Whatever else one might say about that solution—although I could live with it and so it seems, from his remarks today, could Robert Briner—it appears in the light of international practice in 1998 to be too radical, and contrary to current expectations of both lawyers and indeed users.

A second solution starts with the postulate that the problem stems from the fact that some countries are out of the mainstream, and cannot be relied upon to apply international standards. But most important trading countries abide by the contemporary international consensus. Therefore there is no reason—to say the proponents of this solution—why there could not be a mini Brussels Convention (Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, Brussels, 1968/1978) or a mini Lugano Convention (Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Lugano, 16 September 1988) relating solely and specifically to court decisions dealing with arbitration, so that each country within this group of mutually trusting countries would give res judicata effect to each others’ judgments and thus create significant harmonization.

Whatever else one might say about this proposal, and disregarding the unappealing spectre of creating clubs of "trustworthy" countries, it would seem unfortunate
to bring the international arbitral process, which by its essence contemplates minimal court intervention, back into a regime which focuses on the role of the courts.

I favour a third solution, which goes back to article V and proceeds on the basis that it is discretionary—courts may refuse enforcement (and therefore may also accept it) when an award has been annulled in the place where it was rendered. How should this discretion be exercised?

The enforcement judge should determine whether the basis of the annulment by the judge in the place of arbitration was consonant with international standards. If so, it is an International Standard Annulment, and the award should not be enforced. If the basis of the annulment was one not recognized in international practice, or if it was based on an intolerable criterion, the judge is faced with a Local Standard Annulment. He should disregard it and enforce the award.

One may expect that such an approach would lessen the temptation to issue Local Standard Annulments. It is also to be noted that this solution is entirely consistent with the 1961 Geneva Convention (about which we heard earlier from Ottoarndt Glossner) and so contributes to harmonization in the right direction.

This third proposal could (and should) become part of any supplement or protocol to the Convention, but one of its attractions is that it does not require such a protocol—the solution is already available to individual national systems by virtue of the discretion built into article V.
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.

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 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; 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.

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. 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.
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. 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.

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.”

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.

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.” 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.\textsuperscript{14}

The Court also noted that the penalty was not disproportionate to the effects of the breach.\textsuperscript{15}

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.\textsuperscript{16}

Although the Supreme Arbitrazh Court ultimately upheld the arbitral award in \textit{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 \textit{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 \textit{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.”\textsuperscript{17} Russia’s law on domestic arbitration contains a similar limitation.\textsuperscript{18} Also, Article 248 of the Arbitrazh Procedure Code reserves certain disputes involving foreign parties for the state arbitrazh courts’ “exclusive jurisdiction,” including disputes involving real property located in Russia.\textsuperscript{19}

The Supreme Arbitrazh Court has interpreted these provisions as excluding disputes over real estate rights from arbitral jurisdiction. For example, \textit{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.\textsuperscript{20}
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.21

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.”22

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 the lease rights are established by registration of the 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.23

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.”24 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.25 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.”26

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.”27 Suspicion toward international arbitration is most clearly misplaced when both sides to the dispute are Russian-owned companies. As Russia’s integration in 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 Russian courts’ resistance to 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.”28 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.*,29 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.”30
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.”

Although Bremen eliminated any remaining general tendency of American courts to reject forum selection clauses in arms-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. 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, or remedies under the securities laws. 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.

The pre-Bremen resistance of American courts to forum selection clauses is similar to the resistance of Russian courts toward foreign 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 early to give up hope that the isolationism that can be seen in some Russian court decisions on enforcement of foreign 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, remanded by the appellate court for reconsideration of the forum non conveniens issue, and dismissed by the trial court for lack of subject-matter jurisdiction, 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 non-resident defendant unless (i) the defendant has “continuous and systematic general business contacts” with the forum, 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.” 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.” 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.

1. “General” Personal Jurisdiction

In Archangel Diamond Corp. v. Lukoil, 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 US 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”.* 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.”* 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,* 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,* 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 US 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 US exports or imports. 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 US 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 US commerce. The court noted that US 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.48

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.49 The federal and state courts apply forum non conveniens basically the same.50

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.”51 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.”52

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-US 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.53 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 US operations. Thus, the court stated that the record “points to nothing but forum shopping by the plaintiffs.”54

As for the adequacy of the alternative forum, the lack of procedures available in a foreign forum that would be available in US 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.55

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.”56

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.”57 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.” 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,” and that corruption has become a “way of life” in Russia. 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. Such statements might help future litigants keep some Russia-related disputes in US 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 US 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, 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.”

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 US 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.

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.65

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.

Appendix – Excerpt from Information Letter No. 96, Russian Federation Supreme Arbitrazh Court, Dec. 22, 2005

(translation by Daniel J. Rothstein)

Section 29. The arbitrazh court shall refuse to recognize and enforce a foreign commercial arbitral award if it determines that the consequences of enforcement of such award contradicts [sic] the public order of the Russian Federation.

A Russian open joint stock company (hereafter - the joint stock company) and a foreign firm (hereafter - the firm) applied to the arbitrazh court for recognition and enforcement of an award rendered abroad by an international commercial arbitration tribunal (hereafter - the arbitration tribunal) requiring a Russian joint venture and one of its founders to pay damages in the amount of US$ 20 million.

By decision of the arbitrazh court, the application was granted.

The respondents applied to the Supreme Arbitrazh Court of the Russian Federation with a request to vacate the decision and refuse recognition and enforcement of the arbitration tribunal’s award in the territory of the Russian Federation.

The Supreme Arbitrazh Court of the Russian Federation vacated the above-mentioned judicial act and remanded the case for further consideration, proceeding from the following.

The competence of the arbitration tribunal was based on an arbitration clause contained in an agreement on the procedure for reorganization of the joint venture and on the exit of the joint stock company and the firm from participation in the joint venture as founders.

The arbitration clause provided that disputes connected with reorganization of the joint venture into a limited liability company and cession by the joint stock company and the firm of their shares to founders of the limited liability company, as well as the founders’ payment for such cession in the form of property, were subject to adjudication in the arbitration tribunal.
In its award, the arbitration tribunal did not address the fate of the shares in the joint venture’s charter capital. At the same time, the arbitration tribunal held the joint venture and the joint stock company liable to pay the foreign firm the cost of its contribution to the charter capital. Furthermore, it was not taken into account that the foreign firm made its contribution to the joint venture’s charter capital in the form of property, as equipment that was not imported to the territory of the Russian Federation and was located in Bremen (FRG) at the time of adjudication of the dispute.

In addition, a dispute over an agreement between the joint stock company and the joint venture on storage of the equipment had been previously heard by an arbitrazh court of the Russian Federation, which required the [joint stock] company to return the above-mentioned property to the founder.

Thus, the foreign founders did not make their contribution to the joint venture’s charter capital. Furthermore, enforcement of the arbitration tribunal’s award, requiring payment of the cost of the charter capital contribution without deciding the question of the fate of the shares issued for payment of such contribution, or the question of the fate of the property located outside of the Russian Federation, contradicts the public order of the Russian Federation, which contemplates the good faith and equality of parties entering into private relations, as well as proportionality of civil law liability to the breach of duty.

The Presidium of the Supreme Arbitrazh Court of the Russian Federation instructed that on reconsideration of the application for recognition and enforcement of the arbitral award, the court should examine, taking into account the litigants’ equal right to judicial protection, a series of questions: is the agreement submitted to the arbitration tribunal for review consistent with the award; is the issue of redistribution of shares in the joint venture consistent with the damages provided for in the award; is reorganization of the joint venture practicable, and what is the value of the property contributed to its charter capital but stored in Bremen (FRG); to what extent does the possibility of returning to a founder its property contribution to the charter capital of a joint venture created on the territory of the Russian Federation, while also imposing damages in the form of the contribution upon the joint venture itself, as well as one of its founders, comport with the public order of the Russian Federation. Only after clarifying these questions should the arbitrazh court decide the issue of whether the award or part of it should be enforced.

After considering the case and examining the questions posed above, the arbitrazh court denied recognition and enforcement of the arbitral award, because the consequences of enforcing such an award contradict the public order of the Russian Federation, 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.

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2 On political influence and corruption in the Russian courts, see *infra* text accompanying notes 56-59.


4 Cyprus, the Netherlands, and Luxembourg are consistently among the top sources of investment into Russia, and “most of this is Russian capital ‘round tripping.’” Lúcio Vinhas de Souza, *Foreign Investment in Russia*, ECFIN COUNTRY FOCUS, Vol. 5, No. 1, Table 1 & fn. 5.


6 Vaneev, note 2 *supra*, at 40-41.


10 Information Letter No. 96, Section 29.

11 An English translation of this Section of Information Letter No. 96 is provided as an appendix to this article.

12 Karabelnikov, note 8 supra, Part II, at 43-46.


14 Decree of Presidium, Supreme Arbitrazh Court, Case No. 5243/06, p. 5 (Sept. 19, 2006).

15 Id.

16 Decree of Presidium, Supreme Arbitrazh Court, No. 5243/06, pp. 6-8 (Jan. 22, 2008)

17 RF Law on International Commercial Arbitration, art. 1.2.

18 RF Law on Arbitral Tribunals in the Russian Federation, art. 2.

19 Arbitrazh Procedure Code, art. 248.2.

20 Information Letter No. 96, Section 27.


22 Information Letter No. 96, Section 28.

23 ZAO Kalinka-Stockmann v. OOO Smolenskii Passezr, Case No. A40-28757/08-25-228 (Moscow City Arbitrazh Court, Aug. 14, 2008)


26 Arbitrazh Procedure Code, Art. 248.5.


28 Spiegelberger, note 7 supra, at 263.

29 407 U.S. 1 (1972)


31 407 U.S. at 6, 9-10.

32 See, e.g., Phillips v. Audio Active Ltd., 740 F.2d 378 (2d Cir. 2007); Palmco Corp. v. JSC Technatalnergie, 448 F. Supp. 2d 1194 (C.D. Cal. 2006); CFirstClass Corp. v. Silverjet PLC, 560 F. Supp. 2d 324 (S.D.N.Y. 2008). For a collection of modern cases refusing to apply forum selection clauses for various reasons, see Frances M. Dougherty, Validity of Contractual Provision Limiting Place or Court in which Action may be Brought, 31 A.L.R.4th 404, section 4[c].

33 “RICO”: the Federal Racketeer Influenced and Corrupt Organizations Act.


35 See Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006).

37 416 F.3d 146 (2d Cir. 2005).
38 540 F. Supp. 2d 438 (S.D.N.Y. 2007)
39 Metropolitan Life Insurance Co. v. Robertson-Case Corp., 84 F.3d 560, 567 (2d Cir. 1996).
41 Moore's Federal Practice and Procedure, Sec. 6.01.
42 Burger King, 471 U.S. at 477.
43 123 P.3d 1187 (Colo. 2005).
44 283 F.3d 208 (4th Cir. 2002). This court’s refusal to confirm the arbitral award because of minimum contacts standards borrowed from the context of initiation of a lawsuit has been called an “egregious” violation of the New York Convention. Linda Silbermann, International Arbitration: Comments from a Critic, 13 Am. Rev. Int’l Arb. 9, 15 (2002).
45 481 F.3d 309 (5th Cir. 2007).
48 540 F. Supp. 2d at 448-49. By contrast, in another case, the takeover of an area where ninety percent of Nigeria’s oil was produced was a significant effect on US commerce for jurisdictional purposes, because forty percent of Nigerian oil was exported to the US. Wiwa v. Royal Dutch Petroleum Co., 2002 WL 319887 (S.D.N.Y. 2002).
50 See, e.g., 3 Weinstein, Korn, Miller, New York Civil Practice, Section 327.02; Kinney Sys., Inc. v. Continental Int’l Co., 674 So.2d 86 (Fla.1996).
52 Gilbert, 330 U.S. at 507.
53 253 F. Supp. 2d 681 (S.D.N.Y. 2003) (i.e., the same parties as in the 2002 personal jurisdiction decision).
54 253 F. Supp. 2d at 696.
56 253 F. Supp. 2d at 708-09.
63 Id. at 551.
65 In re Yukos Oil, 321 B.R. at 411.
JOY-LUD DISTRIBUTORS INTERNATIONAL, INC. V. MOSCOW OIL REFINERY

SUMMARY OF FACTS

JOY-LUD DISTRIBUTORS INTERNATIONAL, INC. based in New York is part of Sapir Organization, a privately held, real estate holding and development firm with over 7 million square feet of prime Manhattan commercial office space. Founded by a Soviet émigré Tamir Sapir who successfully developed oil projects in Russia and other countries, it is at the forefront of the revitalization of downtown Manhattan and currently has projects in the U.S. and Mexico in excess of $2 billion.

MOSCOW OIL REFINERY is a regional refinery supplying oil product in Moscow and Moscow region. Companies close to the City of Moscow managed MOR at the relevant time.

I. THE CONTRACT AND STOCKHOLM ARBITRATION

January 19, 1995 - MOR and JL entered into an agreement pursuant to which MOR was to sell to JL and JL was to purchase from MOR various oil products during the period from 1995 to 2004.

1998 - MOR terminated supply of the products.

October 15, 2003 - JL commenced UNCITRAL arbitration in Stockholm against MOR.

June 14, 2005 - The Arbitration Tribunal rendered an award in favor of JL in the amount of USD 28,041,975 plus interest in the amount of Swedish reference rate plus 8% from June 30, 2005 until paid in full plus costs. The current total value of the award is in excess of $40 million.

II. THE RUSSIAN COURT PROCEEDINGS

A. The 2003-2006 Collateral Proceedings

Certain MOR shareholders filed claims in the Russian court to invalidate contract pursuant to which JL was supposed to receive oil products and which subsequently became the basis for Stockholm arbitration. If the Russian court ruled that the JL/MOR contract was invalid, then MOR would be able to argue that JL is not entitled to any recovery in the arbitration. The shareholders’ claim was denied. The appellate court and the High Arbitrazh Court affirmed the denial.

B. The First Round of Objections to the Award

MOR argued inter alia that the Stockholm arbitration award which provides for liquidated damages for failure to supply diesel fuel from November 2003 to November 2004 contradicts Russian public order because liquidated damages do not have relationship with actual damages and are in fact punitive where the arbitration tribunal held that JL was not entitled to lost profits. The Moscow Arbitrazh Court upheld the MOR objection but eventually, the High Arbitrazh Court held that the award is enforceable.

End of 2005 - JL filed a complaint with the MAC to recognize and enforce the Stockholm I decision.
December 15, 2005 - MAC denied JL’s request.

March 21, 2006 - The FAC affirmed the MAC decision.

June 19, 2006 - The HAC ruled to accept the matter for supervisory review.

September 19, 2006 - The Presidium of the HAC overruled both MAC and FAC decisions and ordered MAC to issue a Writ of Execution based on the award.

October 25, 2006 - MAC issued a Writ of Execution based on the HAC decision.

January 15, 2007 - Bailiffs issued an order commencing execution proceedings.

C. The Second Round of Objections to the Award

The second round of objections concerned the proper identity of JL. MOR asserted that the JL was not a proper Collecting Party because the company does not exist as a legal entity. According to MOR, the company which is trying to execute the award is a company named similarly to the proper Collecting Party (Joy Lud Distributors International Inc. versus Joy-Lud Distributors International, Inc. – note the difference in hyphen). MOR also asserted that the Bailiff’s order is in violation of the Law on Execution Proceedings because it does not set forth the amount certain but indicates an amount of money plus interest which is not apparent from the face of the instrument.

January 15, 2007 - MOR filed a complaint requesting to invalidate Bailiffs order commencing execution proceedings.

March 30, 2007 - The MAC upheld MOR claim and invalidated the Bailiffs order.

June 9, 2007 - The 9th Federal Arbitrazh Appellate Court (9th AAC) reversed the MAC decision.

August 15, 2007 - FAC affirmed the June 9, 2007 decision reversing the MAC decision. However, FAC noted that MOR has the right to file a complaint based on newly discovered circumstances relating to the proper identity of the Collecting Party.

D. The Third Round of Objections to the Award

MOR again contested JL’s standing as a proper party to the proceedings. Further, MOR accused JL of engaging in fraud by attempting to collect the award to which it is allegedly has no right. MOR asserted that JL’s purported non-existence is a “newly encountered circumstance” of which it was not aware previously. MOR filed its objections directly with the High Arbitrazh Court.

January 22, 2008 – HAC denied MOR request holding that the information provided is not “newly encountered” since it is publicly available and that MOR failed to prove that Joy Lud which attempts to enforce the award is not the same company which entered into the contract at issue in 1995, performed it for three years, was party to legal proceedings in both international
III. THE RUSSIAN CRIMINAL PROCEEDINGS

A. 2004 Initial Criminal Investigation

January, 2004 -- Russian authorities, upon a complaint filed by the new MOR management, initiated a criminal investigation into allegations of conspiracy between MOR and JL to intentionally breach the contract and incur significant debt on behalf of MOR. After interrogating numerous witnesses and a thorough review of the documents, the investigation was closed.

B. Renewed Criminal Investigation

December 2007 -- After MOR asserted that JL does not exist and is fraudulently attempting to collect the award, Russian authorities conducted a number of searches in the JL’s representative office in Moscow. Various documents relating to the JL/MOR contract and the arbitration proceedings have been seized. Several days before the HAC hearing, a criminal investigation has been again initiated based on the MOR request.

March 2008 – Russian authorities seized original documents including the writ of execution from the bailiffs.

Bailiffs now claim that they are unable to proceed with the execution without original documents.
ABA Teleconference
Enforcement of Arbitration Awards in Russia and Ukraine: Dream or Reality?
November 17, 2009 at 11:30 – 1:00PM ET

SELECTED ISSUES AND CASE STUDIES
FOR ENFORCEMENT OF ARBITRATION AWARDS IN UKRAINE

Irina Nazarova
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Objectives:

➢ To provide listeners with a practical overview of the arbitral awards enforcement aspects in Ukraine.
➢ To provide listeners with an understanding which international rules of law apply in Ukraine, to provide them with an understanding how core arbitral doctrines are applied in Ukraine; to provide them with practical examples.
➢ To make listeners think step-by-step about comparative analysis of international practice and the rule of law with Ukrainian legislation for their understanding of key problems in application of law.

Cognitive objectives:

Public order; arbitral clause; law which can govern the dispute and lex valuntatis principle; monopoly of international arbitration institution (is it good or not?); division between venue of arbitral disputes and local arbitral disputes.

Content which will be covered:

➢ International rules of law in the field or arbitration and Ukrainian legislation in this field.
➢ Problems, which arise due to the fact of application of law, problematic issues of public order understanding; necessity to consider cases by their essence and not just from the formal point of view.

References:

New York Convention, European Convention; Washington Convention; Bilateral Agreements; Constitution; International Arbitration Act; Regulations of High Commercial and Supreme Court of Ukrainian the field of corporate disputes; Commercial Procedural Code; Code of Civil Procedure; Enforcement Procedure Act; Act on Local arbitrations; Recommendations of High Commercial and Supreme Commercial Courts; examples re Telenor Mobile Communications dispute (enforcement of arbitral award); Regent Company vs. Ukraine (European court decision); case Ministry o Ukraine vs. Cazprom and Nafogaz, etc.
1. The preemptive force of international rule of law in Ukraine and core international treaties ratified by Ukraine

Legal force of preemptive “international rule of law principle” (collision between Constitution and Law on International Treaties)

The Constitution of Ukraine provides: “binding international agreements ratified by Verkhovna Rada (Parliament) of Ukraine, form a part of the national legislation of Ukraine”. The Constitution, unlike the Constitution of the Russian Federation, does not set out any rules re. the legal force of such agreements vis-à-vis national laws. This may create an impression that international agreements and domestic laws have equal force and the latter may overrule the former through lex posteriori or lex specialis rules or otherwise.

However, the Law “On International Agreements of Ukraine” adopted after Constitution, sets out a general rule that international agreements take precedence over national laws. This rule was subsequently repeated in numerous specific laws.

Therefore, one may conclude that international provisions take precedence over the domestic ones, but an argument to the contrary would not be without foundation as well.

A short list of core international treaties, in force for Ukraine in the field of arbitration, bilateral agreements

You are probably already aware that Ukraine joined the 1958 New York Convention in 1961 and the European Convention on International Commercial Arbitration in 1964, when it was still the Ukrainian Soviet Socialistic Republic, a part of the USSR. As it is well-known, both Conventions govern the recognition and enforcement by the local courts of awards rendered by international arbitrations. By the Law “On the Legal Succession of Ukraine”, adopted immediately after gaining independence in 1991, Ukraine confirmed all international agreements, entered into by the Ukrainian SSR.

As of 1 October 2009, there are 144 members to the New York Convention. With regard to awards made in the territory of non-contracting States, Ukraine applies the New York Convention only to the extent to which those States grant reciprocal treatment. With two of the non-signatories, Yemen and Iraq Ukraine has bilateral agreements providing for enforcement of awards under basically the same rules as provided for in the New York Convention.

The European Convention, on the other hand, fills several gaps of the New York Convention. In particular it contains provisions as to the organisation of the arbitration, plea as to arbitral jurisdiction, jurisdiction of courts of law, applicable law, obligation of the arbitral tribunal to give reasons for the award and the grounds for setting the award aside. So far 27 states have ratified it.

In 2000 Ukraine joined the 1965 Washington Convention, establishing the International Centre for Settlement of Investment Disputes (ICSID). Since then Ukraine has already been involved in several disputes with investors before this body.
2. **Ukrainian legislation in the field of arbitration, the way it applies to key issues in the field of arbitration**

Ukrainian domestic rules of recognition and enforcement of international arbitral awards are concentrated in the following legislation:


- The Law “On International Private Law” sets out the rules for trans-border civil relations and contains, *inter alia*, the freedom of choice of governing law and forum and the most comprehensive set of arbitrability requirements in any of the relevant legislation;

- The Code of Civil Procedures contains the set of rules governing the recognition of foreign judgments, which the courts use, *mutatis mutandis*, in arbitration awards’ recognition procedures;

- The most prominent piece of judicial rule-setting in this field is the Plenum of the Supreme Court of Ukraine’s Ruling “On the Courts’ Practice in Consideration of Applications for Recognition and Enforcement of Foreign Courts’ Judgments and Arbitral Awards” (“the Plenum Ruling”).

*Public order of Ukraine within Ukrainian legislation*

According to the Law “On International Commercial Arbitration” a Ukrainian court may refuse recognize an award if such recognition is contrary to the public order. *It may not be surprising to learn that there is no legal definition of this term ‘public order’, envisaged by the rule of law. Ukraine is Civil Law country and hence case-law does not prevail in Ukraine.*

However, pursuant to the Plenum Ruling a court may refuse to provide consent to enforcement of the arbitration award which is in conflict with public order, *id est*, the legal order of the State, the fundamental principles and policies, which form the basis of the existing regime (concerning its sovereignty, integrity, independence, security, fundamental constitutional rights, freedoms, guarantees etc.).

Therefore, in general, the rules, as such, are not unlike that in other European countries.

The leading U.S. case addressing the appropriate standard under Article V (2) (b) of the New York Convention is *Pasons & Whittemore Overseas Co. v. Societe Generale de l’Industrie du Papier*. The Court of Appeal explained,

In equating “national” policy with United States “public” policy, the appellant quite plainly misses the mark. To read the public policy defence as a parochial device protective of national political interests would seriously undermine the Convention’s utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of “public policy”. Rather, a circumscribed public policy doctrine was contemplated by the Convention’s framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supernational emphasis. The court concluded that
public policy could be invoked as a basis for refusing to recognize foreign arbitral awards “only where enforcement would violate forum state’s basic notions of morality and justice”.

Hence, we can clearly see, that the essence of public policy doctrine is the same in Ukraine, U.S. and international law as well and this essence probably shall not be fixed in one definition, because in doing so, we would significantly limit the doctrine of public order notwithstanding its sense.

So, why is it so problematic to enforce arbitral awards in some countries, f.e., Ukraine? The answer might be found in investigating of applications of the doctrine, its understanding and not the doctrine itself.

International Arbitration Court in Ukraine and Local Arbitral Courts: specific legislation, differences, problems and the reasons they do not work in an acceptable manner

According to the Law “On International Commercial Arbitration” the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (“the ICAC”) is the only body, competent to deal with international commercial disputes in Ukraine. This is confirmed by specialized legislation, such as currency regulations, granting ICAC semi-public status.

Unfortunately, I cannot state that this “monopoly” played a good role for ICAC’ consideration of the disputes. Sometimes, it is not possible to get access to court materials, because such right is not envisaged by ICAC Rules, which usually invoked by arbitrators; minutes are not taken during court hearings, etc. I opine, that such consideration of dispute is nothing else but for the absence of competition in the field of arbitral insinuations being competent to consider disputes between resident and non-resident.

On the other hand domestic arbitral tribunals are prohibited by Ukrainian law from considering disputes involving foreigners. Particularly as the result of this “legitimate” monopoly the domestic arbitral courts rather often play role of the “pocket firms” related to some particular law offices.

These tribunals are infamous in Ukraine for being tainted with inefficiency. It was not until recently, when the law granted third parties, the right to appeal against domestic arbitral awards. For example, in my practice there was a case, in which one such tribunal deprived a local municipal council of a piece of its real property in absence of its representatives attending the hearing. Only the recent developments in the law allowed us to stay the enforcement of this award and to challenge it in the court of law.

Hence, one can conclude that there is a positive trend regarding changes in the legislation governing arbitration in Ukraine.

Arbitration agreement or clause in Ukraine

(A) According to the Law “On International Commercial Arbitration” “arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. The arbitration agreement shall be in writing’.
(B) Non-arbitrable matters

The Law “On International Private Law“ provides that a private-law dispute falls within the exclusive competence of the Ukrainian courts (is non-arbitrable) if it concerns:

- “immovable property” situated in Ukraine;
- execution of intellectual property right, which is subject to registration or issuance of certificate (patent) in Ukraine;
- registration or liquidation of foreign legal persons or private entrepreneurs in Ukraine;
- validity of the entries in state registrars, including land registrar;
- bankruptcy of a debtor, established under the Ukrainian law;
- issuance or annulment of securities, registered in Ukraine.

The Code of Commercial Procedure provides that the following disputes cannot be referred to an arbitral tribunal:

- claims for annulment of acts by state and municipal authorities;
- disputes over State procurement, and
- corporate disputes.

(C) The Commercial courts are a branch of judicial bodies dealing with commercial disputes. Therefore, their practice contains a wide, if not particularly coherent, body of case-law regarding validity of arbitration agreements, this has given rise to some surprising decisions which can be summarized as follows:

- If an agreement, containing arbitration clause was declared invalid, the arbitration clause may be found to be invalid as well\(^1\);
- An arbitration agreement can be concluded by the parties even after the institution of the commercial court proceedings. Such agreement is binding on the court, which should terminate the proceedings if such agreement was concluded\(^2\).
- The arbitration agreement as well as the choice of the law is not binding on a third party, affected by the contract, which, therefore, is free to bring proceedings against the parties before

\(^1\) the Higher Commercial Court’s brief on courts’ practice of resolution by commercial courts of certain categories of cases involving non-residents of 01.01.2009 (“the Brief”)

\(^2\) The Explanation by the Higher Commercial Court on certain issues concerning the practice of consideration of cases involving foreign companies and organisations of 31.05.2002
a commercial court, which would consider the case under Ukrainian substantive and procedural law).

**Corporate disputes and their peculiarities: prohibition to refer to arbitration; obligation to apply Ukrainian legislation; violability of arbitral clauses pursuant to violation of Ukrainian public order**

In 2007, the Higher Commercial Court of Ukraine adopted Recommendations "On practice of application of legislation with respect to resolution of corporate disputes" ("2007 Recommendations"). Although such recommendations are not of biding authority they would normally be followed by lower commercial courts as persuasive authority.

The Higher Commercial Court required the lower courts to treat as void and contrary to public order any shareholder agreements, that submits disputes arising out of corporate relations in joint-stock companies registered in Ukraine to foreign law. The Higher Commercial Court also considered that the parties to shareholder agreements were prohibited from referring their disputes to international arbitration.

This gave rise to a great deal of debate, which is still ongoing among Ukrainian judges, scholars and practitioners, on the arbitrability of corporate disputes. The position of the Higher Commercial Court received limited support in the Ukrainian arbitration community. Many practitioners considered that it contradicted provisions of the 1994 International Commercial Arbitration Act, according to which shareholders of Ukrainian companies with foreign investments are entitled to submit their disputes to international arbitration.

However, the approach was supported by the Supreme Court of Ukraine in its 2008 Resolution "On the court practice in corporate disputes" ("2008 Resolution"), which regarded any joint-stock company shareholder agreement with a foreign governing law as a "circumvention of law" within the meaning of the 2005 International Private Law Act.

Subsequently this view was reflected in law: The Code of Commercial Procedure excludes corporate disputes (that between a shareholder and the company and between shareholders concerning the establishment, activity, management and winding up of companies) from the list of disputes which can be referred by the parties to arbitration.

This rule appears to contradict the Law “On International Commercial Arbitration” and Law “On Regime of Foreign Investments”, which establish the right of shareholders of companies with foreign investors to bring their disputes before international arbitrations.

**Comparative analysis of Supreme Court Regulations, Ukrainian legislation with international rules of law**

Both, the 2007 Recommendations and the 2008 Resolution provide that Ukrainian domestic corporate law is imperative and thus choice of foreign law in shareholders’ agreements is a “circumvention of law”, a violation of public order that makes the relevant agreements void ab initio.

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3 The Judgment of the Kyiv City Commercial Court Kyiv of 09.01.2009 in the case of Cabinet of Ministers of Ukraine vs. Gazprom and Naftogaz
Neither of the above documents refers to any specific piece of legislation supporting this view. In fact it directly contravenes the provisions on freedom of choice of governing law, provided for in The Law “On International Private Law”. This law restricts the imperative nature of the Ukrainian corporate law to the “personal statute of legal entity”, which includes issues of (i) its legal capacity; (ii) its establishment (formation) and (iii) its liquidation. The issues falling outside the scope of personal statute the parties are free to submit to any foreign legislation.

However, according to the Higher Commercial and Supreme Courts’ opinion such actions may result in invalidation ab initio of the agreement. It is noteworthy that, if applied and construed literally, the agreements are invalidated in whole and not in part, that allegedly violates public order. This is contrary to Civil Code of Ukraine’s provisions according to which the court contract is void only in the part which contradicts the law, if it may be assumed that it would have been concluded, even were this part not included. Moreover the courts in 2007 Recommendations and 2008 Resolution seem to have meant that the no foreign law rules should have retrospective effect.

Neither Supreme Court’s Resolution’s nor Higher Commercial Court’s Recommendations are formally mandatory. However these forms of courts’ rule-making have their roots in practices formed back in the time of former USSR and are traditionally treated by lower courts as binding and usually follow them in their practice.

3. Procedure of Enforcement of Arbitral Awards in Ukraine

Brief overview of the procedure of enforcement with references to Ukrainian legislation.

(A) Recognition rules

The Code of Civil Procedure governs the procedure in arbitration awards’ recognition cases.

The competent court is a local court, having territorial jurisdiction over the place of residence/registered address of a person against whom the enforcement is sought. If the person concerned does not reside in Ukraine/the place of residence is unknown, the application is filed with the court, with territorial jurisdiction over the place where property of the debtor is situated.

The relevant application should contain the name and address of the applicant (or the one’s representative); the name and the place of residence/registered address/whereabouts of the property of the debtor; reasons for application.

The debtor may submit its position on the matter within one month after the notification of the commencement of the proceedings. If the debtor is duly notified, his or her failure to appear in court is generally not an obstacle for the hearing. The hearing is held on a sole judge basis. Both parties are allowed to present their cases orally. The applicable procedural rules (on collection of evidences, service of process, recording of court hearing etc.) are the same as that in an ordinary civil case.

The decision of the court to grant or refuse the enforcement of the judgment/award can be challenged before the relevant court of appeal and, subsequently before the Supreme Court of Ukraine (a cassation instance court). This makes the procedure, on the whole, rather cumbersome.
In the Plenum Ruling the Supreme Court expressed the following positions as to the recognitions and enforcement of foreign arbitral awards:

- the application itself is free of any court charges, but the subsequent enforcement proceedings are subject to the relevant court or other fees and charges;
- the award and arbitration agreement are to be translated into Ukrainian, the translation is to be certified by an official or judicial interpreter or an embassy/consulate;
- the application for a consent to the enforcement is subject to the general three-year statutory limitation for compulsory enforcement;
- a person against whom the award is issued may apply for the refusal in its recognition if the successful party uses the award to the detriment of the debtor without applying for its formal recognition;
- in deciding whether the debtor was duly notified of the proceedings the courts take into account the rules of arbitration set out by the parties in the arbitration agreement, UNCITRAL Arbitration Rules, European Convention and the rule of the permanent arbitral body, participating in the proceedings.

(b) Enforcement rules

The Law “On Enforcement Procedure” provides that the compulsory enforcement procedure is initiated by the Bailiffs’ Service of Ukraine following the submission by a creditor of a writ of execution issued by the court of law, including that issued on the basis of an arbitral award.

In the course of enforcement a bailiff is entitled to arrest and order compulsory sale of property, freeze bank accounts, deduct money from various sources of income.

The actions or inaction of the bailiff are open to challenge before the court. The time-limit for the completion of the enforcement proceedings is six months. However, usually they last much longer.

In the judgment in the case of Regent Company v. Ukraine (no. 773/03, § 61, 3 April 2008) the European Court of Human Rights found that Article 6 of the European Convention on Human Rights (the right to fair trial) found that the State’s unreasonable failure to ensure the enforcement of the recognised award may constitute a violation of Article 6 of the European Convention on Human Rights (right to a fair court).

Issues which arise within enforcement of arbitral awards in Ukraine. Link between public order and arbitral clause. Practical examples

On the understanding, that as professional lawyers you must be interested in the grounds for refusal of enforcement of arbitral awards, I will focus more on negative practices in Ukraine and most interesting cases, from my view.
The most frequent ground for refusal of recognition of awards in the Ukrainian courts is the alleged breach of Public Order. It appears the Ukrainian court tend to apply this ground where the award is inconsistent with decisions of Ukrainian courts, in particular where the contract on the basis of which the award is issued, or an arbitration agreement, is held null and void by the domestic court.

As an example of such approach we can look at the case of Telenor Mobile Communications AS v. Storm, LLC. Two shareholders of the Ukrainian mobile operator Kyivstar entered into a dispute over the shareholder agreement. When Telenor, on the basis of the arbitration clause, launched ad hoc UNCITRAL arbitration proceedings in New York, shareholder of Storm successfully sought to nullify arbitration clause before Ukrainian courts, Telenor was not notified of these proceedings and therefore did not participate in them.

Before the arbitral tribunal Storm argued that because Ukrainian courts had already decided the issue, the tribunal in New York did not have jurisdiction and should withdrew from the proceedings.

The tribunal held that the Ukrainian court had not given “meaningful consideration” to certain key issues and thus the tribunal was not barred from continuing with arbitration. The arbitration continued and the arbitral tribunal ruled in favor of the Norwegian firm, which sought to enforce the award in federal court in New York.

However, Ukrainian courts further elaborated on their earlier decision by broadening the scope of the initial rulings. The Ukrainian court addressed the failure to join Telenor as a party in the earlier proceedings by announcing that the court's earlier order "shall apply and be binding also upon those entities that were not among the parties to the [original] court proceedings." The Ukrainian court also held that "[s]hould the parties and the arbitrators... ignore the above circumstances and render an award on the dispute, such acts shall constitute a violation of the court decision." The Ruling of the Kiev Appellate Commercial Court dated November 8, 2006, stated that “since the Shareholders Agreement violated the public order of Ukraine and since the representatives of one of the parties to the agreement – Storm LLC – was not authorised to execute the said Shareholders Agreement and the arbitration clause contained therein as an integral part, the arbitration agreement contained in the Shareholders Agreement in the forum of an arbitration clause is also invalid”. “should the parties and the arbitrators, appointed in accordance with the Shareholders Agreements, ignore the above circumstances and render an award on the dispute, such acts shall constitute violation of the court decision, the explanation of which are given herewith”.

It is sensible to notice that the Ruling mentioned-above was not challenged by the advocates, in my opinion, because of the legal approach that cassation might put under the risk acknowledgement of Ukrainian court’s jurisdiction by the fact it was brought.

The U.S. federal court on the other hand rejected Storm’s requests for stay of the arbitral proceedings which referred to “the apparently collusive nature of the Ukrainian litigation.” Subsequently, the U.S. federal court ruled in Telenor’s favor and warned Storm from seeking further legal rulings in Ukraine.

\[4\] see, the Ruling of the Supreme Court of 14 May 2003 re. award by the International Centre of American Arbitration Association of 30 January 2001 in favour of Western N.I.S Enterprises Fund Corporation against LLC Solona and, the Ruling of the Supreme Court of 18 February 2004 re. award by the Stockholm Arbitration Institute in favour of Quattrogemini Ltd.
Surprisingly, despite the arbitration decision which was rendered on behalf of Telenor, Storm sought enforcement of the arbitral award against itself to confirm its position that arbitration is invalid. Pechersky district court by its Ruling as of October, 5, 2007 invoked “public policy” and refused to recognize and enforce arbitration award on behalf of Telenor.

According to my knowledge this Ruling is still in force, because there was no attempt to challenge it, with the purpose of not acknowledging jurisdiction of Ukrainian courts.

Another ground to invoke “public order” rule is the trend among the judges to refuse recognition where the awards rendered on the basis of foreign law produces a result differing from the one that would have been obtained were the Ukrainian law applied to the matter.

In the case “Western NIS Enterprise Fund” against Sonola, the court of Appeal of Kirovogradskaya Oblast decided to dismiss a claim brought by Western NIS regarding enforcement of an arbitral decision rendered by the International Centre at American Arbitration Association in Ukraine. The court invoked public policy referring to another decision between the same parties rendered by Ukrainian courts. Also the court states that it ignored the conclusion of the American Arbitration Association which did not take into consideraion the Ukrainian decision because it does not correspond to international standards.

However, of course, there is a positive practice as well, e.g. claim of Staleksport (Poland) on enforcement of Polish arbitral decision vs. Ukrainian company “Polttrasfer”, and many others.

**Summary**

In any country and any law system, I consider application of law and understanding of its spirit and philosophy to be the most significant hope for a reasonable decision. Of course, due to the fact that Ukraine gained its independence in 1991, the level of understanding of some international doctrines is not all Ukrainian law society would like to have it. This lack of this understanding can be explained by many factors, emanating from the Soviet Union regime. At the same time Ukraine is taking a trend to enforce arbitral decisions and to secure investments as well. Hence, I would not have criticized Ukrainian law, which is similar to German, but for the way it is applied. However, I can easily assume that many countries face the same problems with understanding of key international arbitration doctrines.
PLEASE NOTE:

These translations are unofficial private translations created by the author of these notes and should not be construed or understood as being official authorised translations of the Laws referred to.


Article 5. Autonomy of will

1. In cases, provided for in this Law the participants (participant) to the legal relationships may at their (its) own discretion choose the law, governing the relevant relationships....

3. The choice of law may concern the document as a whole or any part of it...

5. The choice of law or the change of the law previously chosen may be carried out by the participants to the legal relationships at any time, including at the time of the execution of the document or at different stages of its implementation etc. The choice of law or the change of the previously chosen law, which is made after the document’s execution act retrospectively.

Article 10. Consequences of the circumvention of the law

1. Documents and other actions of the participants of private law relationships aimed at subjection of these relationships to the law other than that, identified according to this Law, circumventing it, are invalid ab initio. In such cases the governing law is that, which is to be applied according to this Law.

Article 14. Application of imperative provisions

1. The rules, set out in this Law cannot restrict the application of imperative provisions of Ukrainian legislation, which govern the relevant relationships, notwithstanding the applicable governing law.

Article 25. Personal law of legal entity

1. The personal law of the legal entity is the law of the state of residence of the legal entity.

2. For the purpose of this Law the state of residence of the legal person is the state in which it is registered or otherwise established under the law of this state.

3. If such conditions are absent or it is impossible to establish them, the applicable law is the law of state in which the administrative body of the legal entity is located.

Article 26. Civil capacity of the legal entity

1. Civil capacity of the legal entity is determined by the personal law of the legal entity.
Article 77. Exclusive jurisdiction

1. The courts of law have exclusive jurisdiction in the following cases with foreign element:

1) if the real estate, which is the subject of the dispute, is situated within the territory of Ukraine;

2) if the case concerns the legal relationship between children and parents, where all the participants reside in Ukraine;

3) if in the succession dispute the testator is a citizen of Ukraine and had his place of residence in Ukraine;

4) if the dispute is related to the formalisation of intellectual property, which requires the registration or the issuance if a certificate (patent) in Ukraine;

5) if the dispute relates to the registration or liquidation in Ukraine of foreign legal entities, private entrepreneurs;

6) if the dispute involves the question of validity of entries in the state registers, including land register;

7) if in the bankruptcy proceedings the debtor was established under the laws of Ukraine;

8) if the case concerns the issuance or annulment of securities registered in Ukraine;

9) cases concerning adoption effected or is being effected in Ukraine;

10) in other cases provided for in the law of Ukraine.
Code of Commercial Procedure of Ukraine

Article 12. Cases falling within the jurisdiction of commercial courts
(as amended by Law No. 1076-VI of 05.03.2009)

Commercial courts deal with following cases:

1) disputes concerning the conclusion, amendment, termination and implementation of commercial disputes, including that at the privatisation of property and other matters...

2) bankruptcy cases;...

4) cases which concern corporate relationships in disputes between a commercial company and its participant (founder, shareholder), including the participant, who withdrew, as well as among participants (founders, shareholders) of the commercial companies, related to the establishment, activity, governance and termination of the activity of this company excluding labour disputes.

A dispute, falling within the jurisdiction of the Commercial court may be referred by the parties to the arbitral tribunal, excluding the disputes related to the invalidation of public acts, as well as to that related to the execution, amendment, termination and implementation of commercial contracts for the satisfaction of public needs and disputed specified in para. 4 of this Article.
Code of Civil Procedure

Section VIII. On Recognition and Enforcement of Judgments of Foreign Courts in Ukraine

Chapter 1. Recognition and Enforcement of Judgments of Foreign Courts, which are Subject to Mandatory Enforcement

Article 390. Conditions of Recognition and Enforcement of Judgments of Foreign Courts, which are Subject to Mandatory Enforcement

1. A judgment of a foreign court is recognised and enforced in Ukraine, if its recognition and enforcement is provided for by the international agreements, ratified by the Verkhovna Rada of Ukraine or on the basis of the principle of reciprocity for the ad hoc arrangement with a foreign state, the judgment of the court of which is to be enforced in Ukraine.

Article 391. Time-limits for Application for Enforcement of the Judgment of a Foreign Court

1. An application for enforcement of the judgment of a foreign court may be filed in Ukraine within 3 years from the date of its entry into force, excluding the judgment to be enforced in regular instalments, which may be enforced pending the whole period of the payment of the instalments but only for the debt occurred within the last 3 years before the application.

Article 392. Courts competent to grant the consent to enforcement of a judgment of a foreign court

1. The question of provision of consent to enforcement of a judgment of a foreign court is dealt by the court having jurisdiction over the place of residence or the whereabouts of the debtor.

2. If the debtor has no place of residence in Ukraine or it’s place of residence or the whereabouts is unknown, the question of provision of consent to enforcement of a judgment of a foreign court is dealt by the court having jurisdiction over the place where the debtor’s property is located.

Article 393. The procedure for filing an application for enforcement of the judgment of a foreign court

1. The application for granting consent for enforcement of the judgment of a foreign court is filed directly by the claimant if the international agreement ratified by the Verkhovna Rada of Ukraine does not provide otherwise.

Article 394. The requirements of form of an application for granting consent for enforcement of the judgment of a foreign court

1. The application for granting consent for enforcement of the judgment of a foreign court should be in writing and must include:

1) Name of the claimant or it’s representative (if the application is filed by it’s representative), it’s place of residence or whereabouts;

2) Name of the debtor or it’s representative (if the application is filed by the representative), it’s place of residence or whereabouts or the location of the debtor’s property in Ukraine;
3) Reasons for filing an application

2. Documents, providing for the enforcement in the international agreements, ratified by the Verkhovna Rada of Ukraine should be appended to the application for granting consent for enforcement of the judgment of a foreign court...

4. Having established that the application and the appending documents do not meet the requirements, provided for in this Chapter or not all the required documents were attached, the court leaves it without consideration and remit the application together with the appending documents back to the claimant (or it’s representative).

Article 395. The consideration of an application for granting consent for enforcement of the judgment of a foreign court

1. Having received the an application for granting consent for enforcement of the judgment of a foreign court, the court within 5 days should inform the debtor in writing and request the debtor to file in writing a response to the application within one month.

2. After receiving the debtor’s response in writing or in case of the debtor’s refusal to file it, or if there is no debtor’s response within one month after it was informed of the receipt by the court of the application, the judge adopts a decision, in which he fixes the time and place of the hearing of which the claimant and the debtor are notified no later than 10 days before the hearing.

3. The hearing may be adjourned at the request of the claimant or the debtor if there are serious reasons.

4. The case is heard in an open session by a single judge.

5. The failure to appear by a claimant or a debtor without good cause, if the judge knows that the relevant person was duly served with the summons, cannot stop the judge from considering the application, if none of the parties requested the adjournment.

6. Having heard the parties and examined the submitted documents, the court renders a decision granting consent for enforcement of the judgment of a foreign court or refusing to grant such consent. The copy of the relevant decision is sent to the claimant and debtor within three days after its adoption...

8. If the judgment of a foreign court specifies the sum to be collected in foreign currency, the court determines the equivalent in Ukrainian currency on the basis of the National Bank of Ukraine exchange rate on the date of adoption of the decision.

Article 396. Grounds for refusal in granting consent for enforcement of the judgment of a foreign court

1. The application for granting consent for enforcement of the judgment of a foreign court cannot be allowed in cases provided for in the relevant international agreements, ratified by the Verkhovna Rada of Ukraine...
Article 397. Appeal against the decision of the court

The decision granting consent for enforcement of the judgment of a foreign court or refusing to grant such consent may be appealed against in accordance with the procedure, provided for in the Code.

Article 398. The enforcement of the judgment of a foreign court

1. On the basis of the judgment of a foreign court and the decision on provision of consent for its enforcement, which when entered into force, the court issues a writ of execution, which is transmitted for implementation in accordance with law.

Article 1. Scope of application

1. This Law applies to international commercial arbitration, if the place of arbitration is in the territory of Ukraine. However, the provisions in Articles 8, 9, 35 and 36 of this Law, apply also if the place of arbitration is outside Ukraine.

2. The following disputes may be referred by the agreement of the parties to international commercial arbitration:

- disputes that arise out of contractual and other civil law relationships, which take place at the implementation of foreign trade and other kinds of international economic links, if the commercial enterprise of at least one of the parties is situated abroad;

- disputes of ventures with foreign investments and international associations and organisations created within the territory of Ukraine between themselves, disputes between their participants as well as their disputes with other Ukrainian entities...

3. This Law does not alter the application of any other law of Ukraine, which prohibits parties to certain kinds of disputes from referring such disputes for arbitration or providing other procedures for referring of disputes for arbitration than that stipulated in this Law.

Article 7. Definition and form of arbitration agreement

1. Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

2. The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

Section VIII Recognition and enforcement of arbitral awards

Article 35. Recognition and enforcement of an arbitral award

1. An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of Article 36.

2. The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in
Article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.

Article 36. Grounds for refusing recognition or enforcement of an arbitral award

1. Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

1) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

- a party to the arbitration agreement referred to in Article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

- the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

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

2) if the court finds that:

- the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

- the recognition or enforcement of the award would be contrary to the public order of this State.

2. If an application for setting aside or suspension of an award has been made to a court referred to in sub-subparagraph five of subparagraph 1 of paragraph 1 of this Article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.
Ruling of the Plenum of the Supreme Court of Ukraine No. 13 of 24 October 2008
“On Court Practice in Corporate Disputes”

9. The activity of a joint-stock company registered in Ukraine as a legal entity, relationships between the company and shareholders, among shareholders of the JSC concerning its activity as well as the corporate governance are governed exclusively by the laws and regulations of Ukraine.

In case of conclusion by the shareholders, foreign legal or physical persons, of an agreement subjecting the relationships between shareholders as well as shareholders and the JSC concerning the activity of the company to foreign law, such agreement is invalid ab initio on the basis of Article 10 of the Law of Ukraine No. 2709-IV of 23 June 2005 “On International Private Law”.

The relationships among the founders (shareholders) of a commercial company concerning the formation of its bodies, determination of their competence, procedures for the announcement of general shareholders’ meetings and taking of the decisions at such meetings are governed by the provisions of the Civil Code of Ukraine and the Law on Commercial Companies. The relevant provisions are imperative by their nature and the failure to meet them violates the public order.

Shareholders of a company registered in Ukraine, cannot on execution of an agreement, subject to foreign law of conditions of validity of documents regarding corporate governance, entered into by the shareholders and the company as well as shareholders alone, since the provisions concerning the validity of documents in Ukraine are imperative.

Shareholders of commercial companies, notwithstanding their origin, are also prohibited from subjecting their corporate disputes, related to the activity of commercial companies, registered in Ukraine, including those related to corporate governance, to international commercial tribunals.
6. Contractual governing and the application of foreign law in corporate relationships.

6.1. The activity of a joint-stock company registered in Ukraine as a legal entity, relationships between the company and shareholders, as well as among shareholders of the JSC concerning its activity of the former are governed exclusively by the laws and regulations of Ukraine.

In case of conclusion by the shareholders, foreign legal or physical persons, of an agreement subjecting the relationships between shareholders as well as shareholders and the joint-stock company concerning the activity of the company to foreign law, such agreement is invalid ab initio.

The relationships among the founders (shareholders) of a commercial company concerning the formation of its bodies, determination of their competence, procedures for the announcement of general shareholders’ meetings and taking of the decisions at such meetings are governed by the provisions of the Civil Code of Ukraine and the Law on Commercial Companies. The relevant provisions are imperative by their nature and the failure to meet them violates the public order.

Relationships concerning the stock turnover, excluding the relationships concerning the implementation of the pre-emption right for acquisition of shares, do not affect the activity of the company and do not relate to corporate governance. Therefore, they do not fall within the rules of conflict of law, provided for in Article 25 of the Law of Ukraine “On International Private Law” on application of the personal law of a legal entity.

6.2. Commercial courts, in dealing with corporate disputes between shareholders, must take into account that the documents, entered into by the shareholders, foreign legal or physical persons on subjecting questions of corporate governance to foreign law violates public order and, according to Article 228 of the Civil Code are invalid ab initio.

Shareholders of commercial companies, notwithstanding their origin, are also prohibited from subjecting their corporate disputes, related to the activity of commercial companies, registered in Ukraine, including those related to corporate governance, to international commercial tribunals.

6.3. According to para. 2 of Article 215 of the Civil Code of Ukraine, there is no need to declare a document invalid, if its invalidity ab initio is established in law. Such invalid document does not create any legal consequences, apart from that related to its invalidity.

Based on the above, an agreement on subjection of corporate governance of a commercial company, registered in Ukraine to foreign law is invalid ab initio and cannot be enforced. Such agreement cannot be enforced, inter alia, on the basis of an award of international commercial arbitral tribunal as violating public order.

Article 1. Enforcement procedure

The enforcement procedure as a final stage of judicial procedure and compulsory enforcement of the decisions of other bodies (officials) is the system of action of the bodies and officials, specified in this Law [the State Bailiffs’ Service], aimed at compulsory enforcement of judgments and decisions of other bodies (officials), carried out on the grounds and in the manner, stipulated in this Law, other acts, adopted in accordance with this Law and other laws as well the decisions, which, according to this Law are subject to compulsory enforcement (hereafter “the decisions”).

Article 3. The documents, issued according to the decisions, which are subject to enforcement by the State Bailiffs’ Service

The compulsory enforcement of the decisions by the State Bailiffs’ Service is carried out on the ground of documents, defined in this Law.

The following documents are subject to enforcement by the State Bailiffs’ Service according to this Law:

1) Writs of execution, issued by the courts and the orders of commercial courts, including those, issued on the grounds of awards of the arbitral tribunals, the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry and Maritime Arbitration Commission at the Ukrainian Chamber of Commerce and Industry.
RULING

November 8, 2006

No. 40/242

The panel of judges of the Kyiv Appellate Commercial Court consisting of:
The Presiding Judge V.O. Zelenin, and
The Judges N.V. Kapatsyn, O.F. Synystya,

With participation of the parties' representatives: not summoned.

Having considered the application filed by Storm Limited Liability Company (LLC) seeking an explanation for the resolution of the Kyiv Appellate Commercial Court issued in case No. 40/242 on May 25, 2006, based on the claim lodged by Alpren Limited, a legal entity under the laws of the Republic of Cyprus, against Storm LLC regarding invalidation and termination of certain acts.

DETERMINED AS FOLLOWS:

On April 25, 2006, the Kyiv Commercial Court held the decision to allow the claim brought by Alpren Limited against Storm LLC.

By its resolution of May 25, 2006, the Kyiv Appellate Commercial Court upheld the decision rendered by the Kyiv Commercial Court in case No. 40/242 on April 25, 2005.

On October 30, 2006, the Kyiv Appellate Commercial Court received an application filed by Storm LLC with a request to provide an explanation for the resolution of the Kyiv Appellate Commercial Court issued in case No. 40/242 on May 25, 2006, regarding the validity of the arbitration clause and the consequences of invalidating the Shareholders Agreement.

Being governed by Articles 86, 89, and 99 of the Commercial Procedural Code of Ukraine,

RULED AS FOLLOWS:

To provide Storm Limited Liability Company with an explanation for the resolution of the Kyiv Appeal Commercial Court in case No. 40/242, dated May 25, 2006.

The court recognized the entire Shareholders Agreement as null and void, including the arbitration agreement included in the form of an arbitration clause in the Shareholders Agreement. The court relied both on the international treaties ratified by Ukraine, and on other legal regulatory acts, in particular, the Law of Ukraine "On International Commercial Arbitration". The court determined that, since the Shareholders Agreement violated the public order of Ukraine and since the representative of one of the parties to the agreement - Storm LLC - was not authorized to execute the said Shareholders Agreement and the arbitration clause contained therein as its integral part, the arbitration agreement contained in the Shareholders Agreement in the form of an arbitration clause is also void / invalid.

As regards the consequences of a void agreement, Article 216 of the Civil Code of Ukraine provides that an invalid deed does not entail any legal consequences, except for those related to its invalidity. Therefore, the Shareholders Agreement, as a void agreement, has not entailed any legal consequences for its parties since the time of its signing, that is, never. In such circumstances, since the invalidity of the void agreement does not require obtaining a respective
court decision (such decision would be a mere restatement of the fact), such agreement is invalid in view of its being void, and the parties had no grounds whatsoever to perform any acts on the basis of such agreement, including to resort to arbitration in connection therewith. The parties have to adjust their acts and act as they would act if there were no such Shareholders Agreement, and any continued acts based on the Shareholders Agreement, including its arbitration clause, in particular, the referral of a dispute for arbitration by three arbitrators in accordance with the applicable UNCITRAL Rules under such agreement shall be treated as a violation of Clause 4 of Article 216 of the Civil Code of Ukraine. According to Clause 4 of Article 216 of the Civil Code of Ukraine, the parties cannot change the legal consequences of the invalidity of a void transaction, and any agreements between the parties in connection therewith shall not have any legal effect.

Should the parties and the arbitrators, appointed in accordance with the Shareholders Agreement, ignore the above circumstances and render an award on the dispute, such acts shall constitute a violation of the court decision, the explanation for which is given herein.

As regards the binding nature of the court decision, according to Article 124 of the Constitution of Ukraine and Article 11 of the Law of Ukraine “On the Judicial System of Ukraine”, court decisions that have entered into effect shall be binding on legal entities, individuals, citizens, state authorities, local government authorities, their officials, citizen unions, and other organizations. Therefore, the court decision shall apply and shall be binding also upon those entities that were not among the parties to the court proceedings.

Presiding Judge

V.O. Zeleznin

Judges:

N.V. Kapatsyn

O.F. Syntysya

True copy of the original

Assistant Judge

[signature]

[seal]

Цей переклад з української мови на англійську виконаний перекладачем Демченко Вікторією

Вікторіною.
УХВАЛА 08.11.2006 р.

Київський апеляційний господарський суд у складі колегії суддів:
Голова колегії – Зеленін В. О.
Суддів: Кашцик Н. В., Синица О. Ф.

За участю представників сторін: не викликалися.

Розглянувши заяву Товариства з обмеженою відповідальністю (ТОВ) "Сторм" про роз'яснення постанови Київського апеляційного господарського суду від 25.05.2006 року у справі № 40/242 за позовом "Альпен Лімітед", юридична особа за законодавством Республіки Кіпр до ТОВ "Сторм" про визнання дій незаконними та припинення дій.

ВСТАНОВИВ:

25.04.2006 року Господарським судом м. Києва було прийнято рішення, яким було задовольнено позов "Альпен Лімітед" до ТОВ "Сторм".

Постановою Київського апеляційного господарського суду від 25.05.2006 року було зазяшено без змін рішення Господарського суду м. Києва від 25.04.2006 року у справі № 40/242.

30.10.2006 року до Київського апеляційного господарського суду надійшла заява ТОВ "Сторм" про роз'яснення постанови Київського апеляційного господарського суду від 25.05.2006 року у справі №40/242, щодо чинності арбітражного застереження та наслідків визнання Акціонерної угоди недійсною.

Керуючись ст. ст. 86, 89, 99 Господарського процесуального кодексу України,

УХВАЛИВ:

Роз'яснити Товариству з обмеженою відповідальністю "Сторм" постанову Київського апеляційного господарського суду від 25.05.2006 року у справі №40/242.

Акціонерну угоду судом визнано ліквідованою в повному обсязі, включно з арбітражною угодою, викладеною у формі арбітражного застереження в тексті Акціонерної угоди. При цьому судом було взято до уваги як міжнародні конвенції, ратифіковані Україною, так і інші нормативні акти, зокрема Закон України "Про міжнародний комерційний арбітраж". Судом встановлено, що оскільки Акціонерна угода порушує публічний порядок України, а крім того представник однієї зі сторін угоди – ТОВ "Сторм" не мав повноважень на укладання вказаної Акціонерної угоди, та її невід'ємної в даному випадку складової частини – арбітражного застереження, то
Голова колегії, суддя

З СРІ БІЛАЛІМ ЗГІДНО

Зеленів В. О.

Судді:

Вослава Гнат, егід.

ПІАПІС Гнат.

Капсотін Н. В.

Синиця О. Ф.
Dear Russia/Eurasia Committee Members,

This new ABA year brings a few changes in the Committee leadership. Christopher Kelley and Katya Gill will serve as Co-Chairs, backed up by an impressive group of Vice Chairs: Yulia Andreeva, Irina Paliaishvili, Franklin Gill, Peter Pettibone and Gene Burd. We will work under the vigilant supervision of Bruce Bean, the Committee’s Senior Advisor. In addition to the leadership, every one of our members brings great value to the table.

Thanks to our active members’ initiatives, this ABA year promises to be busier than ever for the Russia/Eurasia Committee. Various projects are already underway and more are in the making.

The Section’s Fall Meeting will be held in Brussels, September 23-27. All attendees will get an opportunity to meet other Committee members at a breakfast and dinner. Please keep your ears open for the announcements. Also, Yulia Andreeva is putting together a top notch program on investor-state arbitrations, titled: “East-West Investor State Arbitration Boom: Who Is Calling the Shots?” The Program will be presented on September 24.

For those who prefer to attend programs without leaving the comfort of your office, Paul Jones and David Garrison graciously volunteered to hold a teleseminar on Russian IP Laws and Commercialization: The New Part IV of the Civil Code on October 1, 2008. More information on the teleseminar and Yulia’s program can be found at the end of this Newsletter.

If you have any ideas or suggestions for future programs, please let us know. The Section is accepting program proposals for its Spring Meeting in Washington, DC. The program proposal submission deadline is September 31, 2008. Program proposals could be on any topic of interest involving Russia/Eurasia and could be joined by other Committees within the Section. Do not hesitate to step forward with your proposals. Any programs that do not get approved for the Spring Meeting could always be turned into a teleseminar or a Newsletter article.

Franklin Gill and Dmitri Evseev are preparing this year’s Year-in-Review chapter on the enforcement of foreign arbitral awards in Russia and Ukraine, which, without a doubt, will be another masterpiece.
A sequel to a prior Committee publication, *A Legal Guide to Doing Business in Russia and the Former Republics of the U.S.S.R.*, is already in its early stages of development. Scott Shostak is putting a lot of effort into this exceptionally difficult task.

If you would like to learn more about the foregoing projects and get involved, please write to us or join one of our Committee calls which are held every third Thursday of each month. You can find more details regarding the calls and the latest Committee developments on our award-winning website at http://www.abanet.org/dch/committee.cfm?com=IC855000.

This Newsletter issue contains several articles covering Russia, Belarus and Ukraine. Additionally, we included an article related to the Russia-Georgia conflict, which has lately been a sore subject in the Russia/Eurasia region and beyond. If you wish to share your opinion on the subject, as it relates to legal developments or concerns, please send your articles to us for inclusion in the next Newsletter issue. And, of course, articles on a wide variety of other subjects are always more than welcome.

We look forward to seeing or talking to you soon,

Katya Gill, Co-Chair
Christopher Kelley, Co-Chair

**IN THIS ISSUE:**

- **Russia Recognizes the Independence of Georgian Breakaway Provinces. Is It Legal?**  
  *by Sergey Budylin* ... p.3

- **Causes of Conflict Between Investors and the State of Ukraine.**  
  *by Irina Nazarova* ... p.6

- **Professional Responsibility in Belarus – Not So Ethical Standards.**  
  *by Eugenie Voitkevich* ... p.9

- **Russian Customs v. Bank of New York: Is RICO Applicable in Russia.**  
  *by Sergey Budylin* ... p.11

- **Announcements:**
  
  ABA SIL 2008 Fall Meeting: *East-West Investor-State Arbitration Boom: Who Is Calling the Shots?, September 24, 2008* ... p.16

  Teleconference: *Russian IP Laws and Commercialization: The New Part IV of the Civil Code, October 1, 2008* ... p.17
RUSSIA RECOGNIZES THE INDEPENDENCE OF GEORGIAN BREAKAWAY PROVINCES.

IS IT LEGAL?

Sergey Budylin

On August 26, 2008, in the wake of a short but violent Russian-Georgian military clash over South Ossetia, Russia officially recognized the independence of two Georgian breakaway provinces, South Ossetia and Abkhazia.¹

According to Russian authorities, the move is perfectly legal under international law. According to Georgian authorities, the move is patently illegal.² Other countries tend to back Georgia. In a day from the independence recognition by Russia, both the U.S. and all major EU countries condemned the Russian move; so far nobody has joined it. However, Russian authorities have demonstrated that they are completely prepared to confront, essentially, the whole world over the Georgian issue.³ In particular, they have made it clear that Russia does not really mind postponing its accession to WTO⁴ or freezing its relations with NATO.⁵

Emotional, ethical, and political considerations aside, a limited question posed in this article is whether the Russian recognition of the South Ossetian and Abkhazian independence is “legal under international law.”

International Law Principles

Currently, international law is far from being a comprehensive and self-coordinated system of enforceable rules, as national legal systems are. Most international law provisions (such as treaty provisions) are binding only on those countries that expressly or impliedly agreed to be bound by them. However, some international law provisions achieve the status of “peremptory norms” (jus cogens); that is, such provisions bind all states with no derogations allowed.

Many such “commonly recognized” international law provisions have been codified in international conventions with universal or nearly universal coverage. Arguably, the most important of those conventions are the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations of 1970 (“UN Declaration”) and Declaration on Principles Guiding Relations between Participating States of the Conference on Security and Co-Operation in Europe of 1975 (“CSCE Declaration”). Together the two Declarations list ten general principles of international law: (1) sovereign equality, respect for the rights inherent in sovereignty; (2) refraining from the threat or use of force; (3) inviolability of frontiers; (4) territorial integrity of States; (5) peaceful settlement of disputes; (6) non-intervention in internal affairs; (7) respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief; (8) equal rights and self-determination of peoples; (9) co-operation among States; (10) fulfilment in good faith of obligations under international law.

Notably, under the Russian Constitution, “commonly recognized principles and norms of international law,” along with the provisions of international treaties, are part of Russia’s legal system.⁶

The listed principles look more like “councils of perfection” than like legal norms. Obviously, they are largely mutually contradictory. This especially refers to the principles of territorial integrity, on one hand, and of self-determination of peoples, on the other hand. There are no commonly recognized conflict rules to resolve such contradictions. However, because of obvious reasons, the territorial integrity principle is normally given much more weight than the self-determination one (there is no practical way to grant independence to all willing ethnic minorities). In practice, each party in any international dispute simply refers to the principle that is more beneficial for the party.
The incompleteness and inconsistency of international law is aggravated by the lack of adjudication and enforcement mechanisms. The UN International Court of Justice, which originally was intended to be a universal dispute-settlement body, plays a very modest role. This is both because of its limited jurisdiction and because the enforcement of its judgment against an unwilling party requires an action by the UN Security Council. In practice, this means that the disputes are ultimately resolved by the Security Council anyway. The Security Council, however, is often far from being a neutral arbiter. Also, its five permanent members (France, China, Russia, U.S., and U.K.) have veto power, which results in deadlocks on issues in dispute between permanent members.

As a result, in an international conflict each party routinely insists that its actions are “legal under international law,” and the actions of the opposing party are “contrary to international law,” unless and until the issue is resolved by the Security Council (which is often impossible in practice). Unless sanctions are imposed by the Security Council, the only available remedy is unilateral or multilateral counter-measures of individual states. If a sufficiently large number of powerful states consider an action “illegal,” they may try to influence the offender by economic or other counter-measures.

The Kosovo Precedent

Where the black-letter of international law is ambiguous, precedents may be helpful. Apparently, the actions of Russia in Georgia were specifically modelled upon the actions of NATO in Serbia in relation to Kosovo.

Kosovo was an autonomous region of Serbia populated mostly by ethnic Albanians. In 1990, Kosovo declared its independence from Serbia, but the independence was then recognized only by Albania. In 1996-1998, a violent conflict between the Serbia army and Kosovo militia broke out. Serbia failed to restore control over Kosovo. Western countries, including the U.S. and the EU countries, got involved. In 1998, western countries compelled Serbia to sign a ceasefire monitored by European observers. In 1999, the Serbian army attacked the village of Racak killing 40 to 45 civilians. Western countries offered Serbia to sign an agreement calling for the deployment of NATO peacekeeping forces. Serbia declined. In response, NATO invaded Serbia, bombed its capital Belgrade, and forced Serbia to withdraw its forces from Kosovo. On June 10, 1999, the UN Security Council adopted a resolution (No. 1244) passing Kosovo under interim UN administration and authorizing NATO-led peacekeeping forces. The resolution also reaffirmed the autonomous status of Kosovo within Yugoslavia and the territorial integrity of Yugoslavia (of which Serbia is a legal successor). In 2007, a draft resolution of the Security Council, which essentially authorized the independence of Kosovo, was discarded because of Russia’s opposition. Nevertheless, in 2008, Kosovo declared its independence again. The international reaction was mixed. Of the Security Council permanent members, France, the U.S., and the U.K. recognized the independence; China and Russia did not.

Those who recognize the independence mostly rely on the self-determination principle and on the practical impossibility to keep Kosovo within Serbia after the mass killings. Russia considers the independence illegal under the territorial integrity principle and believes the NATO military actions were a gross overreaction.

South Ossetia and Abkhazia

South Ossetia was an autonomous region of Georgia populated mostly by Ossetians. In 1990, South Ossetia declared its independence from Georgia, but the independence was not then recognized internationally. After a violent Georgian-Ossetian conflict, Georgia failed to restore control over South Ossetia. Russia got involved. In 1992, Russia compelled Georgia to sign a ceasefire monitored by Russian, Georgian, and Ossetian peacekeepers. In the years that followed, most South Ossetian residents obtained Russian citizenship due to the Russian policy of granting its citizenship to all former USSR citizens. The night before August 8, 2008, Georgia heavily bombarded Tskhinvali, the South Ossetian capital, and then seized it by a surprise attack. According to Russian reports, 12 Russian peacekeepers were killed; according to South Ossetian unverified reports, about 1,400 civilians were killed. In response, the Russian army invaded Georgia, bombed Tskhinvali and targets in inner Georgia, and forced Georgia to withdraw its forces from South Ossetia. The Security Council failed to adopt any resolution on the issue. On August 26, 2008, Russia recognized the independence of South Ossetia.
The situation in Abkhazia, another breakaway region of Georgia, is similar, albeit not identical. Importantly, before the ethnic conflict, the majority of its population were Georgian, rather than Abkhazians. In 1992, Abkhazia declared its independence from Georgia, but the independence was not then recognized internationally. After a violent Georgian-Abkhazian conflict, reportedly with a certain level of Russian involvement on the Abkhazian side, Georgia failed to restore control over Abkhazia. Gross human rights violations were reported on both sides. The ethnic conflict resulted in mass exodus of Georgians from Abkhazia. By 1994, a ceasefire was reached with an UN-monitored and Russia-led peacekeeping operation of the Commonwealth of Independent States (CIS). In the years that followed, most Abkhazian residents obtained Russian citizenship. In 2006, Georgia attacked and seized the Kodori Gorge in Abkhazia. During the 2008 Russian-Georgian military conflict, Abkhazia went forward and seized the Kodori Gorge back. On August 26, 2008, Russia recognized the independence of Abkhazia.11

Russia insists that the recognition of the independence of Abkhazia and South Ossetia is legal because of the self-determination principle and was inevitable because of the practical impossibility to keep Abkhazians and Ossetians within Georgia after the mass killings. Many other countries condemn the recognition because of the territorial integrity principle and believe the Russian military actions were a gross overreaction.

Conclusion

Because of incompleteness and inconsistency of international law, as well as because of the adjudication system deficiency, in an international dispute there is usually no definite answer who is right and who is wrong. Under the self-determination principle of international law, the Russian move of the recognition of the independence of Georgian breakaway provinces is arguably legal. Under the territorial integrity principle, it is arguably illegal. There is no conflict rule. There is no neutral arbiter.

In support of its position on the issue of South Ossetia and Abkhazia, Russia cites the same arguments NATO countries cite in support of their position on the Kosovo issue. While it seems logically awkward to support one of those positions and condemn the other, both Russia and NATO countries do it without hesitation (which might mean that legal considerations are not that important in international policy). Perhaps the cases may be distinguished, but unfortunately there is no arbiter to do it; nor do the parties care much to demonstrate the distinction. Essentially, each individual country is left to decide whether considering the Russian move “legal” or “illegal” benefits that country more.

Whatever the value of Russian legal arguments might be, most other countries remain unpersuaded. Russia faces a serious international opposition to its move. However, Russian authorities demonstrate they are unimpressed. Apparently, Russian officials view Russian oil and gas deposits as a sufficient counterbalance to international hostility.

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6 RF Constitution, art 15(4).
7 The International Court of Justice, located in Hague, Netherlands, should not be mixed up with the International Criminal Court or with the International Criminal Tribunal for former Yugoslavia, both located in the same city.
9 The latter figure seems to be grossly exaggerated, but, unfortunately, there is little doubt that many civilians were killed.
**CAUSES OF CONFLICT BETWEEN INVESTORS AND THE STATE OF UKRAINE***

*Irina Nazarova*

**INTRODUCTION**

Ukraine's investment environment has seen much change in the last seventeen years; however, one thing that is becoming increasingly apparent is the refusal by Ukrainian authorities to conform to internationally accepted business and legal norms. The failure of Ukrainian authorities to act in the spirit of good faith and fair dealing with investors can be traced to any one of several causes. Vague regulatory standards, a refusal to recognize or enforce foreign and international arbitral awards, and internal political feuding stand out among the most serious and pressing causes of conflict between foreign investors and the state of Ukraine. Despite President Yushchenko’s belief that WTO accession would make Ukraine “open for business”, these unresolved problems stand in the way of that belief’s realization.

The majority of international bilateral and multilateral investment agreements executed and implemented by Ukraine contain provisions on investor-state dispute settlement. These provisions entitle investors to seek remedy for infringement of their rights by the state of Ukraine. Recently the trends towards the use of investor-state arbitration have been strengthening.

The following are examples of why resolution of investor-state problems is absolutely essential to the growth of investor confidence and to the reduction of conflict between investors and the state of Ukraine.

**LEGISLATIVE DEFICIENCIES**

When vague or ambiguous laws exist, foreign investors can be vulnerable to predatory practices of governments or their agencies. This is particularly illustrated by the case of Lemire v. Ukraine (ICSID Case No. ARB(AF)/98/1 (United States/Ukraine BIT)).

In 1995, Lemire, an investor from the United States of America, founded Gala Radio in Ukraine. Gala hoped to gain listeners by applying for more broadcast licenses and expanding its network, which were denied by Ukrainian authorities. Mr. Lemire initiated arbitration proceedings against Ukraine in 1998 at the International Centre for Settlement of Investment Disputes (ICSID) for violations of the US-Ukraine Bilateral Investment Treaty. It appears that Gala Radio did not receive several broadcast licenses because of vague Ukrainian legislation. Broadcast license selection criteria are seemingly not well defined and thus, completely subjective. Furthermore, there is also no obligation for Ukrainian authorities to explain their decisions to license applicants. It could appear to investors that these types of decisions are made arbitrarily and without rationale.

Without clarification of legislation or written explanations of authoritative decisions, investors could be helpless against the subjective interpretations of various Ukrainian authorities. Fortunately for Mr. Lemire, a settlement was reached in 2000 regarding his ICSID case; however, another related case between Mr. Lemire and Ukraine is now pending. If legislation remains vague and subject to arbitrary interpretation, investors could continue bringing suits against Ukraine for what they believe are arbitrary violations of their rights as investors. Legislation in areas of investment should be written clearly, so everyone can come to a common understanding of its meaning. Additionally, Ukrainian authorities should be obliged to provide written explanation of the rationale behind their decisions. These two steps could go a long way towards reducing conflict between investors and the state of Ukraine.
FAILURE TO RECOGNIZE AND ENFORCE FOREIGN AND INTERNATIONAL ARBITRAL AWARDS

It appears that Ukrainian authorities are not working as hard as they could to enforce arbitral awards and are disregarding arbitral agreements which often become the basis for subsequent foreign and international arbitral awards. One case that highlights Ukraine’s disregard of arbitral agreement between the parties and its unwillingness to enforce arbitral awards is *Telenor Mobile Communications AS v. Storm, LLC*, 524 F. Supp. 2d 332 (S.D.N.Y. 2007), a case involving an arbitration conducted under the United Nations Commission on International Trade Law (UNCITRAL) Rules on International Commercial Arbitration and a competing proceeding in the Ukrainian courts. In Telenor, two telecommunications firms—one Ukrainian (Storm) and one Norwegian (Telenor)—got into a dispute over the corporate governance provisions of their shareholder agreement.

Storm successfully sought to have Ukrainian courts nullify an arbitration clause in its shareholder agreement between the two companies. Telenor was given no notice of the hearing and was not even named as a party to the Ukrainian case. Thus, Telenor commenced arbitration in New York pursuant to the arbitration clause in its contract with Storm. Storm argued that because Ukrainian courts had already decided the issue, the arbitration tribunal in New York did not have jurisdiction. On this basis, Storm withdrew from arbitration. The tribunal held that the Ukrainian court had not given “meaningful consideration” to certain key issues and thus the tribunal was not barred from continuing with arbitration. The arbitration continued and the arbitral tribunal ruled in favor of the Norwegian firm, which sought to enforce the award in federal court in New York.

Ukrainian courts took this opportunity to further elaborate on their earlier decision by broadening the scope of the initial rulings. The Ukrainian court addressed the failure to join Telenor as a party in the earlier proceedings by announcing that the court's earlier order "shall apply and be binding also upon those entities that were not among the parties to the [original] court proceedings." The Ukrainian court also held that "[s]hould the parties and the arbitrators . . . ignore the above circumstances and render an award on the dispute, such acts shall constitute a violation of the court decision." The U.S. federal court denied Storm’s attempts to stop the arbitral proceedings citing, inter alia, “the apparently collusive nature of the Ukrainian litigation.” Subsequently, the U.S. federal court ruled in Telenor’s favor and enjoined Storm from seeking further legal rulings in Ukraine.

INTERNAL POLITICAL FEUDING

Internal political feuding has also been a source of conflict for investors. Given the politically polarized climate in Ukraine, foreign investment can serve as a springboard for opposition parties to launch attacks. For example, in October 2007, Vanco International won a bid for Ukraine’s first-ever production-sharing agreement for hydrocarbon deposits on the Black Sea shelf. In April 2008, the Ministry for the Protection of the Environment and Natural Resources, supported by Prime Minister Tymoshenko, unilaterally terminated the production-sharing agreement with Vanco, a U.S. company by revoking Vanco’s oil and gas license. After consultation with President Yushchenko, Ukraine’s Prosecutor General’s Office issued an order suspending the Ministry’s breach of the agreement. In response, the Cabinet of Ministers headed by Tymoshenko published a government resolution to completely void the production-sharing agreement. President Yushchenko and Prime Minister Tymoshenko are in open opposition on the matter, both citing corruption as a motivating factor.

Situations such as Vanco’s are an example of how Ukraine’s investment environment is deeply intertwined with Ukraine’s political feuding. Political opposition to certain investments hinders resolution of disputes on the merits. Vanco’s senior vice president, Jeffrey Mitchell, suggests that this has more to do with publicity and popularity than sound business sense. Mitchell cites Tymoshenko’s reliance on the press for communication, as opposed to direct talks with the company. In other words, the opposition is more political than meritorious. If the issue cannot be settled between the parties, there is an arbitration clause in the production-sharing agreement allowing for dispute
settlement at the Arbitration Institute of the Stockholm Chamber of Commerce. Depending on the political climate in Ukraine, if the parties commence arbitration, who knows if Ukraine would recognize and enforce the arbitral decision? Based on recent examples, no one can be certain.

GENERAL CONCLUSIONS

There are many causes of conflict between investors and the state of Ukraine. In addition to those that are mentioned, Gene Burd addressed another serious issue in his article, *High Commercial Court Tramples International Agreements*, published in the Spring 2008 issue of the Russia/Eurasia Committee Newsletter, regarding the Recommendations of the High Commercial Court of Ukraine. In its Recommendations, the High Commercial Court stated that agreements among shareholders of Ukrainian joint stock companies containing non-Ukrainian choice of law provisions or international arbitration clauses are null and void. By preventing companies from choosing a foreign or international forum to settle certain corporate disputes, the High Commercial Court has handed investors yet another reason to stay away from Ukraine. There are those who argue that the Recommendations are not binding authority on the lower courts, but practice shows the lower courts will nonetheless rely on the higher court's recommendations. The failure to resolve this issue and the others mentioned will undoubtedly give rise to future disputes between investors and Ukraine.

The first step towards rebranding Ukraine’s investment environment as positive is to get rid of the causes of conflict. Several changes could be made to reduce conflict: 1) legislation needs to be written with clarity and authorities should be obliged to explain their decisions in writing, 2) foreign and international arbitral awards need to be recognized and enforced, 3) investments cannot serve as a basis for political attacks, and 4) the High Commercial Court’s Recommendations regarding arbitration clauses should be cancelled, and a law should be drafted explicitly stating that the recommendations of the High Commercial Court of Ukraine shall not be relied upon by lower courts. Many causes of conflict between foreign investors and the state of Ukraine continue to exist. Ukraine may be putting up its “open for business” sign; but with these problems still unresolved, caveat emptor.

Ms. Nazarova can be contacted at Irina.Nazarova@engarde.com.ua.

* This article was adapted from a speech given by Ms. Nazarova at UNCTAD’s June 2, 2008 conference in Kiev on Investment Treaties and Alternative Methods of Investor State Dispute Resolution. All of the conclusions reached in this article are the author's own and are based on personal experiences and knowledge as an attorney in Ukraine.
PROFESSIONAL RESPONSIBILITY IN BELARUS – NOT SO ETHICAL STANDARDS

Eugenie Voitkevich

Picture a simple scenario: a client comes to your law office and asks for legal advice. During the interview, the client reveals to you some sensitive information related to certain events in the past. Next morning, you receive a phone call from a local prosecutor who demands disclosure of that information, because it may be vaguely relevant to other cases being investigated by the prosecutor. Imagine further that the law gives you the right to disclose such information. Sounds absurd and unfair? Unfortunately, current Belarusian law makes this situation quite possible.

After analyzing Belarusian legislative acts and Internet sites of Belarusian law firms, one can conclude that the rules of lawyers’ ethics are underdeveloped in Belarus. The best example of this is the Rules of Professional Ethics for Lawyers approved by the Ministry of Justice of Belarus on June 8, 2007 (the “Belarusian Rules”).

For example, according to Section 36 of the Belarusian Rules, a lawyer has the right to disclose confidential client information upon demand of a court, prosecutor’s office, or state police. The only limitation on such overwhelming right to disclose information is the requirement that the confidential information must be “relevant to any other civil or criminal case being tried by the court or investigated by the prosecutor’s office or police.” No doubt, under such rule, the totalitarian Belarusian Government retains a lot of power to manipulate lawyers in Belarus.

In contrast, in the United States, attorney-client privilege is one of the most important fundamentals, on which the entire legal profession stands. Rule 1.6 of ABA Model Rules of Professional Conduct unequivocally entrusts the client with the right to disclose confidential information, but not the lawyer, and strictly limits instances when an attorney can reveal confidential information without the client’s consent. Any other rule would significantly impede the work of attorneys, because a client would not trust the lawyer and would have very little incentive to tell the truth.

In fact, Belarusian legislators would benefit from scrutinizing the ABA Model Rules of Professional Conduct during the process of developing rules of lawyers’ ethics in Belarus. The Belarusian Rules contain a lot of “gray areas” that may lead to complicated practical situations. For instance, the Belarusian Rules say nothing about the moment when attorney-client relationships begin. It is absolutely not clear at which point an attorney can potentially be liable for misguiding a client. Similarly, the Belarusian Rules do not sufficiently regulate other important aspects of attorney ethics (e.g. conflict of interest, safekeeping of client’s property, allocation of responsibilities between lawyers and paralegals) In the United States, state statutes and case law heavily regulate similar areas of professional ethics.

Although the Belarusian Rules of Professional Ethics for Lawyers need serious revision, some provisions are quite reasonable and resemble certain rules of ABA Model Rules of Professional Conduct. For instance, Section 14 of the Belarusian Rules limits the lawyer’s right to communicate with persons represented by other counsel (similar to ABA Model Rule 4.2) and Section 32 of the Belarusian Rules prevents a lawyer from misleading a tribunal on factual or legal issues (similar to ABA Model Rule 3.3).
Belarusian Republican Union of Lawyers is the most influential association of lawyers in Belarus. The Union does some work in the field of lawyers’ ethics. According to the website of the organization (www.union.by), it plans to create a Committee on Lawyers Ethics that should resolve professional responsibility issues. However, the Union could be much more proactive and involved in developing rules of lawyers’ ethics in Belarus, similar to the American Bar Association in the United States.

In addition, Professional Responsibility classes in Belarusian law schools should be more interesting and educative. Instead of teaching complicated theoretical norms and history of ethics, Professional Responsibility classes in Belarusian law schools should introduce various real-life ethical situations to law students asking them to look for possible solutions. Besides, law students in Belarus should be taught to realize the importance of proper conduct in and outside law school. (Except, today in totalitarian Belarus, engaging in proper conduct, such as participating in activities of political opposition, could endanger law students legal careers).

These days, it is virtually impossible to create democratic legislative acts that would regulate lawyers’ ethics in Belarus. The reason is sad and simple: a great risk exists that the corrupt Belarusian Government will defeat the purpose of the rules of professional ethics and further strengthen unjustified control over lawyers. However, today Belarusian lawyers should by all means learn more about lawyers’ ethics in the United States and other developed countries. It could be the first step toward creating proper rules of professional ethics in Belarus and establishing trustful relationships between Belarusian attorneys and general public.

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RUSSIAN CUSTOMS V. BANK OF NEW YORK: IS RICO APPLICABLE IN RUSSIA?

Sergey Budylin

The Claim

The Arbitrazh Court of Moscow is considering a claim of the Russian Federation Federal Customs Service (FTS) against the Bank of New York Mellon (BNY) amounting to $22.5 billion. Apart from the amount, the peculiarity of the claim is that it is based on U.S. law, namely, the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68.1

BNY has been accused of being instrumental in a massive laundering of Russian funds during the 1990s. In 2005, BNY settled a case stemming from those accusations with U.S. prosecutors, paying $38 million in fines and compensations to the U.S. Case closed? According to FTS, it was just the beginning.

In May 2007, FTS filed a claim in a Russian arbitrazh (economic) court based on RICO. According to FTS' allegations, BNY’s illegal operations inflicted harm to the Russian state budget in the amount of $7.5 billion. In accordance with RICO provisions, the alleged damages were trebled, to result in a $22.5 billion claim. Apparently, this is the largest claim ever in the history of Russian courts.

BNY argues that RICO is a criminal act and, as such, cannot be applied in non-U.S. courts. According to FTS, RICO also contains civil-law provisions that can be applied by Russian courts under appropriate conflict-of-law rules.

The lead judge in the case is Lyudmila Pulova, the chairman of the Moscow Arbitrazh Court banking panel.

FTS is represented by a Miami law firm, Podhurst Orseck, P.A., together with a Moscow law firm. Among their expert witnesses are Alan Dershowitz, a prominent Harvard Law School professor, G. Robert Blakey, a RICO drafter, and Yevgeniy Vasiliev, a Moscow State Institute of International Relations (MGIMO) professor.

BNY is represented by Boies, Schiller & Flexner LLP. Among their expert witnesses are Dick Thornburgh, a former U.S. Attorney General, and Mikhail Yukov, a former Russian Federation Supreme Arbitrazh Court Deputy Chairman.2

On the FTS side, Professor Dershowitz is confident that there is no legal ban on a foreign government bringing a civil RICO action in a foreign court. Mr. Thornburgh, for BNY, argues that, here, a civil RICO action cannot be maintained because there is no injury and no damages to the plaintiffs, and that U.S. proceedings which resulted in the execution of the non-prosecution agreement, did not, by themselves, establish that the Russian Federation suffered actual damages.4

There can hardly be any doubt as to who authored the idea of the suit. Most likely, Russian officials in FTS had never heard of RICO before. On the other hand, Podhurst Orseck is a firm specializing in, *inter alia*, RICO litigation. In particular, they are known for their unsuccessful attempts “to use similar legal theories to bring similar claims [in U.S. courts] for customs duties against U.S. tobacco companies on behalf of Belize, Ecuador, and Honduras,” to quote a BNY press release.6

An intriguing aspect of the case is the legal fees on the plaintiff’s side. Podhurst Orseck (FTS’ attorneys) reportedly charge a 29% contingency fee.7 Interestingly, Russian arbitrazh courts treat contingency-fee legal services provision agreements as unenforceable against clients. Although theoretically questionable, this judicial attitude was recently held constitutional by the RF Constitutional Court.8 Therefore, even if winning the case, the attorneys could end up without their money (to wit, $6.5 billion).

The Section of International Law: Your Gateway to International Practice
Non-Prosecution Agreement

Apparently, plaintiff’s evidentiary base is essentially limited to the facts disclosed in BNY’s 2005 non-prosecution agreement and in related public statements of BNY officials.9

According to the non-prosecution agreement and public statements, the U.S. Attorney Office (USAO) conducted a criminal instigation into allegations that BNY was engaged in money laundering.

Specifically, the admitted facts were as follows. Lucy Edwards, a Russian émigré, was a BNY Vice President until August, 1999. Her husband, Peter Berlin, is also a Russian émigré. In 1996, Berlin, with the assistance of Edwards, opened two corporate accounts with BNY. From February 1996 through July 1999, the accounts received about $7 billion in deposits. The funds were then transferred, normally within days, to numerous third parties around the world. However, the companies transmitting the funds, whose accounts Berlin had opened, did not conduct any genuine commerce. Their activity was a part of an underground money transmitting business conducted by a Russian bank, Depozitarno Kliringovy Bank (DKB).

In 2000, Berlin and Edwards pled guilty to conspiracy to: (1) conduct unauthorized and unregulated banking activities, (2) establish an unlicensed branch of a foreign bank in the U.S., (3) operate an illegal money transmitting business, and (4) launder money to promote wire fraud. BNY accepted responsibility for the conduct of its employee, Lucy Edwards, and other employees (responsible for client check etc.). BNY agreed to cooperate with the prosecution, and to pay a $14 million fine (plus a $12 million fine related to certain other allegations and $12 million to a victim compensation fund). USAO, in turn, agreed not to prosecute BNY.

Mr. Thomas Renyi, the then BNY Chairman and CEO, testified in September, 1999: “No charges have been filed against The Bank of New York. No relevant authorities have asserted that The Bank of New York has engaged in money laundering or violated any other law.” On the other hand, he admitted: “What we have been able to determine is that the central accounts in question here that were controlled seemingly by Mr. Berlin moved $7.5 billion over the past three years [1996-1999] . . . .”10 Apparently, the latter figure, borrowed from Renyi’s testimony, has served as a base for the damages calculation in the FTS claim.

RICO

RICO is a U.S. federal criminal statute adopted in 1970.11 Its apparent original purpose was fighting Mafia-like organized criminal structures.12 However, its language is broad enough to cover many non-Mafia contexts. Besides criminal provisions, the statute also includes civil-liability provisions.

RICO violations are described in its 18 U.S.C. § 1962(a)-(d). The most common ground for civil claims is set forth in 18 U.S.C. § 1962(c):

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.

“Pattern of racketeering activity,” “enterprise,” “unlawful debt,” and even “person” are terms of art defined in 18 U.S.C. § 1961.

The criminal RICO penalties are up to 20 years of imprisonment and/or certain fine per count, 18 U.S.C. § 1963. In addition, civil remedies are available under 18 U.S.C. § 1964. In particular, 18 U.S.C. § 1964(c) reads as follows:
Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

The statutory RICO provisions have been subject to extensive and often non-obvious judicial interpretation by U.S. courts. In particular, it has been held that the “enterprise” used for criminal purposes can itself be either an illegal or perfectly legitimate enterprise; that the factors of “relatedness” and “continuity” of crimes, rather than mere occurrence within a ten-year period mentioned by the statute, determine the presence of the “pattern of racketeering activity”; that the statute of limitation for civil RICO claims, albeit not established by RICO itself, is four years; that, despite the statutory language, referring to “the district court of the United States,” state courts have concurrent jurisdiction over civil RICO claims (then why not foreign courts, one might ask); and that a foreign state is a “person” for the purposes of being able to bring a civil RICO claim in a U.S. court.\textsuperscript{13}

Apparently, RICO was originally expected to be used mostly for criminal jurisprudence purposes. However, the treble damages/attorney fee provision made the statute an attractive litigation tool for many plaintiffs and their attorneys. In the 1980s, civil RICO litigation exploded, and now the number of criminal RICO claims is only a small fraction of civil RICO claims. Importantly, with the exception of security fraud violations, the defendant need not be criminally convicted before a civil plaintiff can sue for treble damages under RICO.

In sum, while RICO is a criminal statute, it also contains civil-liability provisions, and, in fact, in the U.S., “civil RICO” is the most commonly used hypostasis of the statute.

**Applicable Russian Law: Conflict-of-Law and Jurisdictional Provisions**

At the first glance, the whole idea of applying RICO, a U.S. public law, in a Russian court might seem completely outlandish. Obviously, this is not what the U.S. legislature had in mind when adopting the statute. Apparently, non-U.S. courts, let alone Russian courts, have never applied RICO before. And, of course, Russian courts are not authorized to enforce foreign criminal law.

On the other hand, RICO civil-liability provisions belong to U.S. civil law. Foreign civil law provisions are routinely applied by courts of virtually all countries, including Russia. More specifically, under Russian conflict-of-law rules, in case of “obligations resulting from the infliction of harm,” the applicable law is normally the law of the country where the harm-inflicting activity took place.\textsuperscript{14} This might well be U.S. law, including, arguably, RICO.

Procedure-wise, in accordance with the Arbitrazh Procedure Code, Russian arbitrazh courts have jurisdiction over economic and entrepreneurial-related cases with participation of foreign citizens or organizations, \textit{inter alia}, if the relevant “claim originated form the infliction of harm to property by the activity or other circumstance having taken place in the territory of the Russian Federation, or where the harm was inflicted in the territory of the Russian Federation.”\textsuperscript{15}

In sum, Russian procedural law authorizes an arbitrazh court to hear an economic case based on the infliction of harm, if the harm occurred in Russia; Russian conflict-of-law rules authorize a court to apply foreign substantive law to determine the grounds and the amount of liability if the harm was inflicted by actions made in a foreign country.

**Enforcement Perspectives**

Even if FTS wins its case, it is quite unlikely that BNY will pay the award voluntarily. Obviously, BNY does not have sufficient funds in Russia to be seized under a possible Russian court decision. Realistically, any possible perspectives of the case bear upon whether a judgment can be enforced outside Russia.
Internationally, while foreign criminal judgments are normally not enforced, foreign court decisions in civil cases are enforced routinely. A foreign civil judgment may be enforced based either on an international treaty or on the comity principle (comitas gentium) in the absence of such a treaty. In the latter case the presence of reciprocity (i.e., “you enforce my decisions, I enforce yours”) may, or may not, be required for the enforcement. In particular, under Russian statutory procedural law, foreign court decisions are recognized and enforced by arbitrazh courts where this is authorized by a treaty or a Russian federal statute.

In the U.S., a foreign judicial money awards may be enforced based on the law of particular states. In New York, the relevant statute (Article 53 of the Civil Practice Law and Rules, being a clone of the Uniform Foreign Country Money-Judgment Recognition Act) generally authorizes the enforcement of foreign money judgments, save in certain situations.16

However, according to the New York statute, BNY would have many arguments in a New York court in case of a request for the enforcement of a possible future Russian judgment. In particular, BNY could argue that the judgment was “for taxes,” or that Russian courts are not “impartial,” or that the Russian court did not have jurisdiction, or that the judgment was “repugnant” to the New York public policy.

Besides the U.S., FTS could seek to enforce a possible future Russian judgment in any other country where BNY has a branch or assets, if the country either applies the comity principle or has an appropriate legal assistance treaty with Russia (Russia is a party to more than 30 legal assistance treaties).

In sum, generally Russian judgments in civil cases can be enforced in any country applying the comity principle or having a suitable treaty with Russia. Russia does not have such a treaty with the U.S. However, U.S. states, including New York, generally enforce foreign money judgments: no treaty is needed for that. On the other hand, the enforcement of a particular judgment may be precluded by provisions of local law (e.g., non-enforcement of foreign public law, or public policy considerations).

Conclusion

The first and foremost question now in litigation is whether the Russian court has jurisdiction over a RICO claim. Although from a U.S. perspective, legislative intent might seem important for answering this question, for a Russian court, provisions of relevant Russian law are decisive.

Apparently, here the alleged harm-inflicting activity took place in the U.S., and the alleged harm to the Russian state budget was inflicted “in the territory of the Russian Federation.” If so, as discussed above, a Russian arbitrazh court is authorized by Russian arbitrazh procedure law to consider a claim for harm compensation. Further, in accordance to Russian conflict-of-law rules, the court should apply foreign law to calculate the amount of the compensation, although “may” (apparently, in its discretion) apply Russian law, if the harm in Russia was foreseeable. Returning to RICO, if the Russian court decides to apply foreign law, it should determine whether “civil RICO” is a part of applicable foreign law, and, if so, apply it. That is, looking from the jurisdictional angle, the FTS claim does not seem frivolous at all, although it is no doubt extremely unusual.

If the Arbitrazh Court of Moscow accepts jurisdiction, the plaintiff will obviously have a lot of hurdles to take before obtaining a judgment. To name one, the amount of the alleged damages seems to be completely based on BNY admissions made in the U.S., rather than on any customs records, etc. The plaintiff apparently assumes that all funds that passed through BNY accounts were stolen from Russia. However, the Russian customs officials do not seem to explain how exactly the money transfers, albeit dubious from the regulatory point of view, harmed the Russian budget. More realistically, FTS could have a claim for the customs duties and the value-added tax (VAT) underpaid by the Russian importers who exploited the underground DKB money-transmitting facilities. However, none of such importers are even mentioned by name in the claim. It is not certain that such evidence will satisfy the court. The statute of limitation (four years, according to the U.S. Supreme Court) is another obvious issue. And, of course, there is going to be a battle over whether any
RICO violation actually took place. BNY has never admitted to RICO violations and no U.S. court held that BNY committed a RICO violation. If so, the Russian court would have to decide the issue on its own. But arbitrazh courts are purely economic courts and, as such, are not authorized, accustomed or equipped to apply even Russian criminal law, let alone foreign criminal law. The outcome of this first-impression RICO case, if accepted by the Russian court, is completely unpredictable.

If the Russian court accepts the case and decides it in favor of FTS, the next step will be the enforcement of the judgment in a country where BNY has sufficient assets (preferably, in the U.S.). Whether a U.S. court would enforce a possible Russian judgment against BNY is a $22.5 billion question. On one hand, it would technically be a judgment in a civil case, and such foreign judgments are generally enforceable. Moreover, the Russian judgment would be based on U.S. law, which might be viewed favorably in a U.S. court. On the other hand, while the case is worded as a civil suit, essentially it is rooted in Russian public law because the alleged harm to the Russian budget consists of unpaid customs duties and taxes; U.S. courts do not enforce foreign tax/customs law. Perhaps most importantly, one would imagine that a U.S. court might be skeptical, to put it mildly, of the Russian court impartiality. I leave it to the reader to draw a conclusion about the possible attitude of a U.S. court to a would-be Russian judgment. Perhaps FTS may have better luck with the judgment enforcement in some other countries where BNY has branches, if such a country has a legal assistance treaty with Russia.

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4 Id. at 16-17.

5 See Republic of Honduras v. Philip Morris Cos., 341 F.3d 1253 (11th Cir. 2003), cert. denied, 540 U.S. 1109 (2004) (Honduras, Ecuador, and Belize, represented by Podhurst Orseck, sued five U.S. major tobacco companies for RICO violations seeking to remedy the tobacco companies’ schemes to avoid those republics’ taxes; the circuit court adopted the common-law “revenue rule” as the law of the circuit, and held that the revenue rule required the court to abstain from considering the republics’ claims).

6 BNY Press Release, supra n. 2, at 1.

7 http://www.business-magazine.ru/trends/precedents/pub298978 (Russ.).


13 Id.

14 RF Civil Code art. 1219(1).

15 RF Arbitrazh Procedure Code, art. 247(4).

16 NY Civil Practice Law and Rules §§ 5304, 5301(b).
EAST-WEST INVESTOR-STATE ARBITRATION BOOM: WHO IS CALLING THE SHOTS?

September 24, 2008 / 2:30 pm – 4:00 pm

Program Description:

Menatep’s investment dispute with Russia has underscored a new wave of arbitrations against the former “Eastern block” countries. The emerging “arbitration boom” raises questions about the peculiarities of East-West arbitrations, the challenge of representing or opposing post-communist governments, the scope of dispute resolution clauses, and other practical dimensions of investor-state disputes. This session will explore the growing trend of East-West arbitrations through a panel discussion by eminent practitioners and scholars. The most recent investor-state awards, including Rosinvest v. Russia, Eureko v. Poland, Tokios Tokeles v. Ukraine, Berschader v. Russia and Eastern Sugar v. Czech Republic, will be the focal point for the debate.

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**Kostyantyn Krasovsky**, Ministry of Justice of Ukraine, Kiev, Ukraine

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Russian IP Laws and Commercialization: The New Part IV of the Civil Code

Wednesday, October 1, 2008 | 11:30 AM – 1:00 PM ET

Program Description

Intellectual property rights and technology transfers are a part of many business investments and transactions in Russia. The rules in these areas changed significantly on January 1, 2008 when the existing IP laws were repealed and the new and controversial Part IV of the Civil Code came into force. This program will discuss how those changes came about, review Russia’s trademark, copyright, patent and trade secret laws, and discuss practical issues in licensing and commercialization. There will also be a discussion of the enforcement of IP rights by the Russian courts with examples from actual cases. Investment in Russia has been increasing based on improvements in economic and political stability. Join the program and learn how the IP sector is doing.

Our Expert Faculty

Paul Jones practices licensing, intellectual property and competition law internationally with his multi-lingual firm, Jones & Co., in Toronto, Canada. He and his firm have training and experience in both civil law and common law and work in a number of languages including Chinese and Russian. Last year Paul assisted the FTC and participated in a panel with the General Counsel of the FTC and the Special Counsel for International Trade at the U.S. Department of Justice on China’s new Anti-Monopoly Law. Paul has written extensively on intellectual property and antitrust issues including in academic law reviews, and he recently published an article on these issues in China’s for les Nouvelles, the Journal of the Licensing Executives Society International (LESI).

Peter B. Maggs is a law professor at the College of Law of the University of Illinois at Urbana-Champaign, where he holds the Clifford M. & Bette A. Carney Chair in Law. After graduation from Harvard Law School, he studied as an exchange student in Russia. He also taught as a Fulbright lecturer at Moscow State University. During the 1990’s he was heavily involved in projects to aid the development of the legal systems of Russia and its neighbors. His research centers on Russian law and intellectual property law, particularly copyright and trademark law. He also has an interest in international commercial arbitration. He is co-author of a translation of the Civil Code of the Russian Federation, which is now in its third edition. His co-authored translation of the Fourth Part of the Civil Code (which recodified all of Russian intellectual property law) was published in February 2008.

Vladislav Zabrodin was a senior associate with McDermott, Will & Emery, L.L.C. and supervised their offices in St. Petersburg, Russia, prior to joining Capital Legal Services International, L.L.C. Mr. Zabrodin was a senior associate from 1995 until 1998. He headed the CIS legal group of OTIS Elevator Company, working from offices in Hartford, Connecticut; Paris, France; and Moscow, Russia. Mr. Zabrodin graduated from St. Petersburg State University in 1991, with a Bachelor degree, summa cum laude. He completed postgraduate study in the area of international law at St. Petersburg State University and served as visiting professor on Russian law at Turku University, Turku, Finland in 1993. Mr. Zabrodin studied Western and comparative legal systems at Northwestern University School of Law in Chicago, receiving his Master of Laws Degree from Northwestern in 1995. He has spoken frequently to businesses in the USA regarding Russian business and legal matters, and is a member of the International Bar Association and the Licensing Executives Society.
Vladimir Biriulin graduated from Moscow State Linguistic University in 1969 as an interpreter of Spanish, English and French languages. He earned his Law degree from Moscow University of Law in 1981 and also attended the Central Institute of Intellectual Property (Moscow). Biriulin served as a partner in Gorodissky & Partners from 1989 to 2001. He counsels clients on Russian and foreign intellectual property legislations, international IP treaties, conventions and agreements, technology transfer and licensing, infringement of intellectual property owners' rights, unfair competition, copyrights, and also litigates IP cases. In addition, he delivers lectures in Russia and abroad at conferences and seminars. Biriulin regularly publishes articles in IP magazines.

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DECREE No. 13
of the Plenum of the Supreme Court of Ukraine
dated October 24, 2008

On the Practice of Court Examination of Corporate Disputes

To ensure the courts' correct and consistent application of the law regulating corporate disputes, to develop consistent judicial practice in this field, and to provide proper judicial protection of the rights and lawful interests of individuals, legal entities and the state with respect to the establishment, operation, management and shutdown of business entities, the Plenum of the Supreme Court of Ukraine hereby resolves to provide the following explanations to courts:

1. During the examination of cases arising from corporate relationships, the court shall identify the standards of substantive law that are relevant to such relationships and settle the dispute on the basis of those standards.


The provisions of laws that were in effect before the Civil Code entered into force shall be applicable, provided that they do not conflict with that Code.
2. Ukraine Law No. 483-V “On the Amendment of Certain Ukraine Laws Pertaining to the Determination of Jurisdiction in Cases Concerning Privatization and Corporate Disputes,” dated December 15, 2006 (hereinafter Ukraine Law No. 483-V) assigns to the jurisdiction of economic courts matters arising from corporate relationships in disputes between a business entity and its member (founder, shareholder), including a member who has left the company, and between members (founders, shareholders) of business entities pertaining to the establishment, operation, management and shutdown of that entity, with the exception of labor disputes.

In determining the jurisdiction of this category of cases, courts shall be guided by the concept of corporate rights as specified in Article 167, Part 1, of the Economic Code, which defines corporate rights as the rights of a person whose share is defined in the authorized fund (property) of a business entity and which include the competence of that person to participate in the management of the business, to receive a certain part of a profit (dividends) of that entity and of its assets in the event of its liquidation according to the law, and other legal competence specified by the law and statutory documents.

If the composition of participants in a case or the subject of the claim do not correspond to the cases originating from corporate relationships as identified by Article 12, Part One, Paragraph 4 of the Code of Economic Procedure of Ukraine (hereinafter Code of Economic Procedure), economic courts must take into account that, under Article 1 of the Code of Economic Procedure, the jurisdiction of economic courts includes disputes related to the protection of infringed or contested rights and legally protected interests of enterprises, institutions, organizations, other legal entities (including foreign), and citizens doing business without establishing a legal entity.

3. Cases concerning the establishment, operation, management and shutdown of other economic entities that are not businesses (cooperatives, private or collective enterprises, etc.) are not subject to examination in economic court proceedings if an individual is a party to the case. By virtue of its imperative nature, the standard of Article 12, Part One, Paragraph 4 of the Code of Economic Procedure may not be applied by analogy to disputes related to the activities of other entities.

Nor is Article 12, Part One, Paragraph 4 of the Code of Economic Procedure subject to an expansive interpretation with respect to cases related to the establishment, operations, management and shutdown of a business entity unless a party to the case is a member (founder, shareholder) of the business entity, including a member who left the company. In particular, disputes over participation of the heirs of business entity members who have not yet become members in the business entity do not fall within the jurisdiction of economic courts.

4. When settling an issue on whether a dispute that arose between a business entity and the entity’s officers who constitute the company’s executive body or supervisory board is a labor or
a corporate dispute, the court shall be guided by the provisions of Chapter XV of the Ukraine Labor Code (hereinafter the Labor Code).

Pursuant to Article 3 the Labor Code, labor law governs the employment relationships of employees of all enterprises, institutions and organizations, regardless of the forms of ownership, type of business and economic sector, and of persons employed by other physical persons under a labor agreement. In accordance with Article 65, Part Four, of the Economic Code, if a manager of an enterprise is hired, an agreement (contract) shall be executed with him, stipulating the duration of employment, the rights, obligations and liability of the manager, the terms of his/her compensation, dismissal, and other terms of employment as agreed upon by the parties. In accordance with Article 65, Part Six of the Economic Code, an enterprise manager may be dismissed prematurely on the grounds specified by the agreement (contract) pursuant to the law.

Disputes concerning the appeals by members of a company’s executive bodies and of members of a company’s supervisory board who signed labor agreements with the company, concerning decisions by the relevant company bodies about their dismissal (removal, discharge, or recall) shall be examined according to the civil procedure as labor disputes. The courts must pay attention to the fact that in this case the claimant is going to court to protect his/her labor rights as a hired employee and not as a shareholder (member) of a business entity.

Relief for infringed or contested rights in such category of disputes is a suit to reinstate or the obligation to eliminate impediments to the office’s performance of his duties, not a suit to invalidate the relevant decisions of the company general shareholder (members) meeting or of the company supervisory board.

Disputes between a member (founder, shareholder) of a business entity and the company that arise not from corporate relationships but from labor relationships of company officers should also be examined under civil procedure if an individual is one of the parties to the case.

5. When settling cases concerning shareholders’ claims with respect to modification of the system of the register of owners of registered securities, the courts shall take into consideration that Article 9, Part One, of the Law on the National Depositary System requires the issuer to assign maintenance of the register to a registrar by signing the relevant agreement if the number of owners of registered securities issued by that issuer exceeds the number specified by the SCSSM. The issuer’s obligation to provide for maintenance of the register by a registrar of the owners of registered securities is established by the Regulations on the Procedure for Maintaining Registers of Owners of Registered Securities, approved by resolution No. 1000 of the SCSSM, dated October 17, 2006 (Paragraph 9, Section VII).

If the register of owners of registered securities is maintained by a registrar who is a party, the relevant joint-stock company (hereinafter JSC) and the registrar shall be parties to the suits concerning claims with respect to modification of the system of register.
Courts must take into consideration that, pursuant to Article 12, Part One, Paragraph 4, of the Code of Economic Procedure, this category of cases falls within the jurisdiction of economic courts even if one of the parties to the case is an individual.

6. All disputes between a business entity and a member (founder, shareholder), including a member who left the company, and among members (founders, shareholders) of business entities pertaining to implementation of their corporate rights and performance of duties of a member of a business entity based on Article 12, Part One, Paragraph 4, of the Code of Economic Procedure are within the jurisdiction of economic courts regardless of the nature of the participants in the dispute.

The jurisdiction of economic courts includes cases based on claims by the shareholders of a closed joint stock company (hereinafter CJSC) concerning the transfer to the shareholder of the rights and obligations of a share purchaser in connection with the existence of a pre-emptive right to purchase shares being sold by other shareholders of the company. This right is a corporate right of the CJSC shareholders in accordance with Article 81, Part Three, of the Economic Code.

On these same grounds, pursuant to Article 147, Part Two, and Article 151, Part Four, of the Civil Code; and Article 53, Part Three, and Article 65, Part Three, of the Law on Business Entities, the jurisdiction of economic courts includes cases on claims by a member of a limited liability company (hereinafter LLC) or of an additional liability company (hereinafter ALC) concerning the transfer to the shareholder of the rights and obligations of purchaser of a share (or part thereof) in connection with an infringement of their pre-emptive right to purchase.

Because Article 167, Part One, of the Economic Code defines that right as a corporate right, these cases are deemed to arise from corporate relationships.

The jurisdiction of economic courts, based on Article 12, Part One, Paragraph 4, of the Code of Economic Procedure also includes disputes between the members (founder) of a business entity and the business entity concerning ownership of property transferred to the company as a contribution to the authorized (constituent) capital.

7. Because there are no legal standards on special jurisdiction over disputes concerning the issue of securities, the placement of shares or their circulation, or of shares in the authorized (constituent) capital of a company between the shareholders (members) of a business entity and the entity except as specified by Article 12, Part One, Paragraph 4, of the Code of Economic Procedure, economic courts must accept these lawsuits under the rules of Article 1 of the Code of Economic Procedure, i.e. taking into consideration the composition of the parties to the dispute.

8. Cases concerning the recovery of penalties from stock market participants imposed by authorized officers of the SCSSM and cases appealing the decisions, actions or inaction of those
individuals shall be examined pursuant to administrative procedure as public law disputes, based on Article 17, Part One, of the Ukraine Code of Administrative Procedure (hereinafter CAP).

If the subject of a dispute is invalidation of a decision of an entity’s general meeting of members (shareholders) and a claim against a subject of managerial authority is derivative (specifically concerning government registration of the termination of a legal entity), this dispute falls within the jurisdiction of economic courts.

9. Activities of a JSC registered in Ukraine as a legal entity and relationships between the company and shareholders and between shareholders of the JSC concerning its activities and corporate governance shall be governed exclusively by the laws and other regulatory legal acts of Ukraine.

If shareholders that are foreign legal entities or individuals execute an agreement (deed) on the subordination to foreign law of the relationships among shareholders and between shareholders and the joint stock company concerning the company’s operations, this deed shall be null by virtue of Article 10 of Ukraine Law No. 2709-IV, dated June 23, 2005, “On International Private Law.”

Relationships between the founders (members) of a business entity with respect to the formation of its bodies, determination of the purview of those bodies, the procedure for convening the general meetings and the determination of the decision-making procedure during the meetings shall be governed by the provisions of the Civil Code and of the Law on Business Entities. On the basis of their content these standards are mandatory and their violation is a breach of public order.

Shareholders of a company registered in Ukraine do not have the right to agree to subordinate to foreign law the conditions of invalidity of a deed (grounds, procedure, and consequences) concerning corporate governance that was made either between shareholders and the company or among shareholders, since standards concerning the invalidity of deeds in Ukraine are imperative.

Nor are members of business entities, regardless of the subject composition of the shareholders, entitled to make corporate disputes related to the operations of business entities registered in Ukraine, particularly those arising from corporate governance, subordinate to international commercial arbitration courts.

10. When examining corporate disputes, courts must bear in mind that it is impossible to apply such remedies to protect the rights and legal interests of persons that are not specified by current law, particularly by Article 16 of the Civil Code and Article 20 of the Economic Code, and do not emerge from the provisions of the law.

In this connection, claims to recognize the legitimacy of decisions of general meetings cannot be satisfied as they do not conform to possible remedies to protect rights and legal interests. The decisions of general meetings and other managerial bodies of a business entity, being deeds by their legal nature, are valid unless otherwise established by a judicial procedure.
Nor shall demands be satisfied: to deem a general meeting of members (shareholders) of the company as having been held; to deem a restructuring to have taken place; to deem decisions of the general meeting as valid; or to deem decisions of the general meeting enforceable.

The courts shall note that current law does not specify the ability to file a claim in economic court demanding that the court change the venue of the general meeting of a business entity.

Having established that the subject of a claim does not conform to the relief specified by the law, the economic court must dismiss the claim, not discontinue proceedings in the case because the claim is not subject to settlement in Ukraine economic courts.

11. Shareholders (members) of a business entity are not entitled to apply to court to protect the rights and interests of other shareholders (members) of a business entity or of the entity itself beyond the representation relationship, or to justify their claims on the basis of an infringement of the rights of other company shareholders (members).

When examining a corporate dispute, the economic court shall establish whether the person filing a suit has a subjective, substantive right or legal interest that the claim is seeking to protect, and whether there is infringement or contention. Claims seeking to protect rights that may be violated in the future when it is unknown whether they will be violated cannot be satisfied, specifically claims to stop actions by prohibiting impediments to the claimant’s participation in future general meetings.

12. Disputes concerning invalidation of statutory documents of a business entity and the shutdown of a legal entity based on lawsuits filed by officers of the Ukraine State Taxation Service and other authorities that oversee the operations of the company, and also by agencies that handle government registration of legal entities, are not corporate disputes. Article 17, Part One, paragraph 4, of CAP assigns these disputes to the jurisdiction of administrative courts as public disputes on the basis of legal recourse of the authorities.

Corporate disputes include those based on the claims by members (founders, shareholders) of a business entity concerning invalidation of statutory documents of the business entity and the shutdown of the legal entity in connection with the violations of legal requirements for their adoption and approval.

13. In accordance with the requirements of Articles 88, 143, and 154 of the Civil Code, Articles 57 and 82 of the Economic Code, Articles 4, 37, 51, 65, 67, 76 of the Law on Business Companies, and Articles 27 and 30 of the Law of Government Registration, courts are entitled to invalidate a company’s statutory documents if the following requirements are simultaneously met:
- at the time when the case is examined the statutory documents do not meet legal requirements;
- violations during the adoption and approval of the statutory documents cannot be corrected;
- the relevant provisions of the statutory documents infringe the rights or legally protected interests of the claimant.

The provisions of the statutory documents of business entities that do not meet legal requirements shall not be applied.

14. When examining disputes concerning invalidation of statutory documents of a business entity, the economic court shall differentiate between the legal nature of the company’s charter and its constituent (founding) agreement.

Under Article 20, Part Two, of the Economic Code, the charter of a legal entity is the act that determines the legal status of a legal entity, since it contains norms that are binding on company members, officers and other employees and define the procedure for approval and amendments of the charter.

The grounds for invalidation of an act, including the charter, are its noncompliance with the requirements of current law and/or legally defined competence of the body that issued (approved) the act, as well as infringement of the rights and legally protected interests of the claimant in connection with its adoption.

The charter is not a unilateral deed, insofar as the charter is approved (amended) by the general meeting of members (founders, shareholders), which is not a legal person nor a body that represents the company. Nor is the charter a contract, insofar as the charter is approved (amended) not by the agreement of all company members (founders, shareholders), but by a three-fourth’s majority of shareholders’ votes or a simple majority of the votes of the company members (Articles 42 and 59 of the Law on Business Companies).

Norms governing the invalidation of legal deeds are therefore not applicable in examining disputes concerning the invalidation of a charter.

15. Courts must take into consideration that, since the Civil Code (Articles 142, 153) took effect, the constituent agreement of a JSC, LLC and AIC does not govern the relationships between members (shareholders) of a company in its activities and will be inoperative after its goal—the foundation and government registration of the company—is achieved. These agreements must meet general requirements for the deeds, and in examining disputes concerning their invalidation the courts must be guided by the relevant norms concerning invalidity of deeds.

In cases concerning invalidation of a charter, the respondent is a business entity, and there is no need to involve all company members (shareholders) in the case; in cases concerning invalidation of a constituent agreement, all company members (founders) shall be involved as parties to the agreement.
16. Courts may not make any changes to a company’s charter as such acts fall within the exclusive scope of authority of the company’s general meeting (Articles 41, 42 and 59 of the Law on Business Companies). Courts shall have jurisdiction over disputes relating to the invalidity of any changes made to a company’s constituent documents or invalidation of any resolutions passed by a general meeting with respect to making changes to constituent documents.

Pursuant to Article 7, Part Two of the Law on Business Companies, courts shall also have jurisdiction over cases related to the obligation to amend a company’s constituent documents in the event of a member withdrawing from the company; an interest (or any portion thereof) in the company’s authorized (constituent) capital being withdrawn; a successor (or heir) of a member joining a business company, etc., based on claims filed by such persons.

17. In addressing the issue of whether or not a dispute related to the invalidation of resolutions passed by a company’s general meeting is a corporate dispute, courts must take into account the specific composition of the parties to the dispute and the reasons underlying the relevant claim. Proceedings on disputes related to the invalidation of any resolution passed by the governing bodies of a business company based on a claim filed by a nonshareholder or by a nonmember of the company (including those that may have withdrawn from the company) shall not be deemed a dispute arising from corporate relationships.

Courts must take into consideration that resolutions passed by general meetings of members (shareholders) or any other bodies of a business company constitute [legal] acts since such resolutions give rise to legal effects directed at regulation of business relations and are binding upon the parties to such relations.

With this in mind, the following may serve as grounds for invalidating resolutions passed by a general meeting of shareholders (members) of a business company:

– failing to comply with the requirements of law and/or constituent documents at the time of convening or holding a general meeting of the company;
– barring a shareholder (member) of the company from participating in a general meeting;
– infringing upon the rights or legal interests of a company shareholder (member) by passing a general meeting resolution.

18. In examining cases, courts should take into account that not all breaches of law committed at the time of convening or holding a general meeting of the business company provide grounds for invalidating any resolutions passed by such meeting.

The following shall provide conclusive grounds for invalidating a resolution passed by a general meeting as expressly stated by the law:

– the passing of a resolution by a general meeting in absence of a quorum for holding such general meeting or passing such resolution (Articles 41, 42, 59 and 60 of the Law on Business Companies);
- the passing of a resolution by a general meeting on matters not included in the agenda of the company general meeting (Article 43 Part Four of the Law on Business Companies);
- the passing of a resolution by a general meeting regarding any change to the authorized capital of the company if the procedure for disclosing appropriate information to the shareholders (members) has not been duly followed (Articles 40 and 45 of the Law on Business Companies).

In addressing the matter of invalidity of the general meeting resolutions due to any other violations committed at the time of convening or holding a general meeting, the economic court must consider the extent to which such violations may have affected the passing of an appropriate resolution by the general meeting.

19. Courts have to take into consideration that, in order to invalidate a resolution passed by a general meeting of the company, the fact of infringement of the rights and rightful interests of the company’s member (shareholder) must be established. If an examination of the case does not result in establishment of the fact of such infringement, the economic court shall have no grounds for satisfying the claim.

Only such shareholders (members) of the company who were the company’s shareholders (members) on the date of passing of the resolution in question shall be entitled to file a court claim for invalidating a resolution passed by the company governing bodies.

No claim filed by a shareholder (member) of the company for invalidating a resolution passed by a company governing body shall be satisfied if on the date of the passing of such resolution the claimant had not acquired title to any shares or interest in the company’s authorized capital, because its corporate rights could not have been violated.

20. No resolution passed by a general meeting of the company members (shareholders) may be invalidated on the grounds that such resolution was passed by such general meeting on such matters as may fall within the scope of authority of any other bodies of the company (supervisory board, executive body, etc.), since Article 98 of the Civil Code expressly provides for the right of general meetings of the company members to pass resolutions on all matters pertaining to the company’s activities. No provisions of the company’s constituent documents limiting such right shall be applied.

The respondent under any cases related to invalidating a resolution passed by a general meeting shall be the business company rather than its members (shareholders).

Only a resolution passed by a general meeting of the company members, not the minutes of such general meeting, may be invalidated by court. The minutes shall be deemed to be a document recording the fact of the passing of a resolution by the general meeting and shall not be deemed an act in the sense used in Article 20 of the Economic Code.

21. Any resolution passed by a general meeting of the business company may be invalidated by court in the event of failure to comply with the procedure for convening such meeting as determined by Articles 43 and 61 of the Law on Business Companies.

The rights of a company member (shareholder) may be deemed violated as a result of failure to comply with requirements of the law for convening and holding a general
meeting if he/she was unable to participate in such general meeting, duly prepare for discussing
the items on the agenda, register for participation in the general meeting, and so on.

In resolving any disputes related to invalidating any resolution passed by a general
meeting of the business company on the grounds that shareholders (members) have been barred
from participating in such meeting, courts have to make clear whether their absence (or
presence) had materially affected the passing of the resolution in question.

22. If, in violation of the requirements of Article 43 of the Law on Business Companies,
an issue was not included in the published agenda of a general meeting of the company, any
resolution passed by such meeting on such issue shall be deemed invalid through express
prohibition by law.

Any resolution passed by a general meeting and discussed under the agenda item
"Miscellaneous," "Organizational Issues," etc., shall also be deemed invalid. According to
SCSSM Explanatory Note No. 24 of November 10, 1999, items like "Miscellaneous" or
"Organizational Issues" shall not be included in the agenda of a general meeting because such
actions violate the right of a shareholder to review the agenda of a general shareholder meeting
in advance as provided by Article 43, Part One of the Law on Business Companies.

If any provision of the charter or of any other internal document of the company
contradicts the Law on Business Companies, courts should follow the norms of the law.
Specifically, if any internal document allows the general meeting to address any procedural
matters (like matters related to the procedure for conducting a general meeting, etc.) without
including them in the agenda, the court shall not be obligated to consider such internal document
provisions.

No item may be included in the agenda of a company general meeting by a court
decision.

23. No shareholder claim regarding the obligation to convene an extraordinary general
meeting shall be granted as Article 45 of the Law on Business Companies provides shareholders
holding more than 10% of the voting shares with the right to convene extraordinary general
meetings on their own if the Board fails to meet their request.

In addressing any issues pertaining to the legitimacy of having shareholders (or any
representatives thereof) registered at extraordinary general meetings by said shareholders,
economic courts shall follow the requirements of the laws governing the procedure for
convening and holding general meetings.

24. Courts should note that only such persons as may hold shares on the date of a general
meeting (other than a constituent meeting) shall have the right to participate in a general
shareholder meeting. Courts must take into account that, according to Article 5, Part One,
paragraph 3 of the Law on the National Depository System, the rights to take part in the
management, earn an income, etc., arising from registered
securities may be exercised as of the moment of making changes to the record of registered securities holders.

Participation and voting in a general meeting is a shareholder's privilege rather than duty. According to Article 19 of the Ukrainian Constitution, the rule of law in Ukraine is based on the principle whereby no one may be forced to do what is not provided by law. Consequently, no court may obligate a company shareholder (member) to participate or to register to participate in a general meeting.

25. According to Articles 41 and 60 of the Law on Business Companies, a general meeting shall be deemed competent if attended by shareholders (members) holding more than 60% of the votes in accordance with the company's charter. Therefore, any provisions of the company's constituent documents which set forth any other rules for establishing a quorum shall be deemed contrary to the law and shall not be applied.

The lack of a quorum at a general meeting provides conclusive grounds for a court to invalidate any resolution passed by such general meeting.

A general meeting shall be deemed incompetent if on the date of such general meeting no registration of shareholders took place (Article 159 of the Civil Code and Article 41 of the Law on Business Companies) due to the inability to determine a quorum at such general meeting. Any resolution passed by such general meeting shall be deemed invalid in court.

The competence of a general meeting shall be determined on the basis of the record of shareholders on the date of such general meeting (Article 41, Part One of the Law on Business Companies) rather than on the basis of the actual participation of the shareholders in the passing of resolutions by the general meeting.

26. Shareholders may participate in a general meeting personally or by proxy. Powers of attorney issued by shareholders must comply with the general requirements of civil law, specifically with the rule of Article 247, Part Three whereby a power of attorney which fails to indicate the date of its execution shall be deemed null and void.

If a power of attorney issued by a shareholder to authorize voting at a general meeting is issued (drawn up or certified) in violation of any requirements established by law, the person to whom such power of attorney is issued shall not be authorized to participate or vote at a general meeting. Consequently, no shareholder vote cast by proxy under such power of attorney may be taken into account in making up a quorum at a general meeting or in determining the voting results.

27. Courts should note that the procedure for withdrawal of a member from an LLC, an ALC, a general partnership, or a mixed partnership (Articles 126 and 148 of the Civil Code and Articles 54 and 71 of the Law on Business Companies) may not apply to a JSC. Consequently, no claims for a shareholder's withdrawal by payment of the value of the shares held by such shareholder shall be satisfied.
No claims for terminating a shareholder’s membership in a JSC may be satisfied either, on such grounds as failure of the shareholder to perform his/her duties to the company, failure to show up at a general shareholder meeting, or refusal to participate in a general meeting, etc.

28. In resolving any disputes related to a member’s withdrawal from the company, economic courts must be guided by the fact that, according to the Civil Code or the Law on Business Companies, a member of an LLC or an ALC may at any time withdraw from such company regardless of whether or not other members or the company itself agrees to it. The withdrawal of a company member shall not be predicated on any resolution of the meeting of the members or on making any changes to the company’s constituent documents. Consequently, the date of withdrawal of a member from the company shall be deemed the date of notice of withdrawal given by such member to the appropriate officer of the company, or the date such notice is delivered to the officers by mail. Any provision of the constitutional documents limiting or restricting the right of a member to withdraw from the company shall be deemed illegal.

If the company takes no action in connection with such notice of withdrawal from the company given by a member (no steps are considered for making any changes to the company’s constituent documents or for state registration thereof), any company member may file a claim with an economic court with respect to the company’s obligation to perform state registration of any changes to the company’s constituent documents due to a change in the company membership as provided by Article 7 of the Law on Business Companies.

29. In resolving any disputes related to the removal of a company member, economic courts shall, pursuant to the provisions of Article 64 of the Law on Business Companies, examine all facts associated with such removal of a company member, assess such member’s conduct, and establish if any effects exist in relation to such member’s actions (or inaction) that may be adverse to the company. If no such adverse effects are found to exist yet, the likelihood that such adverse effects do materialize shall be properly evaluated. A causal connection between the actions (inaction) of the company member and the adverse effects they may have for the company shall be determined, and the reasons for the member’s conduct and the form of his guilt shall be examined, etc.

In addressing the existence of any impediment that such member’s actions may cause to the accomplishment of the company’s goals, it should be determined if the member’s conduct substantially complicates the company’s activities or makes them virtually impossible.

Economic courts must consider both the actual facts that provided grounds for removal of a company member and compliance with the requirements of the law and constituent documents for convening and holding an appropriate general meeting.

Removal of a member from an LLC or an ALC under Article 59 of the Law on Business Companies shall fall within the scope of authority of the general meeting of such LLC or ALC rather than the court jurisdiction.
30. The decision as to an heir (successor) of a member joining an LLC or ALC shall fall within the scope of authority of a general meeting of the members of such company.

In determining the manner and the method of assessing the value of the portion of the company’s assets and the portion of the company’s profits to which a removed (withdrawn) LLC or ALC member may be entitled, as well as the manner and terms of their payment, economic courts shall apply the relevant provisions of the company’s constituent documents.

If not regulated by the constituent documents, the value of the portion of the company’s assets to be paid shall equal the value of the company’s net assets (to be determined in such manner as may be established by law) prorated to the member’s interest in the company’s authorized capital as evidenced by the balance sheet drawn up on the date of withdrawal (removal). The portion of the profits to which the member may be entitled shall be calculated on the date of withdrawal (removal) from the company.

If a member has not made or paid his/her contribution to the company’s authorized capital in full, such member shall be paid the actual value of his/her interest prorated to the portion of his/her contribution made or paid.

If it is found in the process of dispute resolution that no net assets are available to the company as of the time of withdrawal (removal) of its member, the economic court shall dismiss the relevant claim due to the unavailability to the company of any assets to be paid.

Article 147, Part Five of the Civil Code provides for a similar procedure for determining the value of the portion of the LLC or ALC assets to be issued or paid to the successor to a company member that is a legal entity or to the heir to a company member that is an individual if such successor or heir refuses to join the company or is denied company membership. Such value shall be assessed as of the date of reorganization or liquidation (death) of the member (Article 55 of the Law on Business Companies).

31. No sale by a member of his/her interest (or any portion thereof) in violation of the pre-emptive right of purchase exercised by other members (Article 147, Part Two of the Civil Code and Article 53, Part Two of the Law on Business Companies) shall result in the invalidity of such deed. In such event, any company member may file in court his/her claim for transfer of the seller’s rights and duties to such member in a manner similar to the rule of Article 362, Part Four of the Civil Code.

In doing so, economic courts must bear in mind that transfer of title under a barter agreement is also deemed as purchase and sale of an interest (or any portion thereof) in the company’s authorized capital under Chapter 54 of the Civil Code.

Any person acquiring an interest in the LLC or ALC authorized capital shall exercise the rights and perform the duties of a company member as of the time title to such interest in the authorized capital passes to such person.
32. The rule of Article 81, Part Three of the Civil Code that establishes the pre-emptive right of purchase for the benefit of CJSC shareholders with respect to any purchase of shares is imperative; therefore, no such right may be limited by any CJSC constituent documents.

No sale of shares by a CJSC shareholder in violation of the pre-emptive right of purchase shall result in the invalidity of such deed. The result of such violation shall be the right of any CJSC shareholder to demand in court that the seller’s rights and duties be transferred to him/her in a manner similar to the rule of Article 362, Part Four of the Civil Code.

Due to the lack of proper regulation of the procedure for exercising the pre-emptive right of purchase by CJSC shareholders with respect to the purchase of any shares sold by other company shareholders to third parties, economic courts must apply the relevant provisions of the company’s constituent documents. If no regulation is provided by the constituent documents either, shareholders shall have the pre-emptive right of purchase with respect to the purchase in proportion to the number of shares they hold.

Transfer of title under a barter agreement must also be deemed as purchase and sale of CJSC shares for the purpose of Chapter 54 of the Civil Code. The pre-emptive right of purchase shall not apply to the transfer of title to CJSC shares as part of universal legal succession.

33. In resolving any disputes related to the formation of a business company’s authorized capital or any changes to its amount, courts must abide by the following. If acceptance and turnover statements or provisions of the company’s constituent documents include no notifications that a member’s contribution to the company’s authorized capital is property rights, including the right to use property, such property contribution by the member to the authorized (constituent) capital shall be deemed company property.

34. The fact that notice of a general meeting fails to comply with the requirements established by law (Article 40 of the Law on Business Companies and the Procedure for Increasing/Decreasing the Amount of Authorized Capital of a Joint-Stock Company as approved by Decision No. 387 of the SCSSM dated February 22, 2007) shall provide conclusive grounds for invalidating any resolutions passed by a general meeting with respect to any changes to the amount of the authorized capital of a JSC.

Any resolution passed by the general meeting with respect to any changes to the company’s authorized capital may also be invalidated by court if the company has included inaccurate information in such notice as intentional misinformation (Article 11, Part One, paragraph 4 of Ukraine Law No. 448/96-BP “On State Regulation of Securities Markets in Ukraine,” dated October 30, 1996).

In resolving any disputes related to the invalidation of a resolution passed by the general meeting with respect to an increase or decrease in the authorized capital of the company, economic courts must determine whether general grounds existed for invalidating such general meeting (violation of the procedure for convening and holding a general meeting) and whether specific grounds existed, in particular, with respect to compliance with the rules for notification about a general meeting for making changes to the company’s authorized capital.
In doing so, no arguments presented by claimants (shareholders) with respect to the business reasonableness of any resolution to increase or decrease the amount of authorized capital shall be taken into account, specifically the arguments that a certain resolution violates their rights related to investment of funds in the company’s authorized capital, etc.

35. Economic courts may render decisions regarding payment of a portion of profits (dividends) to a shareholder (member) only if a business company fails to pay dividends on the basis of a resolution passed by the general meeting or if dividends are paid in a smaller amount than required by the relevant resolution (Articles 10, 41 and 59 of the Law on Business Companies and Article 158 of the Civil Code).

If a general meeting passes a resolution not to distribute the company’s profits, no economic court may replace the highest governing body of the company or interfere with the company’s business activities.

Economic courts must also take into account the terms and the manner of the distribution and payment of dividends, as well as any restrictions on their payment as established by Article 158, Part Three of the Civil Code with respect to the situations where a JSC may not declare or pay any dividends.

36. A remedy available to any member of a business company for obtaining information about the company’s activities (Article 10, Part One, paragraph “d” of the Law on Business Companies, Article 116 of the Civil Code, and Article 88, Part One of the Economic Code) is a court order requiring that the company take action by disclosing the appropriate information.

A business company must disclose to its member (shareholder), at the latter’s request, only reporting documentation (the company’s annual balance sheets, financial statements and operating reports, audit committee protocols, and minutes of meetings of the company’s governing bodies) along with information contained in the company’s constituent documents, rather than any information about the company’s business activities, unless otherwise provided in the company’s constituent documents.

It follows from Article 9 of Ukraine Law No. 2657-XII of October 2, 1992, “On Information,” that courts may not oblige a company to provide any other documents about the company’s activities as this would constitute unlawful interference with the company’s internal business affairs.

37. Any company member (shareholder) may request that information about the company’s activities be disclosed to him/her as of the date he/she acquires the status of member (shareholder). According to Article 5 of the Law on the National Depository System, corporate rights arising from shareholding (including the right to obtain information about the company’s activities) may be exercised only after appropriate changes have been made to the record of holders of registered securities.

Economic courts must also take into account the procedure for disclosing information about the company’s activities to members (shareholders) as set forth by the business company. Once the company has set forth a procedure for acquiring
access to information about the company’s activities in compliance with the requirements of Articles 33 and 35 of the Ukrainian Law “On Information” and SCSSM Explanatory Note No. 5 of October 29, 2002, “Procedure for Applying Article 10, Paragraph “d” of the Ukraine Law on Business Companies, any company shareholder (member) may exercise his right to obtain information according to the established procedure.

38. Company members (shareholders) and other persons whose rights and rightful interests have been violated by a decision of the company’s supervisory board or executive body may appeal such decisions in court as [legal] acts since the company’s supervisory board and executive body constitute the company’s governing bodies authorized to make binding decisions. This is also in compliance with Article 55 of the Ukrainian Constitution.

Courts shall take into account that decisions made by other company bodies on matters falling within the exclusive scope of authority of the general meetings (Articles 145 and 159 of the Civil Code and Article 41 of the Law on Business Companies) shall exceed the limits of their authority and as such may be deemed invalid by courts.

39. A decision made by the company’s supervisory board may be appealed in court by any company shareholder (member) by filing a claim for invalidating such decision if the latter fails to comply with the requirements of the law or violates the rights or rightful interests of the company member (shareholder). The respondent under such claim shall be the company.

In resolving disputes related to the procedure for convening and operating of the company’s supervisory board and establishing if its meeting is competent, the provisions of the company’s constituent documents shall be applied. If not regulated by the constituent documents, an analogy of law should be used in terms of the rules governing the relevant aspects of convening and holding a company general meeting (mandatory notification of all supervisory board members of the meeting, disclosure of the meeting agenda, competence, and decision-making procedures).

Resolution of disputes related to appointing or dismissing a company member (shareholder) as member of the supervisory board does not fall under the jurisdiction of courts. According to Article 41 of the Law on Business Companies, electing or recalling supervisory board members shall fall within the exclusive scope of authority of the company general meeting.

No disputes related to invalidating minutes of a company supervisory board meeting shall fall under the jurisdiction of courts either.

40. In resolving any disputes related to the division of authorities of the chairman and members of the collegial executive body of the company, economic courts shall take into account the following. If the company’s charter provides that the company’s executive body shall be composed of several persons and, therefore, the chairman of the board shall not operate as the sole governing body, then in order for the company to accrue civil rights and duties the chairman shall, as provided by Article 99, Part Two, and Article 161
of the Civil Code, put forward relevant matters for consideration by a board meeting or a general shareholder meeting.

Courts should note that the procedure for convening and establishing a quorum at a meeting of the company’s collegial executive body must be provided for by the company’s constituent documents. If not regulated, courts shall apply an analogy of law for establishing a quorum or any other matters pertaining to the general meeting of a relevant company (mandatory notification of all collegial executive body members of the meeting, disclosure of the meeting agenda, competence, and decision-making procedures).

Courts shall take into account that under Article 41, Part Five, paragraph “1” of the Law on Business Companies it is the approval of agreements (contracts) executed for an amount exceeding the amount provided for by the company’s charter, not the execution per se of such agreements (contracts), which falls within the scope of authority of the general meeting. If the authority of the company’s executive body to execute agreements is not limited by the company’s constituent documents, the fact that an agreement was not approved after being executed shall not invalidate such agreement.

41. In examining any claims related to the termination of authorities of a member (members) of the executive body, supervisory board, or any other bodies of the company due to expiration of the term in office for which they were elected or appointed, courts shall take into account that existing laws provide for no such remedy for protecting their rights and rightful interests. The authorities of the company’s officers shall be terminated by their re-election, and addressing this matter does not fall under the court jurisdiction.

42. In resolving disputes related to the invalidation of any deeds executed by the executive body of a business company if the resolution passed by the general meeting for its election for office has been invalidated by a court, courts shall apply Article 92, Part Three, and Article 241 of the Civil Code. Specifically, in third-party relations, no limitation of authorities with respect to a legal entity representation shall have legal force except where such legal entity proves that the third party knew or, in all circumstances, could not help knowing about such limitations. This provision guarantees the stability of property turnover and constitutes a standard generally recognized by international practice, specifically by the First Directive 68/151/EEC of the Council of the European Economic Community of March 9, 1968.

43. Economic courts should note that interim relief remedies may be applied only on such terms as may be set forth by Article 66 of the Economic Procedure Code, i.e. if failure to apply such remedies may impede or render impossible the enforcement of an economic court decision. The list of interim relief remedies set forth in Article 67 of the Economic Procedure Code is all-inclusive.

With this in mind, any prohibition imposed on holding a general meeting of the company members (shareholders) will in fact mean prohibiting the company from conducting
its activities in terms of the authority of the general meeting. Economic courts shall consider prohibiting any unlawful interference of government bodies and local authorities, including courts, in economic relations (Article 6 of the Economic Code).

Any prohibition imposed on holding a general meeting of the company members (shareholders) will also violate the right of the company members (shareholders) to participate in the company management.

Cases dealing with claims for invalidation of any resolutions passed by the company general meeting bring out no cause-and-effect relationship between the enforceability of such court decision and the application by the economic court of interim relief remedies by imposing a prohibition on holding a general meeting of the company members (shareholders).

Courts may not prohibit a business company or any bodies or shareholders (members) thereof from holding a general meeting of the company members (shareholders) by applying interim relief remedies with respect to any disputes related to invalidation of the governing bodies of the business company, the invalidation of any deeds related to the company’s shares, or application of any effects of the invalidity of such deeds, or with respect to any other disputes. Courts also may not apply such interim relief remedies that may in fact signify a prohibition imposed on holding a general meeting of the company members (shareholders), in particular, on registering for participation in such general meeting or prohibiting the registrar from providing the record of shareholders as of the date of the general meeting, etc.

44. In satisfaction of a suit by means of enjoining the respondent from certain actions, economic courts may enjoin a company from making decisions on certain issues included in the agenda during its general meeting only on the grounds set forth in Article 66 of the Code of Economic Procedure, and only provided that these issues are directly related to the subject matter of the dispute. Remedies granted to satisfy a suit shall not result in the company’s actual incapability of carrying out its activities nor the company’s failure to comply with current legislation.

45. When considering the issue of satisfaction of a suit, economic courts shall assess whether the claimant’s arguments for the need for certain remedies are reasonable, taking into account the following conditions:

– relationship between a certain remedy in satisfaction of the suit and the subject matter of the claim;
– likelihood of complications during enforcement or failure to enforce the court’s decision, if such remedies are not granted;
– prevention of violations of legally protected rights of persons that are not parties to said proceeding, such violations being a result of remedies so granted.

Court decisions to invalidate acts should establish the fact whether the act complies with the statutory requirements and whether the claimant’s rights have been abused,
and should not establish the respondent's obligation to perform certain actions. In this respect, satisfaction of such suits by enjoining from execution of decisions made by the general meeting does not bear a necessary (mandatory) connection with claims, with their subject matter.

Satisfaction of a suit to invalidate an agreement of sale and purchase of shares by enjoining a shareholder from participating in management of a company has no cause-effect relation to the condition that failure to grant such remedies may complicate or render enforcement of a court decision impossible. As the agreement of sale and purchase is recognized null and void as of its commencement, the issue of whether realization of the right to participate in the general meeting is justifiable may be the subject matter of a separate suit. However, this is not directly related to enforcement of such a court decision.

46. Pursuant to the provisions of Article 67 of the Code of Economic Procedure, when granting remedies in satisfaction of a suit, economic courts shall provide an exact description of actions that the respondent and other persons are enjoined from performing. Economic courts may not enjoin a company or its officers from performing any actions.

In satisfaction of claims to invalidate a decision of the company's general meeting regarding election (reelection) of members of its executive body, economic courts may not grant remedies to satisfy the suit by enjoining the company's officers in question from performing any actions, which would prevent the company from conducting business.

47. Remedies granted to satisfy a suit shall be commensurate with the demands stated by the claimant. To arrive at commensurability, an economic court should compare negative consequences from remedies granted in satisfaction of the suit with negative consequences that may arise from failure to grant such remedies, giving consideration to relevance of the right or lawful interest, whose protection the claimant applies to the court for, value of the property, whose seizure he/she applies for, or proprietary consequences of the respondent being enjoined from performing certain actions.

Remedies in satisfaction of a suit may be granted by the court only within the subject matter of the suit and shall not violate rights of the company's other shareholders (members), in particular, by enjoining them from performing any actions on the block of shares directly related to the subject matter of the dispute.

If the respondent argues that the remedy in satisfaction of a suit is required because he/she will suffer significant damage, should such remedy be not granted, he/she must justify the possibility of such damage, its extent, the relation of potential damage to the subject matter of the dispute, and that this exact remedy in satisfaction of the suit is needed and sufficient to prevent such damage.

Courts may not grant remedies in satisfaction of a suit that are effectively equivalent to granting of claims.
48. Satisfaction of a suit by seizure of shares does not decrease their number in the company’s authorized capital, nor affect the scope of their holders’ corporate rights. In this regard, courts should be governed by requirements of Article 159 of the Civil Code and Articles 41, 42 of the Companies Act to resolve issues related to whether holding of a general meeting was reasonable and decisions made were lawful.

49. Courts should take into account that the registrar of holders of registered securities may appeal against a decision of a general shareholder meeting only if such a decision violates his or her rights or lawful interests. If the registrar appeals against a decision made by a company to terminate contractual obligations with the registrar with respect to registration of holders of registered securities, courts should take into account that, because the claimant is not a shareholder, that the general meeting made a relevant decision, which is within its terms of reference and does not contradict the principle of freedom of contract (Article 627 of the Civil Code), may not demonstrate violation of the claimant’s rights. Accordingly, courts should decline such suits.

50. Shareholders may not judicially challenge an agreement between a company and the registrar of holders of registered securities for maintenance of a register of holders of registered securities, as they are not party to such an agreement. Similarly, shareholders may not judicially induce conclusion of an agreement between a company and the registrar of holders of registered securities for maintenance of a register of holders of registered securities because, pursuant to Article 181 of the Economic Code, a suit to induce conclusion of an agreement may be filed by a person who is a potential party to such contractual relationships. Shareholders may judicially challenge decisions of general meetings to conclude, amend or terminate a relevant agreement.

Pursuant to Part Two, Article 9 of the Law on National Depository System, decisions to assign maintenance of a register of holders of registered securities are made solely by general meetings of shareholders. Therefore, courts are not competent to demand the registrar to surrender the register of holders of registered securities, or reassigning it to another registrar, including within remedies granted in satisfaction of a suit, if there is no decision of the general meeting of shareholders on such reassignment.

51. Law does not provide for the right of a company’s shareholder (member) to apply to court for protection of rights or legally protected interests of a company beyond relationships of representation. On these grounds, economic courts should not satisfy a suit by the company’s shareholders (members) filed to conclude, amend, terminate or invalidate agreements and other acts made by the company. Disputes of this type are within the jurisdiction of economic courts regardless of their subjective composition pursuant to paragraph 4, Part One, Article 12 of the Code of Economic Procedure, if the shareholder (member) of the
company substantiates relevant claims by violations of his/her corporate rights.

52. Courts should bear in mind that paragraph 2, Final Provisions of Law No. 483-V, provides for jurisdiction of economic courts over disputes arising from corporate relationships, if relevant proceedings have not been initiated (opened). If such proceedings were opened by a court of general jurisdiction before Law No. 483-V became effective, the matter shall be heard on its merits by a court of general jurisdiction. If proceedings had not been initiated by local courts of general jurisdiction before Law No. 483-V became effective, such claims are forwarded for consideration to relevant local economic courts.

Appeals and appellate proceedings that have not been considered by general courts of appeal after Law No. 483-V became effective are forwarded for consideration to relevant economic courts of appeal depending on what local economic court had jurisdiction over the proceeding pursuant to provisions of Law No. 483-V.

Cassation claims (petitions) against court decisions that had been filed before Law No. 483-V came into force, regardless of the procedure effective as of the time they were filed and for which the Supreme Court of Ukraine did not initiate cassation proceedings, should be forwarded to the Higher Economic Court of Ukraine for consideration. The Higher Economic Court of Ukraine reviews court decisions in question as provided by the Code of Economic Procedure.

53. Court decisions within proceedings arising from corporate relationships made by courts of general jurisdiction before Law No. 483-V became effective should be reviewed by economic courts in light of newly discovered circumstances. As Law No. 483-V became effective, such proceedings are within the jurisdiction of economic courts and considered under the rules of the Code of Economic Procedure. Pursuant to requirements of Article 363 of the Code of Civil Procedure a court decision in such proceedings is not subject to review by a court of general jurisdiction that made such a decision.

Economic courts have jurisdiction over issues related to postponed or deferred enforcement of a court decision, modifications in the enforcement method and procedure, suspension, regression of enforcement of the court decision and a challenge of action or omission of bodies of the State Enforcement Service in respect of court decisions in proceedings arising from corporate relationships.

The ruling to grant the application for review of a court decision in light of newly discovered circumstances may be appealed on grounds of violations of jurisdiction of proceedings, if this ruling is made outside the scope of jurisdiction.

54. Court decisions in proceedings arising from corporate relationships made by courts of general jurisdiction or administrative courts with violations of rules of jurisdiction of proceedings are subject to appeal under the rules of the Code of Civil Procedure or the Code of Administrative Procedure.
If the general or administrative court of appeals establishes that the court decision by a
local general or administrative court was made with violations of rules of jurisdiction, while the
proceeding should be considered under the economic court procedure, the relevant court of
appeals revokes the decision of the local court and ceases proceedings on the matter.

Court decisions made by general courts of appeals following consideration of the appeal
against the decision of a local court of general jurisdiction based on violations of jurisdiction of
proceedings arising from corporate relationships are subject to cassation appeal to the Supreme
Court of Ukraine under the rules of the Code of Civil Procedure.

Court decisions made by administrative courts of appeals following consideration of the
appeal against the decision of a local court of general jurisdiction based on violations of
jurisdiction of proceedings arising from corporate relationships are subject to cassation appeal to
the Higher Administrative Court of Ukraine under the rules of the Code of Administrative
Procedure.

Chief Justice of the Supreme Court of Ukraine

V.V. Onopenko

Secretary of the Plenum of the Supreme Court of Ukraine

Yu.L. Senin

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