

Foreign Court Decisions, Arbitral Awards and Sovereignty in Russia

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Abstract

This chapter examines a number of theoretical difficulties related to the implementation, in Russia, of the decisions and awards of foreign courts and arbitral tribunals. Along with the normative conditions for recognizing and enforcing foreign decisions, the author draws attention to the educational background of legal professionals—especially judges—in Russia. It is suggested that the statist conception of law inherited from Soviet legal scholarship implicitly leads to the contemporary Russian legal doctrine of negating the obligatory force of decisions from foreign courts. In the opinion of the author, the core of this conception resides in the traditional concept of sovereignty, which excludes the direct effect of legal acts made by foreign states, private arbitration tribunals, and international organizations. Nevertheless, there have been signs of a change in the attitude of the Russian judiciary in several key rulings by commercial courts. The author concludes that one now can observe seeing tendencies indicative of the development of a different concept of law in the mentality of legal professionals in Russia.

Keywords

arbitral awards, commercial courts, court judgments, execution, public policy, sovereignty, supremacy

1. Introduction

In order to become better integrated in the global economic system, Russia's long trek to membership in the World Trade Organization successfully crossed the finish line when it became a WTO member in mid-2012; as part of the 'price' of membership, the Russian Federation has agreed to open up its markets to broader international competition. Internationalizing the Russian economy (further) and entering a globalized market (in fuller fashion) not only will result in the lifting of trade and customs barriers; it also—in the long run—should lead to a reduction in public-law rules and regulations in those areas in which international business has its own rules and private arbitration remedies. In other words, the globalization of Russia's economic markets could also lead to the globalization of Russia's 'legal market', as well as the internationalization of a domestic judicial system that nowadays is still too vigilant—especially with

respect to the enforcement of foreign arbitral awards and court judgments¹— in its cooperation with foreign and international judicial bodies (albeit the limits on such cooperation are not as restrictive as those in place during the Soviet era).

In the opinion of the present author, the difficulties are connected not only with gaps and deficiencies in Russian legislation but, also, with the state-centered and paternalistic attitude of many judges, who treat foreign decisions and awards as something that could possibly infringe upon state sovereignty.² In this article, we will attempt to determine whether there is any logic to this vigilance and whether it resides in the conviction that domestic and international law create two different legal entities (the dualist conception), so that no acts of any other legal power can have a direct obligatory effect on a given territory where a sovereign state exists. The dualist concept holds that acts of an alien legal power—international law in this case—must be incorporated into the domestic legal order before becoming binding on that state's territory. Furthermore, this incorporation is not automatic; instead, it involves the consent of the relevant state's legislative body—first and foremost, through the adoption of a law ratifying a particular act of international law, such as a treaty. Following ratification, international acts still need to be considered by domestic courts in terms of the extent to which they can affect public policy and whether they can be reconciled with domestic law and order.

Following this logic, cases involving the potential execution of foreign judgments and arbitral awards occasionally have been considered in Russian courts as if they were introducing new norms into domestic law rather than merely facilitating

* The author presented the main ideas contained in this article at a conference, "The Development of Russian Law", at the University of Helsinki Faculty of Law (23-24 November 2011). All translations from Russian into English are by the present author unless otherwise noted.

¹ In this article, we shall not make any distinction between the respective problems of the execution of arbitral awards and of the judgments of foreign courts, as such a distinction would not help in demonstrating the main theses, although—from a certain perspective—it would not be inappropriate to make such a distinction. As Ilya Nikiforov remarked: "In the case of arbitration there is less room for sovereignty concerns and political interference." See Ilya Nikiforov, "Litigating in Europe: Is the System of Enforcing Judgments Effective? Enforcement of Judgments in Russia", 1(2) *Dispute Resolution International* (2007), 219-232.

² For a theoretical framework of reference for this problem (with respect to other countries beyond the Russian borders), see the following: John H. Jackson, "Sovereignty - Modern: A New Approach to an Outdated Concept", 97 *American Journal of International Law* (2003), 782-802; Antonio F. Perez, "The International Recognition of Judgments: The Debate Between Private and Public Law Solutions", 19 *Berkeley Journal of International Law* (2001), 44-89; and Murat Sumer, "Jurisdiction of Sovereign States and International Commercial Arbitration: A Bound Relationship", 2 *Ankara Bar Review* (2008), 55-65. As far as we are aware, as yet there is no in-depth research on the impact of the sovereignty doctrine on the execution of foreign judgments and awards in Russia. The prevailing opinion is expressed by Marysheva: "The execution of foreign decisions is not a simple intrusion, but an intrusion par excellence into the sovereignty of the state the territory of which is concerned." See Natal'ia Marysheva, "Mezhdunarodnaia pravovaia pomoshch' i ee vidy", in Natal'ia Marysheva *et al.*, *Problemy mezhdunarodnogo chastnogo prava* (Kontrakt, Moscow, 2000), 190-205, at 204. We will attempt to analyze the theoretical premises of this prevailing opinion below.

the implementation of foreign legal decisions. In fact, Russia is a party to numerous international agreements and treaties on such issues, as a result of which many rules have already been incorporated into Russian legislation, rules which are commonly accepted by other countries and which can be considered universal.³ At the level of enforcement, however, a lawyer can feel the difference between the attitudes of Russian judges and, say, European judges, regarding the recognition of foreign judgments and arbitral awards.⁴ Experiencing this difference in practice, a scholar might be tempted to provide an analytical account and theoretical explanation of her observations. It was just such a temptation that provided the main incentive for the present author to undertake this research. In this respect, this article does not pretend to be an exhaustive practical guide to technical-legal nuances for lawyers engaged in enforcing foreign judgments and arbitral awards but, rather, a theoretical reflection on the connection between a certain legal *Weltanschauung* prevalent in Russia and a particular state of affairs in Russian judicial practice regarding the enforcement of foreign judgments and arbitral awards. We are aware of the limits of such reflections and do not assert that our conclusions would either be universal or comprehensive in explaining everything about this matter, in every particular case, or the mentality of every individual Russian judge. Rather, we will sketch an ideal type⁵ as an organizing principle around which comparative legal scholars could build their work and make comparisons. In the spirit of the Weberian construction of an ideal type, we will accentuate only a selection of philosophical assumptions, abstracting them from other conditions (economic, institutional, etc.) which also, undoubtedly,

³ First of all, there is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, (10 June 1958). Other treaties can be also mentioned that are partly dedicated to the matters of implementation of judgments and awards: Convention on Civil Procedure, The Hague (1 March 1954); International Convention on Civil Liability for Oil Pollution Damage, Brussels (29 November 1969); and Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, Rome (7 October 1952).

⁴ Regarding the values and attitudes of the Russian judiciary, see Kathryn Hendley, "Business Litigation in Russia: A Portrait of Debt Collection in Russia", 31 *Law & Society Review* (2004), 305-347; Vadim Volkov and Arina Dmitrieva, "Rossiiskie sud'i kak professional'naia gruppy: tsennosti i normy" and Katrin Khendli (Kathryn Hendley), "Ispol'zovanie sudebnoi sistemy v Rossii", in Vadim Volkov (ed.), *Kak sud'i primimaiut resheniia. Empiricheskie issledovaniia prava* (Statut, Moscow, 2012), 128-155, and 267-325, respectively. For a comparative analysis of different attitudes of Russian and French judges in matters regarding the execution of foreign decisions, see Dmitrii Litvinskii, *Voprosy priznaniia i ispolneniia reshenii sudov inostrannykh gosudarstv (na osnove analiza prava Rossii i Frantsii)* (St. Petersburg State University, St. Petersburg, 2003), doctoral dissertation; and *id.*, *Priznanie inostrannykh sudebnykh reshenii po grazhdanskim delam (sravnitel'no-pravovoi analiz frantsuzskogo zakonodatel'stva, sudebnoi praktiki i iuridicheskoi doktriny)* (St. Petersburg University Publishing House, St. Petersburg, 2005). In this article, the present author will not be concerned with question of the difference between Russian and Western legal mentalities since this issue requires separate, independent research.

⁵ For Max Weber, an ideal type is "formed by the one-sided accentuation of one or more points of view and by the synthesis of a great many diffuse, more or less present and occasionally absent concrete individual phenomena, which are arranged according to the one-sidedly emphasized viewpoints into a unified analytical concept". Max Weber, "Objectivity in the Social Science and Social Policy", in Max Weber, *The Methodology of the Social Sciences* (Free Press, Glencoe, IL, 1949), 90.

have an impact on the situation regarding the recognition and enforcement of foreign decisions in Russian *arbitrazhnye sudy* (state commercial courts).⁶

⁶ In Russia, an *arbitrazhnyi sud* is a state court of law; under the 1993 RF Constitution and related subordinate legislation, these courts are empowered to resolve commercial disputes primarily among legal persons but, in some instances, among state agencies and private individuals. Functionally, it is a commercial court but not called such in Russian (this would be *ekonomicheskii sud* although the term is used elsewhere in the region, e.g., for the Commercial Court of the Commonwealth of Independent State: *Ekonomicheskii Sud SNG*). The use of the term “*arbitrazhnyi*” derives from the *Gosarbitrazh* bodies which decided disputes among state-owned enterprises in the USSR. The current system of Russian commercial courts has four levels: first instance regional courts (eighty-one courts in the subjects of the Russian Federation), appellate courts in twenty appellate circuits, cassation courts in ten federal circuits, an intellectual rights court (established in 2010), and the Supreme Commercial Court (also referred to in English as the Higher *Arbitrazh* Court), respectively: *sud pervoi instantsii*, *sud arbitrazhnogo okruga*, *sud federal'nogo okruga*, *sud po intellektual'nym pravam*, *Vysshyi arbitrazhnyi sud*.

This system of courts is differentiated from the courts of general jurisdiction (*obshchaia iurisdiksiia*). Eschewing any more detail about the judicial system here, we only shall remark that the courts of general jurisdiction deal with the bulk of enforcement cases except for those involving commercial disputes which, not illogically, are within the bailiwick of the commercial courts. Since this article examines the practice of Russian commercial courts, it is their enforcement practices which we shall consider; but the reader should be aware that a complete overview also would include consideration of enforcement matters in courts of general jurisdiction. This would be problematic, however, not only due to constraints of space in this work; not all the cases from courts of general jurisdiction are (as yet) fully accessible on-line. Furthermore, there has not been full consensus between these two jurisdictions in interpreting and applying the law. Therefore, consideration of enforcement matters in courts of general jurisdiction—and comparing this experience with that of the commercial courts in Russia—is something best left to another research project. Instead, we offer the reader these sources for information and ideas: Roman Zaitsev, *Priznanie i ispolnenie v Rossii inostrannykh sudebnykh aktov* (Wolters Kluwer, Moscow, 2007); and Vladimir Zaitsev and Roman Zaitsev, “Rassmotrenie sudami obshchei iurisdiksii del o priznanii i privedenii v ispolnenie reshenii inostrannykh sudov”, in Vladimir Iarkov and Irina Medvedeva (eds.), *Mezhdunarodnoe sotrudnichestvo v notarial'noi i sudebnoi sfere* (Izdatel'stvo SPbGU, Saint Petersburg, 2006), 165-184. We only mention here that matters of recognition and enforcement of foreign decisions are apportioned (as other matters) in the following way: the courts of general jurisdiction consider all matters except those which pursuant to Art.32 of the 2002 RF Commercial Procedure Code are within the competence of the commercial courts, i.e., those cases which are connected with entrepreneurial and other economic activity (*predprinimatel'skaia i iniaia ekonomicheskaiia deiatel'nost*). In the general jurisdiction courts, the issue of recognition and enforcement of foreign decisions and foreign arbitral awards is governed by chapter 45 of the 2002 Civil Procedure Code which sets out the normative requirements similar to those of the RF Commercial Procedure Code, analyzed in section 4 below. Enforcement of domestic arbitral awards is regulated by the chapter 47 of that Code. It should be mentioned that on 8 October 2013, President Vladimir Putin sent a draft bill (No.352924-6) to the Russian Parliament (the State *Duma* of the RF Federal Assembly) proposing an amendment to the RF Constitution so as to merge these two court systems (the courts of general jurisdiction and the commercial courts) into one. The text of the draft bill is available at <http://static.consultant.ru/obj/file/doc/fz_081013.pdf>. Given the personality of the author of the draft bill, there is a strong probability that the entire Russian court system will be restructured within a few months.

Private bodies for dispute resolution are called *treteiskie sudy*. There is no unanimity in how this term should be translated in English-language academic literature. We have opted for ‘commercial court’ to signify Russian state courts resolving commercial disputes (*arbitrazhnye sudy*) and ‘arbitration tribunal’ for a private, commercial-law arbitral body (*treteiskii sud*), domestic or foreign. For the structure of judicial system in Russia, see the 1993 RF Constitution, Chapter 7; the Constitution (as amended) is at *Sobranie Zakonodatel'stva Rossiiskoi Federatsii* (2009) No.4 item 445.

2. Theoretical Background

From a comparative standpoint, it might be an interesting theoretical exercise to consider the links among the mentalities of legal professionals in various countries and their juridical practice. However, such an investigation surely would be doomed to remain purely theoretical and speculative. After all, we could hardly expect to discover any causal relationship or find any empirically substantiated facts when trying to connect the wording of a particular judgment with the mentality of the legal professionals of a given country—let alone with the habits and mental states of a given judge. In undertaking an analysis in this article in terms of an ideal type, the present author finds it appropriate to underscore once again that he does not dare claim any universality for his conclusions nor aim to provide any universal criteria for examining the parallels among the mental paradigms of judges and their judicial pronouncements. Nevertheless, the abundant comparative-law literature—where one can observe not only a comparison of legal texts but, also, mention of the diverse mentalities of legal professionals from different countries⁷—reassures us that such matters are not devoid of academic interest. There also is no small amount of literature on the execution of foreign judgments and awards in Russia in which the authors refer to excessive formalism, fidelity to the letter of the law, propensity to defend public rather than private interests, and the political engagement of the Russian judiciary in such cases.⁸ Far from contesting these findings or even considering them, we would inquire into the philosophical reasons underlying the particular strategy of Russian judges in these cases. As René David has stressed, it is the “psychology of those to whom the law applies and those who are charged with its application”⁹ that really matters in comparative law. This psychology can be perceived as a multitude of diverse emotions and attitudes or can be abstractly organized around one or several axes. The first approach allows for the gathering of vast amounts of empirical data; but to conceptualize them, one needs a theoretical framework which only can be gained from the second approach¹⁰

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

⁸ Many examples of such deliberations can be found in the American Bar Association’s publication *Enforcement of Arbitration Awards in Russia and Ukraine: Dream or Reality?* (American Bar Association, Chicago, IL, 2009).

⁹ René David, “Methods of Unification”, 16 *American Journal of Comparative Law* (1968), 13-27, at 13; and René David and John E.C. Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (The Free Press, London, 1978), 11.

¹⁰ To remind the reader: the first approach is that of legal positivism which implies fidelity to the letter of the law, while the second is based on a deep analysis of legal culture, mentality, psychology, and the philosophy of those who create and apply the laws. This dichotomy of formalist and substantive approaches in comparative law has been reiterated by numerous legal thinkers, especially see the analysis in David and Brierley, *op.cit.* note 9.

(which implies examination not only of the formal legal texts but, also, of legal consciousness). Even while impoverishing an endlessly diverse reality (generalizing the individual physiological and mental experience of each judge, reducing it to some ideal types which are supposed to be common to all the members of the given legal order), such an approach could yield a perspective for linking together and explaining the peculiar attitude of Russian judges toward foreign judicial decisions.¹¹

In trying to assess judicial practice in Russia in terms of this question, some issues arise concerning not only the techniques of producing norms but, also, the *Weltanschauung* of several generations of lawyers who have been raised and nurtured with a fixed set of theoretical ideas. The average Soviet lawyer had several conceptual credos about the law: to wit, that the law is always produced by the state; that no law can subsist without the state; and, finally, one state, one law, meaning that—from the statist perspective—the decentralization and internationalization of the law signify the decline and degeneration of both the law and the state.¹² The sacred definition of the law (*pravo*)—which was endemic in Soviet textbooks and the legal literature—asserts that: “Law is a system (or order) of social relationships, which corresponds to the interests of the dominant class and is safeguarded by the organized force of that class.”¹³ While it has undergone certain cosmetic changes, this definition basically still governs the mentality of the Russian legal community and remains omnipresent in legal textbooks. Theoretically, the main assumption of most of those who, these days, write on legal matters, decide cases, and adopt laws in Russia states that the law always: (1) is appropriated by the state; (2) establishes a social order; and (3) protects certain interests.¹⁴ From this point of view, allowing for the direct enforcement

¹¹ Here we speak, rather, of a potential perspective since such an approach to an understanding of legal reality has not (yet) been formed in Russian theoretical jurisprudence although in other legal cultures one can find abundant research on this perspective. The most notorious is that of the American legal realists and their contemporary followers (e.g., Richard A. Posner, *How Judges Think* (Harvard University Press, Cambridge, MA, and London, 2008)).

¹² For more on the educational and theoretical background of the Soviet judiciary and its remnants in the mentality of contemporary Russian judges, see Kathryn Hendley, “Are Russian Judges Still Soviet?”, 23(3) *Post-Soviet Affairs* (2007), 240-274, especially at 259-267, where the mindsets of Russian commercial judges are analyzed with reference to interviews and sociological inquiries conducted by Professor Hendley.

¹³ Peter Stuchka, *Selected Writings on Soviet Law and Marxism* (M.E. Sharpe, Inc., New York, NY, London, 1988, Robert Sharlet, Peter B. Maggs, Piers Beirne, eds., transl, introd.), 143-144.

¹⁴ This can be seen in the overwhelming majority of textbooks on legal theory, e.g., those written by authors from the leading Russian law faculties such as *MGU* (Moscow State University): Mikhail Marchenko (ed.), *Teoriia gosudarstva i prava* (Zerkalo, Moscow, 2004) or *Moskovskaia gosudarstvennaia iuridicheskaia akademiia* (Moscow State Legal Academy): Orest Martyshin, *Teoriia gosudarstva i prava* (Norma, Moscow, 2009). For a detailed account of the influence exercised by the statist understanding of law on law enforcement in Russia, see Andrei Kashanin and Sergei Tre'iakov, “Obshcheteoreticheskie problemy issledovaniia problem pravoprimereniia”, in Iurii Tikhomirov (ed.), *Pravoprimerenie: teoriia i praktika* (Formula prava, Moscow, 2008), 12-73, especially at 39-57. The very name of the basic discipline taught

of judgments of foreign courts and awards of arbitral tribunals runs into difficulty at the level of basic theoretical assumptions because: (1) these decisions are not made by the state if made by private arbitration, or, if rendered by the courts of a foreign state, they are not made by 'our' state; (2) introducing and acknowledging elements of 'alien' legal systems in Russia endangers the unity of 'our' state law and threatens law and order in the country; and (3) some interests which are destructive for the Russian national legal system can penetrate through these 'alien' judgments and awards.

These canonical representations about legal centralization still are perceptible in Russian legislative and judicial policies.¹⁵ One paradigmatic issue concerns the outdated conception of sovereignty: the idea of an absolute sovereign authority that cannot be bound by other powers unless it is because of the will and the consent of this absolute sovereign authority. This concept still reigns in Russian legal doctrine and has an impact on different spheres of law enforcement in Russia. This should not be surprising because the new Russian legal system only has been in existence for twenty years; one cannot expect that this mentality can be cardinally changed in such a short time.¹⁶

On the one hand, the Russian legal system shares much in common with countries having a civil-law, *i.e.*, code-based law, system of judicial review, as well as basic concepts and theoretical schemes dating from the pandect jurisprudence of the nineteenth century. So, at first glance, the distance between legal regimes is not that large. On the other hand, if we compare Russia's contemporary legal system with that of the Soviet Union, we can note several major characteristics which still differentiate Russian law from that of Western systems. In 1969, John Hazard pointed out that the particularities of the Soviet legal system compared to Western systems included the subordination of private law to public law: "strong, even unchallengeable political leadership, fortified by law in maintaining its distinct position" and "law as [a] mechanism of mobilization for total social involvement".¹⁷ Remnants of this system are still evident in modern Russian society and are manifest in the rhetoric of the country's current political leaders—especially considering the economic dominance of state-owned corporations,

at universities is symptomatic of the statist approach—*Teoriia gosudarstva i prava* (Theory of State and of Law)—where the state precedes the law.

¹⁵ Kathryn Hendley, "Assessing the Rule of Law in Russia", 14 *Cardozo Journal of International and Comparative Law* (2006), 347-391.

¹⁶ Peter Solomon and Todd Foglesong, *Courts and Transition in Russia: The Challenge of Judicial Reform* (Westview Press, Boulder, CO, 2000); and Peter Solomon, "Judicial Power in Russia: Through the Prism of Administrative Justice", 38(3) *Law and Society Review* (2004), 549-582.

¹⁷ John N. Hazard, *Communists and Their Law: A Search for the Common Core of the Legal System of the Marxian Socialist States* (University of Chicago Press, Chicago, IL, 1969), 523-524.

the one-party governance of United Russia, and traditional paternalism as the ideology of legal and political development in Russia.¹⁸

This *spetsifika* (particularities or perhaps “exceptionalism”) has remained a part of Russian legal ideology over time in spite of the fundamental political and economic changes over the past two-plus decades, and they inevitably have repercussions on Russian courts at all levels. As an example, the Chief Justice of Russia’s Supreme Commercial Court, Anton Ivanov—in a 2102 speech at the St. Petersburg International Legal Forum—stressed what he called “unfair competition” between Russian and foreign courts.¹⁹ In his opinion, the fact that many Russians—both natural and legal persons—prefer to resolve their disputes in the courts of foreign jurisdictions rather than in Russian courts “breaches the principle of legal certainty and, also, encroaches upon the sovereign immunity” of Russia. Chief Justice Ivanov voiced his confidence that “Russia must protect its citizens and legal entities from unfair competition among foreign judicial systems”; to the end, he even proposed “protective measures”—such as blacklisting, blocking bank accounts, and so forth—to protect the national jurisdiction from competition with Western judicial systems. This rhetoric shows a striking similarity to the ‘ideology of the Great State’ (*velikoderzhavnaia ideologiia*), which stretches beyond the Soviet period—all the way back to the times of Imperial Russia.

This paradigmatic²⁰ issue can be examined with respect to the recognition and enforcement of foreign judicial acts, where Russian courts often tend to protect sovereignty rather than the interests of private *natural or legal persons* who are engaged in commercial disputes.²¹ One anecdotal example of this attitude can be seen in a case where the lower courts refused to enforce the judgment of an English court only because it was not based on Russian law. While this decision

¹⁸ See Mikhail Antonov, “Theoretical Issues of Sovereignty in Russia and Russian Law”, 37(1) *Review of Central and East European Law* (2012), 95-113.

¹⁹ Anton Ivanov, “Nedobrosovestnaia konkurentsiia pravovykh system: sovremennye problemy”, *Vysshiĭ Arbitrazhnyi sud Rossiiskoi Federatsii* (22 May 2012), available at <<http://www.arbitr.ru/press-centr/news/speeches/52580.html>>. A partial overview of the speech in English is in: Sergei Feklyunin, “Russian Law and Unfair Competition”, Russian Information Legal Agency (25 May 2012), available at <http://rapsinews.com/judicial_analyst/20120525/263259093.html>.

²⁰ ‘Paradigm’ is defined by Kuhn as a set of received beliefs that exerts a deep hold on one’s mind and that acts as act as a conceptual box for classification of all future information. See Thomas Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press, Chicago, IL, 1996), 10. If, like Kuhn, we presume that “no body of facts can be interpreted in the absence of at least some implicit body of intertwined theoretical and methodological beliefs that permits selection, evaluation, and criticism”, then we can postulate that there is such a body of beliefs which is common to the contemporary Russian judiciary (surely, we do not admit that this paradigm is accepted or even perceived by every judge) in working with legal texts, facts, and findings.

²¹ Given the considerable overload of cases in the commercial courts (about 1.5 million decisions per year) and the lack of systematization of case law in Russia, it is very difficult to encompass all the cases adjudicated in Russia during recent years concerning any particular matter. Thus, our analysis of case law remains selective; in other words, we refer only to the cases which are within our knowledge and especially to those which have resonated among lawyers, legal scholars and in the literature. Our findings are not presented here as precise statistical data.

was overturned by the Russian Supreme Court in 2000, nonetheless we believe that this example is indicative of the excessive vigilance of the Russian courts in such matters.²² Going beyond commercial litigation in Russia and turning to constitutional issues, an example which we believe also typifies the Russian judicial scene these days can be seen in the case of *Markin* and its two competing judgments—at the end of the first decade of the 2000s—from the RF Constitutional Court and the European Court of Human Rights (ECtHR),²³ together with the extremely negative reaction of much of the Russian judicial community to the European Court’s decision.²⁴ These cases are not accidental, and they can be explained *inter alia* by the basic ideas which have been cultivated in Russian and Soviet legal education, as outlined above.²⁵

3. Modalities of Enforcement and Defense

In case of a dispute, a creditor will either need to seek a judgment from a Russian court directly or obtain a judgment from a foreign court (or arbitration tribunal) which it will seek to have enforced by the Russian courts. A Russian defendant

²² *Sophocles Star Shipping Inc. v. GUP VO Tekhnopromeksport*, Postanovlenie Prezidiuma Verkhovnogo Suda Rossiiskoi Federatsii (12 December 2000) No.106pv-2000, <<http://base.garant.ru/1776230>>. In this case, the plaintiff’s request for the execution of an award handed down by the London Court of International Arbitration was first dismissed by the Moscow City Court (on 11 April 1997) on the grounds of a technical omission. After the London Court remedied this omission in 1999, the plaintiff again filed its application with the Moscow City Court, where the application again was denied on 6 December 1999. The Court reasoned that the English courts had to comply with the procedures for the elimination of technical omissions which are set forth in Russian legislation, apparently forgetting that the case was heard and resolved in England and that, in Russia, the matter concerned only the execution of the award. This evident mistake was corrected only in the third instance, in the Presidium of the RF Supreme Court.

²³ *Konstantin Markin v. Russia* at the European Court of Human Rights (ECtHR) (2012) Application No.30078/06 concerned a military serviceman, Konstantin Markin, who was divorced from his wife and was awarded custody of their three minor children. He had applied for a three-year period of parental leave, but his request was denied because only female personnel are allowed parental leave in the RF armed forces. In 2006 and 2007, the Russian courts of general jurisdiction rejected his applications on the basis of national-security concerns. On 15 January 2009, Russia’s Constitutional Court upheld this position, reasoning that “non-performance of military duties by military personnel en masse must be avoided, as it might cause a detriment to the public interests protected by law”. The Russian government insisted that the ECtHR was not competent to reconsider the opinion of the Constitutional Court and the content of Russian laws, as “the Court would encroach upon the sovereign powers of the Parliament and the Constitutional Court”. The ECtHR found the situation discriminatory and condemned Russia for violating Art. 14 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, stating that Russia’s Constitutional Court can err when deciding human right cases. The final award of the Grand Chamber is at <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109868>>.

²⁴ For an important part of the discussion which followed the ECtHR’s judgment, see Valerii Zor’kin, “Apologiya Vestfal’skoi sistemy”, *Rossiiskaia gazeta* (22 August 2006); *id.* “Predel ustupchivosti”, *Rossiiskaia gazeta* (29 October 2010).

²⁵ Mikhail Antonov, “The Philosophy of Sovereignty, Human Rights, and Democracy in Russia”, *Higher School of Economics Research Paper* (2013) No.WP BRP 24/LAW/2013, available at <<http://ssrn.com/abstract=2309369>>.

who loses her case abroad will have an opportunity to apply a supplementary defense against the recognition and enforcement of the judgment in Russia. Possible procedural defenses are set out in Article 244(1) of Russia's 2002 Commercial Procedure Code (*Arbitrazhnyi protsessual'nyi kodeks*);²⁶ these include defenses related to the question of whether the foreign judgment has entered into force in its state of origin, whether the defendant has properly been notified of the hearings, whether the subject matter of the judgment was within the exclusive jurisdiction of the Russian courts, whether the judgment conflicts with a judgment rendered in (or with a case already under consideration by) Russian courts,²⁷ whether the limitation period for enforcement has expired, or whether enforcement in Russia would violate public policy.²⁸

In order to commence enforcement proceedings in Russia, the party seeking enforcement has must file an application with the RF commercial court at the place of the debtor's domicile (legal address) or, if such place is unknown, at the location of her assets. The time within which such proceedings must be initiated is limited to three years (after the decision has been rendered), although—under certain circumstances—this term may be extended. As the formal list of grounds for refusal of a foreign decision shows, the recognition and enforcement of such decisions should be the rule while denial should, rather, be an exception. Another rule of Russian court procedure places the burden of proof for these various defenses upon the party seeking to resist enforcement.²⁹ In spite of such rules, these formal grounds have been interpreted by RF commercial courts quite broadly—frequently, in the opposite sense. Such an interpretation, in fact, allows for a reconsideration of the case on its merits which formally is

²⁶ RF Federal'nyi Zakon "Arbitrazhno-protsessual'nyi kodeks Rossiiskoi Federatsii" (24 June 2002) No.96-FZ, *Sobranie zakonodatel'stva Rossiiskoi Federatsii* (hereinafter "SZ RF") No.30 item 3012.

²⁷ This defense often is used by unscrupulous lawyers who initiate simultaneous ('collateral') legal action in a Russian court while the principal lawsuit is being considered in a foreign court (or arbitral tribunal). Russian legislation does not provide for injunctions (or other legal remedies) against such collateral actions; moreover, Russian courts cannot reject or suspend a lawsuit simply because the same case is being heard in a foreign jurisdiction. This explains the reason for commencing such simultaneous actions: they remain an efficient means with which to struggle against enforcement of foreign decisions. See Elliot Glusker, "Arbitration Hurdles Facing Foreign Investors in Russia: An Analysis of Present Issues and Implications", 10(3) *Pepperdine Dispute Resolution Law Journal* (2010), 595-622.

²⁸ Diana Tapola, "Analysis of Grounds for Refusal in Enforcement of Foreign Judgments in Russia", 18 *Mealey International Arbitration Report* (2007), 150-166.

²⁹ This rule is not explicitly fixed in an article of a procedural code; rather, there is only a general rule that each party is required to prove the circumstances to which it refers (Art. 65, RF *Arbitrazh* Procedural Code, *op.cit.* note 26). Yet, the courts abide by this position (the burden in *exequatur* cases is on the party resisting enforcement). As an example, one can cite the RF Supreme Commercial Court's Information letter (26 February 2013) No.156 (reproduced at <http://www.arbitr.ru/as/pract/vas_info_letter/82122.html>). Here, the court reproduces this rule (in section 3 of its letter) with reference to public order: if a party resists enforcement by arguing that enforcement would be contrary to public policy, this party shoulders the burden of proving that this would constitute a public-policy violation.

prohibited.³⁰ Furthermore, in Russian practice, it usually is the plaintiff who must provide all the relevant evidence so as to persuade the enforcement court that there are no procedural defects in the judgment which the plaintiff seeks to enforce. In determining the validity of one of the above-mentioned defenses, enforcement courts do not consider themselves bound by the facts established by foreign courts and may reconsider them.³¹ Thus, an enforcement procedure can turn into a new court battle.

As we have highlighted above and as RF court practice confirms, the reasons for refusing to recognize and enforce foreign decisions vary from the invalidity of an arbitration agreement and insufficient notification of a party, procedural defects and violation of public policy, to disputes that are not arbitrable abroad (e.g., registration or liquidation of Russian entities, registration of intellectual-property rights or rights to real property). Certainly, Russian courts are very particular about formalities, and often they refuse to enforce a decision on the grounds that the arbitration forum was not named precisely, because translated texts were not notarized in the required manner, because of defects in the apostille certifying foreign documents, and so forth. In reality, when deciding whether or not these formal omissions are material, judges usually enter into the matter of litigation and reassess the dispute from the standpoint of Russian law; namely, how a Russian court would rule on case with such procedural defects, and who would win the case there. It is of no small importance that there are no special judges or panels to render decisions regarding recognition and enforcement; these cases are considered by ordinary commercial-court judges who regularly adjudicate similar civil matters according to Russian legislation.³² One could conclude that, in such cases, judges are unable to withstand the psychological imperative to reconsider foreign judgments and awards on their merits through the lens of domestic law—even if such reconsideration formally cannot influence their decision on the matter of enforcement. That having been said, it is quite possible that such a personal reconsideration in fact could affect the judge's decision.

Another major issue in the recognition and enforcement of foreign arbitral awards and court judgments is the application of the *publichnyi poriadok* (public-policy) exception (*ordre public*) by Russian state courts. It is almost impossible to find a uniform interpretation of this exception, as it usually touches on issues subject to an entirely subjective assessment. Even if Russian courts are not formally allowed to go beyond the above-mentioned exclusive defenses and reconsider

³⁰ William R. Spiegelberger, "The Enforcement of Foreign Arbitral Awards in Russia: An Analysis of the Relevant Treaties, Laws and Cases", 16 *American Review of International Arbitration* (2005), 261-314.

³¹ The ban on reassessing a case on its merits does not clearly interdict an evaluation (within the scope of the defenses allowed against enforcement) of new facts which were not previously considered or even reconsideration of established facts in light of new-found facts.

³² Tatiana Neshataeva, "International Civil Procedure in the Russian Federation: Sources and Issues", 28(2) *Review of Central and East European Law* (2002-2003), 137-165.

a case on its merits (the rule of *res iudicata*), courts in many cases—under the guise of ‘public policy’—reevaluate the facts on which foreign decisions are based. It is indicative that the clause in the 1958 New York Convention dealing with public policy has, in Russian procedural codes, been transformed and expanded to include ‘sovereignty’ and ‘public safety’ as additional criteria. For example, according to Article 412(5) of the 2002 RF Civil Procedure Code: “The court refuses enforcement if execution of a foreign judgment can impair the sovereignty of Russia or endanger the safety of Russia or contradict the public policy of Russia.”³³ These days, courts almost never use the sovereignty argument explicitly; but, often, it is implied in the reasoning about public policy where judges mix the question of *ordre public* with that of national sovereignty and security.³⁴ *Ordre public* usually is translated into Russian as *osnovy pravoporiadka* (“the fundamentals of public law and order” or “the fundamental principles of Russian legislation”), if we follow the wording of the 1988 USSR Supreme Soviet Decree “On Recognition and Enforcement in the USSR of the Judgments of Foreign Courts and Arbitrations”,³⁵ which formally still remains in force inasmuch

³³ RF Federal’nyi Zakon “Grazhdanskii protsessual’nyi kodeks Rossiiskoi Federatsii” (11 November 2002), SZ RF No.46 item 4532.

³⁴ See Dmitry Davydenko and Eugenia Kurzynsky-Singer, “Substantive Ordre Public in Russian Case Law on the Recognition, Enforcement and Setting Aside of International Arbitral Awards”, 2(20) *American Journal of International Arbitration* (2010), 209-233. See, also, George Ginsburgs, “Execution of Foreign Arbitration Awards: The Heritage of Domestic Legislation, Bilateral Treaties and Intra-Comecon Entities”, in Albert J. Schmidt (ed.), *The Impact of Perestroika on Soviet Law*, in F.J.M. Feldbrugge (ed.), *Law in Eastern Europe*, No.41 (Martinus Nijhoff, Dordrecht, Boston, MA, London, 1990), 457 ff.; and William Simons, “The Enforcement of Foreign Arbitral Awards under Russian Law: The (Ab)use of the Public Policy Doctrine in Russian Courts”, in R. Clark, F. Feldbrugge, and S. Pomorski (eds.), *International and National Law in Russia and Eastern Europe: Essays in Honor of George Ginsburgs*, in William Simons (ed.), *Law in Eastern Europe*, No.49 (Martinus Nijhoff Publishers, The Hague, London, Boston, 2001), 373-474 (also published as “Ispolnenie reshenii inostrannogo arbitrazha: doktrina publichnogo poriadka v Rossii i za rubezhom”, in *Zivilisticheskie zapiski: Mezhdvuzovskii sbornik nauchnykh trudov*, No.4 (Institut chastnogo prava, Moscow and Ekaterinburg, 2005), 504-563).

³⁵ Ukaz Prezidiuma Verkhovnogo Soveta SSSR “O priznanii i ispolnenii v SSSR reshenii inostrannykh sudov i arbitrazhei” (21 June 1988) No.9131-XI, *Vedomosti Verkhovnogo Soveta* (1988) No.26 item 427. But note that *publichnyi poriadok* also is found in Art.1193 of the 1994 RF Civil Code. The 1994 RF Civil Code (30 November 1994) No.51-FZ with subsequent amendments, SZ RF (1994) No.32 item 3301, has been enacted in four parts (between 1995 and 2008). Art.1193 is contained in the third part (Sec.VI, Private International Law, chap.66 *et seq.*), which entered into force on 1 March 2002. The RF Civil Code has been translated into English in a number of publications; one is by Alexei N. Zhiltsov and Peter B. Maggs (transl.), *Civil Code of the Russian Federation (English and Russian editions)* (Infotropic Media, Moscow, 2010, 2nd rev. ed.).

In its early 2013 Information Letter (No.156. *op.cit.* note 29), the RF Supreme Commercial Court (SCC) published an overview of court decisions in which *ordre public* had been applied. In the Court’s letter, it cited the definition of *publichnyi poriadok* offered by a lower (unnamed) commercial court in a case (but, likewise, not naming any of the parties or the year in which the case had been heard in court) in which a foreign complainant had petitioned for enforcement of a foreign arbitral award, which claim however was resisted by the Russian corporate respondent. The lower court had characterized public policy (*publichnyi poriadok*) as “[...] fundamental legal grounds (principles) which possess the highest imperativity, universality, particular social and public importance and which comprise the bases of the foundation of the economic, political [and] legal system of the state” (*pravovye nachala*

as it does not contradict later legislation. The same formulation is reproduced in later Russian legislation and regulations.

In general, a violation of the public-policy rule is to be understood as a contravention of fundamental constitutional principles (see below). Nevertheless, RF courts sometimes apply this defense in cases involving major corporations that, if an enforcement decision were to go against them, might adversely affect the economic situation in a small town or even threaten national security. An example of this can be seen in the judgments of lower courts in the case of the Baltic Factory (*Baltiiskii zavod*) which were re-heard by the RF Supreme Commercial Court. In this case, in early 2009, the St. Petersburg Commercial Court had denied enforcement³⁶ of an arbitral award by the Stockholm Chamber of Commerce, *firstly*, on the grounds that enforcement would have threatened the strategic interests of the state; and that the possible insolvency of the Baltic Factory threatened a strategic industry controlled by the state and, consequently, that “it [would have caused] a nuisance [*ushcherb*] to the sovereignty and security of the state, thus contradicting the public order of Russia”. The St. Petersburg Court’s *second* argument was that the Swedish Chamber of Commerce had failed to observe the rules of Russian law which require that—if a transaction exceeds a certain maximum amount—each party must provide evidence that the respective board of directors has consented to said transaction. Two months later, the Northwestern Circuit Cassation Court³⁷ upheld the lower court’s ruling—although only on the basis of its second argument, rejecting the sovereignty argument. Only as a last resort did the RF Supreme Commercial Court allow enforcement, rejecting both arguments—about national sovereignty and about the applicability of Russian law to the case where an agreement signed by the Swedish plaintiff in the case (*Stena RoRo Ab*) first should have been approved by *Stena*’s board of directors. In the Supreme Commercial Court’s view, Russian law cannot regulate the internal procedures of a Swedish company, and national sovereignty does not depend on commercial contracts or civil liability.³⁸

The public-policy defense has also been used in Russian courts in order to place limits on liability. For example, in cases where an exorbitant amount

[printsipy], kotorye obladaiut vysshei imperativnost’iu, universal’nost’iu, osoboi obschestvennoi i publichnoi znachimost’iu i sostavliut osnovu postroeniia ekonomicheskoi, politicheskoi, pravovoi sistemy gosudarstva). While the 2013 SCC Information Letter repeats rather than expressly endorses the lower court’s public-policy language, the fact that this definition appears in the SCC Letter implicitly constitutes endorsement. At least, the widespread view of Russian lawyers is that if a clear principle—such as this one—is cited in a SCC letter, it signifies SCC approval of that which the Court has cited.

³⁶ *Stena RoRo Ab v. OAO “Baltiiskii zavod”*, Opreделение Arbitrazhnogo suda Sankt-Peterburga i Leningradskoi oblasti (20 February 2009), No.A56-60007/2008. Unless otherwise noted, all information related to cases from Russia’s commercial courts have been obtained from the website of the RF Supreme Commercial Court at <www.arbitr.ru>.

³⁷ *Stena RoRo Ab v. OAO “Baltiiskii zavod”*, Postanovlenie Federal’nogo Arbitrazhnogo suda Severo-Zapadnogo Federal’nogo okruga (24 April 2009) No.A56-60007/2008.

³⁸ *Stena RoRo Ab v. OAO “Baltiiskii zavod”*, Postanovlenie Vysshego Arbitrazhnogo suda Rossiiskoi Federatsii (13 September 2011) No.9899/09, in the appeal of case No.A56-60007/2008.

of interest has been added to a debt or where the punitive-damage (“*penia*” or “*neustoika*”) claim is far in excess of the proven value of goods or services in a dispute, Russian courts have intervened to reconsider judgments either fully or partially, referring to public policy when claiming that such excessive penalties are unacceptable in Russia. In fact, this sort of application of the *ordre public* clause constitutes a clear reassessment of the merits of foreign judgments.³⁹ It is noteworthy that that this understanding of public policy was reflected in a 2005 Information Letter of the RF Supreme Commercial Court⁴⁰ in which the Court declared that public policy implies, *inter alia*, “consistency with the public order based on the principles of equity, parity, fairness, proportionality of penalties to real damages and to the extent of intentional guilt”. In fact, it implies that

³⁹ Bezborodov and Rodionov justly remark that: “Public policy serves as the main ‘stumbling block’ regarding this issue. As judgments of foreign courts may not be contested on their merits, but only on formal indicia and on the basis of the violation of the principles of public policy, public policy is the only option for refusing to recognize and enforce the foreign judgment, and it is frequently used by Russian courts.” See Alexander Bezborodov and Nikita Rodionov, “Russia”, in Mark Moedritzer and Kay C. Whittaker (eds.), *Enforcement of Foreign Judgments 2012 in 28 Jurisdictions Worldwide* (Law Business Research Ltd., London, 2011), 97-102, at 102. The issue of the connection of punitive damages and public policy likewise is one which is debated in other jurisdictions; see, e.g., Csongor István Nagy, “Recognition and Enforcement of US Judgments Involving Punitive Damages in Continental Europe”, *NiPR* (2012) No.1, 4-11; and Peter Hay, “The Development of the Public Policy Barrier to Judgment Recognition Within the European Community”, 6 *The European Legal Forum* (2007), 289-294. A masterful analysis of this problem in the Russian jurisdiction is: Kathryn Hendley, Peter Murrell, and Randa Ryterman, “Punitive Damages for Contractual Breaches in Comparative Perspective: The Use of Penalties by Russian Enterprises”, (3) *Wisconsin Law Review* (2001), 639-679. For an analysis of French jurisprudence as another national example from the European Legal Space, see Benjamin W. Janke and François-Xavier Licari, “Enforcing Punitive Damage Awards in France After Fountaine Pajot”, 60(3) *American Journal of Comparative Law* (2012), 775-804.

Punitive damages are *de facto* recognized in Russian legal doctrine (so-called “*shtrafnaia neustoika*”, implicitly mentioned in Art.394 of the RF Civil Code, *op.cit.* note 34) and frequently applied by the courts. This doctrine also requires that judge must compare the amount of *neustoika* with the actual damages and reduce the *neustoika* if it evidently is disproportional (*iavno nesorazmerna*) with the actual damages. Under Art.333 of the RF Civil Code: “If a penalty [*neustoika*] is evidently disproportional with the consequences caused by failure to perform an obligation, the judge is entitled [*vprave*] to reduce the amount of the penalty”. This position is not at all coherent (one can infer from Art.333 that a penalty cannot exceed the amount of the damages although Art.394 allows for penalties in excess of damages) and fails to offer one any reasonable (let alone exact) criteria for assessment of “evident disproportionality”. It is a highly controversial issue, and delving into a more rigorous analysis would require a greater research effort than can be fit within the framework of this article.

⁴⁰ Informatsionnoe pis'mo Vysshego Arbitrazhnogo suda Rossiiskoi Federatsii, “Obzor praktiki rassmotreniia arbitrazhnymi sudami del o priznanii i privedenii v ispolnenie reshenii inostrannykh sudov, ob osparivanii reshenii treteiskikh sudov i o vydache ispolnitel'nykh listov na prinuditel'noe ispolnenie reshenii treteiskikh sudov” (22 December 2005) No.96, *Vestnik Vysshego Arbitrazhnogo suda Rossiiskoi Federatsii* (2006) No.3, para.29. Such information letters are instructions which are issued by the RF Supreme Commercial Court (and the RF Supreme Court) to the lower courts on various matters of interpretation or application of the laws. Unlike so-called “*pravovye pozitsii*” (legal positions) formulated in the Presidium's Rulings (*postanovleniia*) in particular cases or in the Presidium's acts of interpretation of the laws (*raz'iasneniia*)—which are binding on the lower courts in pursuance of Art.311 of the 2002 RF Code of Commercial Procedure—information letters do not formally have this binding force; nevertheless, they reflect the official position of the highest instance of this jurisdiction and, therefore, normally also are respected by commercial-court judges.

foreign courts adjudicating cases involving Russian defendants should keep in mind the standards of fairness, proportionality, etc. from Russian jurisprudence when rendering their damages awards. Here, the Court failed to recognize any distinction between the internal and international dimensions of public policy (see below). This position has long been followed by the lower courts. For example, a 2011 ruling of the Federal Commercial Court for the Northwestern Circuit held that a foreign decision can be considered contradictory to Russia's public policy when:

“During the execution of this decision, any illegal acts can be carried out, or any acts that endanger the sovereignty and security of the state can be performed, that affect the interests of large social groups and that are incompatible with the principles of the economic, political, and legal systems of the state, that affect the constitutional rights and freedoms of citizens, or that contradict the fundamental principles of civil law, such as the parity of parties, inviolability of property, and freedom of contract.”⁴¹

Public and private interests—along with international and domestic standards—are inappropriately mixed in this reasoning which, once again, demonstrates that Russian commercial courts have not fully abandoned the paternalist attitude of *Gosarbitrazh*, the former Soviet judicial system which adjudicated disputes among state enterprises in the Soviet period; now, this paternalism is exercised under the guise of defending sovereignty. The courts sometimes still reconsider private commercial disputes from the standpoint of public interests; in doing so, they extend ‘public interests’ to such circumstances and facts which normally are subject only to the discretion of private parties to a civil contract.⁴² Another strategy for using the public-policy clause to reassess a private transaction from the standpoint of the state's interests is to refer to broad philosophical categories, such as “social justice” (*sotsial'naiia spravedlivost'*) or “legal consciousness” (*pravosoznanie*). This logic is transparent in a 2013 Moscow Circuit Court judgment in which public order is defined as “those principles of the social order of the Russian state, a violation of which (also in cases of the execution of judgments of foreign courts and arbitration tribunals) could lead to a result that is inadmissible from the point of view of the Russian legal consciousness”.⁴³

Nevertheless, one also can see signs of a new, less statist approach in legal practice. A 2009 ruling of the Federal Commercial Court of the Moscow Circuit in the *Eric van Egeraat Associated Architects BV* case can serve as a good example.⁴⁴ Here, the defendant cited virtually unanimous judicial practice in Russia which

⁴¹ *Odffell SE v. OAO "PO Severnoe mashinostroitel'noe predpriiatie"*, Postanovlenie Federal'nogo Arbitrazhnogo suda Severo-Zapadnogo okruga (10 March 2011) No.A05-10560/2010.

⁴² See Antonio F. Perez, “The International Recognition of Judgments: The Debate Between Private and Public Law Solutions”, 19 *Berkeley Journal of International Law* (2001), 44-89.

⁴³ *Traviata Environmental Limited v. OAO "Rosgazifikatsiia"*, Postanovlenie Federal'nogo Arbitrazhnogo suda Moskovskogo okruga (1 July 2013) No.A40-16710/13-68-179.

⁴⁴ *Eric van Egeraat Associated Architects BV v. OOO "Kapital Group"*, Postanovlenie Federal'nogo Arbitrazhnogo suda Moskovskogo okruga (27 August 2009) No.A40/8155-09.

does not permit punitive damages to exceed the amount of the primary debt. The defendant's argument in this dispute was that excessive punitive damages are contrary to the doctrine of public policy in Russia,⁴⁵ which condemns such abuses of the law.⁴⁶ In *Eric van Egeraat*, the liquidated damages (1.47 million Euros) which had been awarded the plaintiff by a Swedish arbitration tribunal were almost three times the amount of the debt-claim at issue (517,000 Euros). The Moscow Federal Commercial Court rejected this argument of respondent Kapital Group and held that:

“The argument that the amount of awarded damages does not correspond to the principle of adequacy of civil liability, as a measure of the consequences of the breach, falls on the merits of the resolved case, and does not pertain to the grounds for refusal of recognition and enforcement of a foreign judgment [or] a foreign arbitral award.”⁴⁷

Thus, it seems that the Russian judiciary is beginning to distinguish more clearly between two different and independent conceptions of public policy in both its national (*ordre public interne*) and international aspects (*ordre public international*). Certain criteria for considering the reasonableness, justice or adequacy (*razumnost'*, *spravedlivost'*, *sorazmernost'*) of the recognition and execution of foreign decisions may, and probably must, be used by national judges when deciding whether or not to grant an *exequatur* in their country. But these criteria cannot be deduced from the principles of the national legal system since the judgments and awards to be executed come from external jurisdictions, where such principles (in this case Russian) are not, and must not, be mandatory.⁴⁸ It is evident that a foreign court decision stems from another jurisdiction with different rules, and to properly decide whether or not it can be executed in Russia (or in any other country for that matter), one needs criteria which would be above both foreign and domestic legal systems in question. This proposition implicitly is confirmed in Article

⁴⁵ This also is the case in many other countries with the civil-law system. FSee the references in fn. 38 above.

⁴⁶ The controversy about the nature of liquidated damages was the crucial issue of the *Eric van Egeraat* case. While the defendant argued that liquidated damages are punitive by their nature and, thus, incompatible with the Russian *ordre public*, the plaintiff insisted that liquidated damages are not entirely punitive. But even if they are, the plaintiff argued in the alternative that they would not contradict to the Russian *ordre public*, as there is no explicit ban on punitive damages in Russian legislation (in Art.10 of RF Civil Code, *op.cit.* note 34, there is only an interdiction of the abuse of law [*zloupotreblenie pravom*] which sometimes, but not always, has been interpreted by Russian courts as constituting a bar to punitive damages).

⁴⁷ *Eric van Egeraat*, *op.cit.* note 43. A similar position was confirmed in several later judgments, e.g., *Adecco AG v. OOO "Orglot"*, Postanovlenie Federal'nogo Arbitrazhnogo suda Moskovskogo okruga (19 April 2011) No.A40/3065-11; and *Borregaard Industries Ltd v. OAO "Vyborgskaia tselliuloza"*, Postanovlenie Federal'nogo Arbitrazhnogo suda Severo-Zapadnogo okruga (10 May 2011) No.A56-68936/2010.

⁴⁸ In the words of Benjamin N. Cardozo: “Our own scheme of legislation may be different. We may even have no legislation on the subject. That is not enough to show that public policy forbids us to enforce the foreign right. [...] We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.” *Loucks v. Standard Oil Co. of New York* (224 NY 99, 120 NE 198), available at <www.uniset.ca/other/pubpol/120NE198.html>.

1193 of the 1994 RF Civil Code. This provides that: “Refusal to apply norms of foreign law cannot be based solely on differences between the legal, political, or economical systems of the corresponding foreign state and the legal, political, or economical systems of the Russian Federation.”⁴⁹ In cases involving the recognition of foreign judgments, judges should deal rather with the doctrine of *international* public policy; this allows courts to reject foreign laws or judgments where they are considered contrary to fundamental international legal values.⁵⁰ Then, reassessment of foreign decisions on their merits—inevitable when considering these decisions from the standpoint of public policy—would take place in a more appropriate field: *i.e.*, that of international law. On the basis of *Stena RoRo Ab v. OAO “Baltiiskii zavod”*, one can presume that Russian judges have begun to distinguish between domestic public policy (the basic rules of the domestic legal order) and international public policy (the basic principles of international law), stressing that it is the latter that is relevant for *exequatur* cases.⁵¹

4. Normative Requirements and International Comity

As in many countries, in order to secure enforcement of a judgment rendered by a foreign court, Russian law requires that the judgment be formally recognized by a Russian court and that a writ of execution (*ispolnitel’nyi list*) be issued; in other words, that a procedure of *exequatur* (*ekzekvatura*) be fulfilled. The only exceptions to this rule are judgments rendered by courts of member states of the Commonwealth of Independent States (CIS); *i.e.*, countries of the former Soviet Union with the exception of Georgia and the Baltic states. These decisions are recognized without reference to special validation procedures—although enforcement still requires a domestic court to issue a writ of execution.⁵² For non-CIS countries, the general rule is that Russian courts only will recognize a judgment when it is supported by a relevant international treaty between Russia

⁴⁹ 1994 RF Civil Code, *op.cit.* note 34.

⁵⁰ See Alex Mills, “The Dimensions of Public Policy in Private International Law”, 4(2) *Journal of Private International Law* (2008), 201-236.

⁵¹ Another example of this approach can be seen in a 2011 ruling of the Federal Commercial Court of the Moscow Circuit in *OAO “VTB Bank” v. OAO “Finansovaia lizingovaia kompaniia”*, Postanovlenie Federal’nogo Arbitrazhnogo suda Moskovskogo okruga (12 May 2011) No.KG-A40/3936-11. Here, the cassation court reversed the decision of the lower court and allowed execution of the foreign award, reasoning that public policy implies “only such fundamental principles of law that possess universality, reveal their absolutely imperative character, and attest to their particular significance for all”.

⁵² “Soglashenie o poriadke razresheniia sporov, svyazannykh s osushchestvleniem khoziaistvennoi deiatel’nosti” (20 March 1992), *Vestnik Vysshego Arbitrazhnogo suda Rossiiskoi Federatsii* (1992) No.1; and “Konventsiiia o pravovoi pomoshchi i pravovykh otnosheniiakh po grazhdanskim, semeinym i ugovnym delam” (22 January 1993), *SZ RF* (1993) No.317 item 1472. Court decisions from countries which have ratified this treaty are valid *per se* and do not need to be *recognized* in the same way as do decisions stemming from other countries. However, in order to be *enforced*, decisions from treaty states nonetheless need a writ of execution (*ispolnitel’nyi list*) as do domestic decisions; for this, one needs to apply to the relevant court of law.

and the country in which the judgment was rendered. This is a simple application of will theory, where the state freely obligates itself—without any prejudice to its sovereignty—and the dualist theory of relations between international and domestic laws remains intact.

The first fact which needs to be established is that there are normative grounds for enforcement within Russia's legal system. Enforceability of a foreign decision depends on whether the judgment has been issued by a commercial arbitration tribunal or by a foreign state court. In the former case, the matter is more or less clear. Russia is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, pursuant to which international arbitral awards—while subject to limited defenses—are enforceable through local courts in signatory states in the same manner as domestic arbitral awards. Russia's main domestic legislation on international arbitration is its 1993 Law on International Commercial Arbitration, Article 35 of which states that "an arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced".⁵³

On the other hand, when a case involves execution of a judgment of a foreign court, several issues will arise where there are no relevant international treaties. On the other hand, when a case involves execution of a judgment of a foreign court, several issues will arise which are related to the absence of relevant international treaties. There is no single applicable convention governing the execution of the judgments of foreign courts (as, for example, the New York Convention does for commercial arbitration), and Russian law does not contain a definitive answer as to whether foreign judgments may be executed without a relevant bilateral treaty. This has led to controversies related to the limits of sovereignty and to the force and effect which other states' laws and legal orders may have in Russia.

One of the major reasons for this is that Russia has not signed the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. Consequently, when Russian courts are called upon to rule on an application to recognize and enforce a foreign judgment, the decision must be based on a bilateral treaty between Russia and the country in which the judgment was rendered. Clearly, things are easier where there is such a treaty: the Russian court only has to check certain formal aspects (such as due notification of the parties in the process, due form of legalization such as apostille, etc.)—which sometimes can become a material issue for a case, as suggested in the section 3 above—and then allow enforcement. Despite a lack of direct regulation, Russian courts also may recognize and enforce foreign court judgments on the basis of international comity and reciprocity, although there is

⁵³ RF Zakon "O mezhdunarodnom kommercheskom arbitrazhe" (7 July 1993) No.5338-I, *Rossiiskaia gazeta* (14 August 1993).

no established doctrine in Russia in this regard.⁵⁴ Furthermore, except for a single provision in the 2002 Bankruptcy law, there are no norms in Russia's domestic legislation which provide for international comity as a criterion for recognition.⁵⁵ This fact gives rise to the question of the respective force and effect of foreign judgments for the public agencies of another state, *e.g.*, judges and bailiffs in situations where Russia has not concluded a treaty with the relevant country. If we adopt the speculative language of Russian legal theory, then it is a question of delimiting the sovereign's state powers through the legal acts of foreign countries.

The traditional approach of Russian courts in enforcing foreign civil judgments has been to rely on Article 241 of the 2002 RF Commercial Procedure Code. This provides that judgments of foreign courts will be recognized and enforced in Russia where provided for "by international treaty of the Russian Federation and federal law".⁵⁶ There have been and still remain disputes around this formulation. Moreover, these disputes have been motivated by contradictory statements by Russia's Supreme Commercial Court. It should be noted here that a similar problem can be seen in the New York Convention: when signing this agreement, the Soviet Union made the reservation that it would apply the Convention only inasmuch as non-contracting states would grant reciprocal treatment.⁵⁷ Considering the fact that most countries are signatories to the Convention, however, there is no practical importance to this legal impediment with respect to issues pertaining to the execution of arbitral awards.⁵⁸

Until recently, Article 241 of the RF Commercial Procedure Code had been interpreted by the courts as precluding enforcement of foreign judgments in Russia in the absence of a reciprocal treaty for the enforcement of judgments with the particular state in which the judgment had been rendered. The literal meaning of this article is clear: no treaty, no law, no execution. This understanding matches the statist conception of law inherited by the Russian legal community

⁵⁴ See Gene M. Burg, "Comity in Cases Involving the Russian Element", Russian-American Symposium on Private International Law (29 April 2004), available at <<http://www.docstoc.com/docs/51079658/Comity-in-Cases-Involving-Russian-Element>>.

⁵⁵ The only law containing relevant rules on comity is Art. 1 of the 2002 RF Law on Insolvency (Bankruptcy), which establishes that judgments awarded in insolvency matters may be recognized and enforced in Russia based on the concept of reciprocity. RF Federal'nyi Zakon "O nesostoiatel'nosti (bankrotstve)" (26 November 2002) No.127-FZ, *SZ RF* (2002) No.43 item 4190.

⁵⁶ RF Federal'nyi Zakon "Arbitrazhno-protssessual'nyi kodeks Rossiiskoi Federatsii" (24 June 2002) No.96-FZ, *SZ RF* (2002) No. 30 item 3012.

⁵⁷ But as the Convention does not apply to judgments of foreign courts (only to those of arbitration tribunals), this argument is far from being convincing. Nevertheless, the principle of reciprocity constantly reemerges in legal debates about the execution of foreign judgments in Russia. Nikiforov notes that the idea of execution without a treaty—on the basis of international comity—has been discussed many times at the RF Supreme Commercial Court and even been included in draft bills on the Russian Civil Procedure and Commercial Procedure Codes. See Nikiforov, *op.cit.* note 2, 220-222.

⁵⁸ See Boris Karabelnikov and Dominic Pellet, "Enforcement of International Arbitral Awards in Russia: Still a Mixed Picture", 19(1) *ICC International Court of Arbitration Bulletin* (2008), 65-85.

from Soviet legal theory: one state, one law, no law without the state. If we stand on firm positivist grounds, such an approach should not surprise us; the extent of lawmaking and judicial force of the state is defined by its territory and delimits the sovereignty of the state. Thus, a foreign decision can be executed in a country only if this is expressly permitted by the authorities of the country in which execution is to be carried out. The question emerges as to whether these authorities have to be a legislative power that ratifies treaties or whether they can be a judicial power. In other words, are the courts also competent to rule on the admissibility of foreign legal acts in a given legal order? The position of the RF Constitutional Court on this matter (execution of foreign judgments without a bilateral treaty) was formulated in the 2007 *Adamova* case⁵⁹ in which the Court concluded that a decision of a foreign court does not have any legal consequences in Russia in the absence of a treaty between Russia and the state in which the decision was rendered. Thus, courts cannot enforce a decision in the absence of a treaty; this would go beyond the competence of the judiciary to change or introduce laws⁶⁰ and contradicts the separation of powers. The principles of comity and other principles of international law were held by the Constitutional Court to be irrelevant in this category of disputes.

The statist approach to this issue is based on the dualist concept of international law.⁶¹ Nevertheless, this dualist concept is becoming obsolete in a contemporary world which adheres more and more to a monist concept—implying that both domestic and international law constitute one system, thereby leading to one hierarchy of norms and principles.⁶² When a domestic norm contravenes the general norms and principles of international law, this norm must be overruled. This approach already has been enshrined in Article 15 of the 1993 RF Russian Constitution which states that “commonly recognized principles and norms of international law and international treaties of the Russian Federation shall be a component part of its legal system”.⁶³ This questions the correlation between the strict rules of Russian procedural codes (no treaty, no execution) and the principle of comity and reciprocity which is basic for international law— including respect for the official acts of other states and equal treatment for the acts of other states

⁵⁹ Opređenje Konstitutsionnogo Suda Rossiiskoi Federatsii “Ob otkaze v priniatii k rassmotreniiu zhaloby A.R. Adamovoi na narushenie ee konstitutsionnykh prav chast’iu 1 stat’i 409 Grazhdanskogo protsessual’nogo kodeksa Rossiiskoi Federatsii” (17 July 2007) No.575-O-O. Unless otherwise noted, all information related to cases from the RF Constitutional Court has been accessed on the Court’s website at <www.ksrf.ru>.

⁶⁰ In Russia, a treaty is ratified by adopting a federal law.

⁶¹ National and international law have different realms of competence and are not part of a single system.

⁶² Fiona De Londras, “Dualism, Domestic Courts, and the Rule of International Law”, in Mortimer Sellers and Tadeusz Tomaszewski (eds.), *Ius Gentium: The Rule of Law in Comparative Perspective* (Springer, Vienna, 2009), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1393293>.

⁶³ Konstitutsiia Rossiiskoi Federatsii (12 December 1993), *SZ RF* (1993) No.4 item 445.

as a response to the respect which those states pay to the acts of the concerned state. Also, from a legal standpoint, it is certainly not irrelevant that, on 24 June 1994, Russia entered into a Partnership and Cooperation Agreement with the European Union, whereby the Russian Federation obligated itself, among other things, to respect the legal acts of European countries.⁶⁴

During the past several years, Russian commercial courts have rendered several diverging decisions in this respect, upholding the principle of comity and allowing for execution in the absence of an international treaty. However, such cases remain quite rare⁶⁵ as compared with cases in which Russian courts have followed the formalist approach and have denied execution because of the lack of a bilateral treaty. Here we will cite two of the decisions upholding comity.⁶⁶ One is from a 2009 ruling of a three-judge panel of the RF Supreme Commercial Court: Justices Neshataeva, Babkin and Sarbash upheld decisions of lower-level RF commercial courts which had recognized a 2008 court judgment rendered in Dordrecht, The Netherlands.⁶⁷ Despite the absence of a Russian-Dutch treaty

⁶⁴ “Agreement on Partnership and Cooperation establishing a Partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part” (28 November 1997), *Official Journal* (1997) L 327, 3-69. However, Art.99 of the PCA (Partnership and Cooperation Agreement) provides that: “Nothing in this Agreement shall prevent a Party from taking any measures: 1. which it considers necessary for the protection of its essential security interests: [...]”.

⁶⁵ The exact percentage is unknown because of lack of the official statistics on this matter. To the best of our knowledge, there are only a few cases in which Russian courts have recognized foreign decisions under the principle of international comity; these cases are analyzed in the present article. See, also, footnote 19 above.

⁶⁶ A symbolic step was taken as early as in 2005 in the case of YUKOS, where the Moscow Commercial Court enforced the judgment of the High Court of England and Wales against YUKOS for breach of a credit agreement in the absence of a bilateral treaty. The basis for enforcing the foreign ruling was a reference to international comity. *Clifford Chance SNG Ltd et al. v. OAO “Nefianaia kompania YUKOS”*, *Opredelenie Arbitrazhnogo suda goroda Moskvy* (21 December 2005) No.A40-53839/05-8-388,). Since the texts related to this case have not (yet) been published on the official website (<www.arbitr.ru>) of the Moscow Commercial Court, see the following article in which details of the case are described: William Spiegelberger, Venera Kamalova, and Irina Sergeeva, “Russian Courts Enforce an English Money Judgment in the Absence of a Directly Applicable Treaty”, 19(2) *White & Case Dispute Resolution Newsletter* (2006), 4-5.

Courts also can broadly interpret the provisions of the relevant treaties to decide whether enforcement is possible, as happened in the above case (in the second instance). In its statement allowing execution of a judgment of the High Court of England and Wales against YUKOS, the lower court referred (along with citing the principle of comity) to the fact that there was a 1992 international treaty between Russia and Great Britain about equal court protection of commercial interests in both countries. In reversing the judgment, the cassation court argued that the treaty in question did not constitute sufficient grounds for enforcement in Russia since it dealt with general questions of legal protection, adding that its formulations also were vague. In the opinion of the cassation court, the law requires a specific treaty on mutual recognition and execution with clear and unambiguous wording. See Dmitrii V. Litvinskii, “Printsipy ‘vzaimnosti’ i ‘prava na sud’ v oblasti ekzekvatury na ispolnenie v Rossii inostrannykh sudebnykh reshenii: Postanovlenie Federal’nogo arbitrazhnogo suda Moskovskogo okruga ot 2 marta 2006 g.”, *Mezhdunarodnyi kommercheskii arbitrazh* (2006), 37-65.

⁶⁷ *Rentpool BV v. OOO “Pod”emnye tekhnologii”*, *Opredelenie Arbitrazhnogo suda Moskovskoi oblasti* (8 June 2009) No.13688/09, regarding case No.A41-9613/09, (upheld by the Cassation Court of the Moscow Circuit on 29 July 2009 and by the RF Supreme Commercial Court on 7 December 2009).

on recognition and enforcement, the Court reasoned that Russian judgments were enforceable in The Netherlands and that a number of them in fact had been enforced there. Under the principles of comity, the Supreme Commercial Court explained, the decision made by the Dutch court had to be executed in Russia. The wording of the decision placed particular emphasis on the fact that the Russian legal system could not tolerate a refusal to recognize and execute judicial judgments rendered by competent courts pursuant to valid legal norms, and this principle does not discriminate between domestic and foreign judicial judgments. In a similar finding in 2012, the Moscow Commercial Court also referred to the principle of international comity in its decision recognizing the judgment of an English court—again in the absence of a bilateral treaty.⁶⁸

5. Conclusions

Russian courts have shown an ambivalent attitude in relation to foreign dispute resolution, which perhaps is not surprising given that Russia only in the last few decades has opened itself up to both private enterprise and international commerce. This ambivalence, however, seems to be diminishing with time. Court doctrine is becoming more predictable, at least, insofar as there are several key rulings in this field—several of which have been collected in the above-mentioned 2013 Information Letter from the RF Supreme Commercial Court⁶⁹ along with a number of landmark cases which also have been decided in recent years.

The decisions in this landmark dispute—including an April 2013 decision by Justices Panova, Babkin and Sarbash denying an application from Pod'emnye tekhnologii Tsentr (apparently an affiliated entity to respondent Pod'emnye tekhnologii from the 2009 *Rentpool* case to whom the defendant had sold the contested assets) contending that the enforcement ruling of the Russian trial court (the Moscow Regional (*oblast*) Court) had distorted (*povlekle iskazhenie*) the 2008 Dutch court judgment and, also, one of August 2013 in which the Moscow Circuit Commercial Court returned the case to the lower Moscow Regional Court for another hearing—are reproduced at <<http://kad.arbitr.ru/Card/655043f7-6f6c-4ac4-95ef-ff2ce605263d>>.

The *Rentpool* case also has given rise to positive reaction in other quarters. See Charles R. Irish, "Making More of Russia's Tilt Towards Asia: Improving the Legal Environment for Broader Economic Cooperation Between the Russia Far East and Asia" (April 2013), reproduced at <<http://law.wisc.edu/profiles/pubs.php?iEmployeeID=146>>. Professor Irish writes:

"Within Russia, the good news is that the legal environment affecting domestic and foreign business enterprises is improving. [...] The 2009 decision of the Russian Supreme Arbitrazh Court also gives reason for optimism. [...] The *Rentpool B.V. Case* [...] may open the way for enforcement of foreign judgments from the United States, the United Kingdom, and many other countries."

⁶⁸ *Boegli-Gravures SA v. OOO "Darsail-ASP" and Andrei Pyzhik*, Opređenje Arbitrazhnogo suda goroda Moskvy (10 February 2012) No.A40-119397/11-63-950, (upheld by the Cassation Court of the Moscow Circuit on 19 April 2012, and by the Supreme Commercial Court on 26 July 2012).

Even if agreeing to apply the principle of comity, a court may reserve itself the right to reassess facts which show that Russian decisions are regularly and fairly executed in another country. Thus, in 2008, the Moscow City Commercial Court reasoned that it could allow execution if it were proven that the American courts systematically executed Russian decisions. See *Pan Am Pharmaceutical Inc. v. FGUP "RKNPK"*, Opređenje Arbitrazhnogo suda goroda Moskvy (29 April 2008) No.40-7480/08-68-127.

⁶⁹ *Op.cit.* note 34.

There are a number of indicators reflecting a changing mentality within the Russian courts—including confirmation by the Supreme Commercial Court of the power of commercial courts to freeze assets and grant other interim security measures in support of foreign arbitration proceedings.⁷⁰ Another example—the 2011 *State Registration of Rights* case—which illustrates this change quite clearly is a statement made by the Constitutional Court in reply to an inquiry from the Supreme Commercial Court about the possibility of enforcing awards issued in private commercial arbitration tribunals in cases dealing with rights to real property. All parties involved—including the RF Prosecutor-General, the Russian Land Registry,⁷¹ and the presidential representative to the Constitutional Court—agreed with the RF Supreme Commercial Court’s argumentation. This had insisted that arbitration courts could not decide on rights with regard to real estate, as such decisions would oblige the state (namely, the Russian Land Registry) to register rights established by non-state (arbitration) tribunals (*treteiskie sudy*). This would represent an infringement of the sovereignty of the state, inasmuch as state power would be subject to another power. Nevertheless, the Constitutional Court disagreed stating that arbitration tribunals can adjudicate issues related to real property for the simple reason that there are no formal interdictions in existing Russian legislation, and that sovereignty would not be infringed if the state cooperated with foreign and domestic arbitration tribunals.⁷² We should note here that—although the 2011 ruling of the RF Constitutional Court in the *State Registration of Rights* case only concerned domestic arbitration tribunals—these findings undoubtedly also will be of relevance in discussing enforcement of awards issued by foreign arbitration tribunals.

The frequent choice of foreign arbitration in Russia-based transactions shows that many transactions are likely to involve difficult and complex matters where domestic Russian courts are not as competent—and, therefore, probably not as impartial—as one would wish. From this perspective, it is vital to more fully understand not only particular specific court decisions on recognition and enforcement but, also, the legal mentality which underlies these decisions and the trend toward transforming this mentality in contemporary Russia. There are few “protective measures” (such as those suggested above by Chief Justice

⁷⁰ This confirmation can be seen in *Edimax Limited v. Shavla Chigirinskii*, Postanovlenie Vysshogo Arbitrazhnogo suda Rossiiskoi Federatsii (20 April 2010) No.17095/09, regarding case No.A40-19/09-OT-13.

⁷¹ The full name of this institution is the Federal Service of the Russian Federation for State Registration, Cadastre, and Cartography (*Federal'naia sluzhbba gosudarstvennoi registratsii, kadastra i kartografii*).

⁷² Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii po delu o proverke konstitutsionnosti polozhenii punkta 1 stat'i 11 Grazhdanskogo kodeksa Rossiiskoi Federatsii, punkta 2 stat'i 1 Federal'nogo zakona “O treteiskikh sudakh v Rossiiskoi Federatsii”, stat'i 28 Federal'nogo zakona “O gosudarstvennoi registratsii prav na nedvizhimoe imushchestvo i sdelok s nim”, punkta 1 stat'i 33 i stat'i 51 Federal'nogo zakona “Ob ipoteke (zaloge nedvizhimosti)” v sviazi s zaprosom Vysshego Arbitrazhnogo suda Rossiiskoi Federatsii (26 May 2011) No.10-P (with a concurring opinion by Justice Aranovskii).

Ivanov) which could improve Russians' attitude toward their judicial system without "paradigmatic shifts" in the legal mentality of the judiciary.⁷³ Several of the judicial acts which have been discussed in this chapter can be seen as an indication that the Russian judiciary has begun to reconsider basic theoretical conceptions about the nature of the law, its relation to the state, and about relations between international and domestic legislation.

⁷³ On 21 March 2013, United Russia deputies Mikhail Starshinov, Konstantin Chibko, and Ishrat Fakhritdinov signed a draft bill (No.243734-6, available at <<http://asozd2.duma.gov.ru/main.nsf/%28Spravka%29?OpenAgent&RN=243734-6&02>>). This proposes preventing Russian citizens and companies from applying to foreign courts by introducing strict civil liability for those who commence proceedings abroad—including in states the judgments of which are deemed to contravene the procedural rules set forth in Russian legislation with respect to jurisdiction. The bill would bring such proceedings under the competence of Russian courts. The Russian lawmakers initiating the bill justified their proposal on the basis of the notion that "intrusion into the competence of the Russian courts infringes Russia's state sovereignty". At the time of this writing (fall 2013), the future of this draft bill remains unclear (although, in the present author's opinion, it will be rejected since it contravenes international law). However, we believe that is symptomatic of the ongoing debates concerning the protection of sovereignty and court jurisdiction.

A similar trend also can be observed in the US: "Beginning in 2010, legislators in half of the US states proposed—and in two states adopted—a series of bills or state constitutional amendments designed to restrict the use of international law and foreign laws by state (and sometimes federal) courts." Aaron Fellmeth, "International Law and Foreign Laws in the US State Legislatures", 15(13) *American Society of International Law Insights* (2011), reproduced at <<http://www.asil.org/insights110526.cfm>>.