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Dear Russia/Eurasia Committee Members,

Welcome to the Spring issue of our Committee Newsletter. In this issue, we are pleased to bring to you the following articles:

- **Daniel J. Rothstein**, *An Introduction to Enforcement in Russia of Foreign Arbitral Awards, and Barriers to Entry to American Courts*;
- **Maria Grechishkina**, *The Hague Service Convention of 1965: Pitfalls on the Road of Effective Service of Judicial Documents in Russia*;
- **Olena Kibenko**, *E-Shops in Ukraine: Legal Framework*;
- **Paul Jones**, *Typo-Squatting in Two Alphabets: "Luxoil" and "Лукойл" – A Competition Law Matter?*; and
- **Sergey Budylin**, *Khodorkovsky Trial: Who Is the Crime Victim?*

As you enjoy these insightful and informative articles, please consider joining your colleagues who have written for this issue by sending us your observations and analysis about the law, law practice, and other law-related matters in Russia and Eurasia. We have a diverse and talented membership, and our Newsletter offers us the opportunity to keep each other informed about developments that matter to us.

We have a new Newsletter Editorial Board: Katya Gill, Sergey Budylin, Paul Jones, Daniel Rothstein, Elena Helmer, and Christopher Kelley. This Board stands ready to assist you in helping to continue to bring timely and informative articles to our award-winning Newsletter. We depend on you for our articles. Please let us know when you have an article ready for publication or have an article in mind. Several of you are already working on articles for our next Newsletter, and we are eager for more. We are looking forward to your article.

We also encourage you to make plans to attend the **Resolution of Russia-Related Business Disputes: The Next Wave Conference** in Moscow on September 21, 2009, at the Moscow Marriott Grand Hotel. This Conference, which is being sponsored by the Section of International Law and our Committee, will bring together members of the global legal community for a full day of informative and substantive programs presented by world-class experts, followed by a reception at Spaso House. Topics will include:

- Arbitration in Russia: The Current State of Play and Prospects for the Future;
- Investment Treaty Arbitration: A Strategic Option or Legal Defense?;
- Russians Abroad: The Experience of Russian Companies in Foreign Litigation and Arbitration; and
- Related Civil and Criminal Proceedings in Russia.

This will be an impressive, “must attend” event. We will be updating you on registration information soon, but now is the time to add this conference to your fall plans. You can find the program flyer at: <http://www.abanet.org/intlaw/docs/MoscowFlyerFINAL.pdf>.

In addition to encouraging you to attend our Moscow conference, we are pleased to announce that the fourth **CIS Local Counsel Forum** will take place in Kyiv, Ukraine, on June, 24-26, 2009, at the Opera Hotel. The Forum will be hosted by RULG-Ukrainian Legal Group and is being cross-promoted by the ABA Section of International Law. Registration is now open at <http://www.rulg.com/cisforum/registration.asp>.

The inaugural CIS Local Counsel Forum was held in Kyiv in June 2006, hosted by RULG-Ukrainian Legal Group, and was the first ever wide-scale meeting of the international legal community with the best Local Counsel law firms from the CIS economic region (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan). Since then, the CIS Forum has evolved into an informal network of managing and senior partners of CIS and international law firms, meeting annually in different venues chosen by the Delegates. The second Forum was successfully held in Baku in June 2007, hosted by the prominent Azeri law firm Fina LLP. The third Forum was hosted by the leading Russian law firm of Egorov Puginsky Afanasiev & Partners in June 2008 in St. Petersburg.

The draft program of the fourth CIS Local Counsel Forum is posted on the Forum’s website, http://www.rulg.com/cisforum/forum_program.asp, where additional information will be posted as preparations progress. Attending both conferences—Moscow and Kyiv—will be an excellent opportunity for you to renew your friendships with Committee members and to broaden your network in Russia and Eurasia.

You should not forget two upcoming ABA events, the 2009 ABA Annual Meeting to be held in Chicago, IL July 31 – August 2, and the 2009 Section of International Law Fall Meeting in Miami Beach, FL, October 27 - 31. Both events will offer a variety of educational programs and networking opportunities. Also, program proposals are now being accepted for the 2010 Section of International Law Spring Meeting in New York. If you are interested in submitting a program proposal, please send it to Yulia Andreeva at yandreeva@debevoise.com no later than June 15, 2009.

We look forward to seeing you at one of the upcoming events!

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

AN INTRODUCTION TO ENFORCEMENT IN RUSSIA OF FOREIGN ARBITRAL AWARDS, AND BARRIERS TO ENTRY TO AMERICAN COURTS¹

Daniel J. Rothstein

I. Introduction

Since the large-scale entry of foreign businesses into the Russian market in the early 1990s, the normal practice for foreign parties to international business deals in Russia has been to provide, when possible, for dispute resolution to take place outside of Russia and to be governed by other than Russian law. The main reasons for this are fears that Russian commercial law is undeveloped, and that Russian legal institutions are inexperienced in commercial matters, biased in favor of local parties, susceptible to political influence, or corrupt.²

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 Russia³ 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;⁴ 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.⁵

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.⁶ 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.⁷

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.⁸ 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.⁹

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."¹⁰

The Supreme Arbitrazh Court's discussion of this case, which is only three pages long,¹¹ 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.¹²

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."¹³ 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.¹⁴

The Court also noted that the penalty was not disproportionate to the effects of the breach.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.¹⁶

Although the Supreme Arbitrazh Court ultimately upheld the arbitral award in *Joy-Lud*, the Court’s repeated, in-depth examination of the substance of the award does not send a clearly pro-arbitration message. In its 2006 decision, the Court’s reliance on the similarity between Swedish and Russian law governing contractual penalties raises a question as to whether the Court would have refused to enforce the award on public policy grounds (i) if Swedish and Russian law were not similar, or (ii) if the Court had considered the penalty disproportionate to the breach of contract. (As noted above, the Court found the penalty proportionate.) Also, the 2006 decision’s reference to the equality of Russian and foreign litigants sounds gratuitous, creating the impression that upholding an award for a foreign party is an important occasion, and by implication perhaps an exception.

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

2. Exclusion of Subject Matter from Arbitral Jurisdiction

Under Russia’s Law on International Arbitration, the subject matter of international commercial arbitration is limited to “disputes resulting from contractual and other civil law relations.”¹⁷ Russia’s law on domestic arbitration contains a similar limitation.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.¹⁹

The Supreme Arbitrazh Court has interpreted these provisions as excluding disputes over real estate rights from arbitral jurisdiction. For example, *Information Letter No. 96* discussed a domestic arbitral award that upheld the claimant’s contractual right to purchase a building. Specifically, the award “recognized the [claimant’s] ownership right” and “required the state registration agency to register that right.” The claimant’s application to enforce the award was denied, because replacing the owner of real estate in the state registry is a matter of “public and administrative law relations,” and thus not the subject of “contractual and other civil law relationships” which are the only permissible subject matter of arbitration, as noted above.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.”³¹

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.³² 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,³³ or remedies under the securities laws.³⁴ 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.³⁵

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*,³⁶ remanded by the appellate court for reconsideration of the *forum non conveniens* issue,³⁷ and dismissed by the trial court for lack of subject-matter jurisdiction,³⁸ 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,³⁹ 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.”⁴⁰ 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.”⁴¹ 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.⁴²

1. “General” Personal Jurisdiction

In *Archangel Diamond Corp. v. Lukoil*,⁴³ 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."*⁴⁴ 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*,⁴⁵ 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*,⁴⁶ 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.⁴⁷ 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."⁵⁸ 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,"⁵⁹ and that corruption has become a "way of life" in Russia.⁶⁰ 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.⁶¹ 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*,⁶² 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."⁶³

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.⁶⁴

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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¹ Reprinted with permission from *International Law Practicum*, Autumn 2008, Vol. 21, No. 2, published by the New York State Bar Association, One Elk Street, Albany, NY 12207.

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

³ Aleksandr Vaneev, *Recognition and Enforcement of Decisions of Foreign Courts in Russia* (in Russian), KORPORATIVNYI IURIST, No. 3, p. 39 (2007).

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.

⁵ *Inside Russia's Arbitration Bar*, GLOBAL ARBITRATION REVIEW, Vol. 3, Issue 2 (2008).

⁶ Vaneev, note 2 *supra*, at 40-41.

⁷ See Diana V. Tapola, *Enforcement of Foreign Arbitral Awards: Application of the Public Policy Rule in Russia*, 22 ARBITRATION INT'L 151 (2006).

⁸ *Information Letter of the Russian Federation Supreme Arbitrazh Court No. 96* (hereinafter “*Information Letter No. 96*”), Dec. 22, 2005, available in Russian at www.arbitr.ru. For comprehensive discussions of practice before *Information Letter No. 96*, see William Spiegelberger, *The Enforcement of Foreign Arbitral Awards in Russia: An Analysis of the Relevant Treaties, Laws, and Cases*, 16 AM. REV. INT’L ARB. 261 (2005); and Kaj Hobér, ENFORCING FOREIGN ARBITRAL AWARDS AGAINST RUSSIAN ENTITIES (1994).

⁹ Boris Karabelnikov, *The Supreme Arbitrazh Court of the Russian Federation Does Not Trust Foreign Arbitration* (Parts I and II) (in Russian), KORPORATIVNYI IURIST, No. 4, p. 51, No. 5, pp. 43, 46 (2006).

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.

¹³ Evgeny Rashevsky, *Public Policy, Arbitrability, and Enforcement*, in 3 GLOBAL ARB. REV., Issue 2, p. 29 (2008).

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.

²¹ *OAO Moskva-Krasnye Kholmy v. ZAO Hewlett Packard*, Case No. KG-A40/83370-07 (Federal Arbitrazh Court, Moscow Circuit, Sept. 3, 2007), reported in MEZHHDUNARODNYI KOMMERCHESKII ARBITRAZH, No. 1, pp. 158-64 (2008).

²² *Information Letter No. 96*, Section 28.

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

²⁴ MEZHHDUNARODNYI KOMMERCHESKII ARBITRAZH, No. 3, p. 98 (2007).

²⁵ *Janow Properties Ltd. v. IPOC Int’l Growth Fund Ltd.*, Case No. F04-2109/2005 (14105-A75-11) (Federal Arbitrazh Court, Western Siberia Circuit, March 31, 2006).

²⁶ Arbitrazh Procedure Code, Art. 248.5.

²⁷ Dmitri Davydenko and Aleksandr Muranov, *Issues of Recognition and/or Enforcement of Foreign Decisions in Russia* (in Russian), KORPORATIVNYI IURIST, No. 3, pp. 42, 46 (2007).

²⁸ Spiegelberger, note 7 *supra*, at 263.

²⁹ 407 U.S. 1 (1972)

³⁰ 407 U.S. at 12-13.

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 Techsnabexport*, 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.

³⁴ For a historical survey of American hostility to choice of foreign forums, foreign law, and arbitration, and a discussion of post-*Bremen* treatment of public policy objections to application of foreign law, see James T. Brittain, Jr., *Foreign Forum Selection Clauses in the Federal Courts: All in the Name of International Comity*, 23 HOUSTON J. INT’L L. 305 (2001).

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

³⁶ 304 F.Supp. 2d 570 (S.D.N.Y. 2004).

- 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-Ceco Corp.*, 84 F.3d 560, 567 (2d Cir. 1996).
- ⁴⁰ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).
- 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).
- ⁴⁶ 98 N.Y.2d 238 (2002).
- ⁴⁷ *Norex Petroleum Ltd. v. Access Industries, Inc.*, 540 F. Supp. 2d at 442.
- 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. *Wima v. Royal Dutch Petroleum Co.*, 2002 WL 319887 (S.D.N.Y. 2002).
- ⁴⁹ See, e.g., *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474 (1984).
- ⁵⁰ See, e.g., 3 Weinstein, Korn, Miller, NEW YORK CIVIL PRACTICE, Section 327.02; *Kinney Sys., Inc. v. Continental Ins. Co.*, 674 So.2d 86 (Fla.1996).
- ⁵¹ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981).
- 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.
- ⁵⁵ *Mercier v. Sheraton Int'l, Inc.*, 981 F.2d 1345 (1st Cir. 1992).
- ⁵⁶ 253 F. Supp. 2d at 708-09.
- ⁵⁷ *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1084 (S.D. Fla. 1997).
- ⁵⁸ PRIME-TASS, Jan. 22, 2008 (in Russian), <http://www.vedomosti.ru/newsline/index.shtml?2008/01/22/536208>
- ⁵⁹ *Medvedev Orders Cleanup of Courts*, THE MOSCOW TIMES, May 21, 2008
- ⁶⁰ *Kremlin to Cede Power to Fight Graft*, THE MOSCOW TIMES, July 3, 2008.
- ⁶¹ *A Litmus Test for the Rule of Law*, THE MOSCOW TIMES, June 7, 2008.
- ⁶² 94 N.Y.2d 541 (2000).
- ⁶³ *Id.* at 551.
- ⁶⁴ *In re Yukos Oil Co.*, 321 B.R. 396, 399, 411 (Bankruptcy Ct., S.D. Tex. 2005). For a discussion of the Texas bankruptcy case and other Yukos proceedings, see Dmitry Gololobov and Joseph Tanega, *Yukos Risk: The Double-Edged Sword—A Case Note on International Bankruptcy Litigation and the Transnational Limits of Corporate Governance*, 3 N.Y.U. J. LAW & BUS. 557 (2007). Gololobov is the former Yukos general counsel.
- ⁶⁵ *In re Yukos Oil*, 321 B.R. at 411.

**THE HAGUE SERVICE CONVENTION OF 1965:
PITFALLS ON THE ROAD OF EFFECTIVE SERVICE OF
JUDICIAL DOCUMENTS IN RUSSIA**

Maria Grechishkina

INTRODUCTION

The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters concluded on November 15, 1965 (the “Convention”) marked a significant step towards facilitation of international service. The Convention allows a number of ways for service of judicial and extra-judicial documents on parties located outside the originating country.

In furtherance of ratification of the Convention, member states adopted reservations, implemented relevant internal procedures, and appointed central authorities. However, disparate views on the operation of the Convention have introduced inefficiencies. In particular, procedures and reservations placed by the United States and Russia have paralyzed the effectiveness of the Convention between the two countries.

The article analyzes the advantages of the Convention in comparison to its less developed predecessors. The article also explores the current status of the Convention as applied to Russia and the U.S., identifies the issues underlying the existing dispute, and looks into possible ways for the litigants to proceed under the circumstances.

I. Legal Import of the Hague Service Convention.

The Convention regulates the same relations as the “basic” Hague Convention of March 1, 1954 on Civil Procedure (“1954 Convention”)¹. With no common law countries participating in the 1954 Convention, the drafters of the Convention were seeking to accommodate the civil law countries of continental Europe and the common law countries. This was a challenging task since the national laws governing the service of process in countries like the U.K. and the U.S. were very different from the practice existing in continental Europe.

The advantages of a country being party to the Convention are obvious – the Convention lays out a variety of avenues for service which both simplify and expedite process. Also, the number of countries party to the Convention is greater than any other convention dealing with similar matters.

Initially, it was hard to exaggerate the legal importance of Russia’s and the United States’ participation in the Convention - there were no previous treaties on service in civil and commercial matters between the United States and Russia besides a narrow agreement concluded by the exchange of notes between the Soviet Union and the United States Ambassador in Moscow in 1935 which will be discussed below.²

II. Service under the Convention.

As set forth above, the prime goal of the Convention was facilitation and expediting of the delivery of the judicial (and extra-judicial) documents. The main innovation introduced by the Convention was appointment of a Central Authority by each participating country. Article 2 of the Convention provides:

Each Contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other Contracting States and to proceed in conformity with the provisions of Article 3 and 6.

Each State shall organize the Central Authority in conformity with its own law.

The requests for service are to be forwarded to the Central Authority by a “forwarding authority” - an authorized body in the originating state. The authorized bodies are to be determined by the country of origin. Pursuant to Article 3 of the Convention, there is no requirement that the documents be legalized or apostilled. Article 18 of the Convention allows appointment of more than one Central Authority.

The Convention also allows a Contracting State to effect service through diplomatic or consular agents. However each contracting state, in accordance with the Article 8 of the Convention, can object to such service in its territory, except in cases when the service is being performed on citizens of the state of origin.

In addition, pursuant to Article 10 of the Convention, if the state where the recipient is located does not object, service can be done by mail or through authorized representatives of the addressed country. Specifically, Article 10 provides:

Provided the State of destination does not object, the present Convention shall not interfere with –

- a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
- b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
- c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

The practice of service of judicial documents directly through judicial officers, officials or other competent persons of the State of destination complies with the procedure existing in common law countries; however in many civil law European countries this way of service is not commonly used.

III. Russia’s Accession to the Convention and Russia’s Fee Dispute with the United States.

The Convention was ratified and became effective as to Russia on December 1, 2001.³ By this point in time, the Convention had been valid for over 18 years as to the United States. More than 2 years passed after ratification by the Russian Federation before a Central Authority was appointed pursuant to Article 2.⁴ The Ministry of Justice was designated to act as the Central Authority. Further, the Russian Federation restricted its participation by filing reservations in 2004 regarding certain aspects of the treaty.⁵ In the Reservation Declarations, *inter alia*, Russia objected to any means of service, such as service by mail under Article 10, other than service through Central Authority.

By submitting its Reservation Declarations, Russia excluded the possibility of service through diplomatic or consular agents, stating that: “Pursuant to Article 8 of the Convention, diplomatic and consular agents of foreign States are not

permitted to effect service of documents within the territory of the Russian Federation, unless the document is to be served upon a national of the State in which the documents originate.” The United States also objected to this way of service declaring that “service of process and legal papers is not normally a U.S. Foreign Service function, except when directed by the U.S. Department of State, officers of the U.S. Foreign Service are prohibited from serving process or legal papers or appointing others to do so.”⁶

Between October 28 – November 4, 2003, a Special Commission on the Practical Operation of the Hague Service, Evidence and Legalization Conventions convened at the Hague. The Special Commission issued Conclusions and Recommendation in part dealing with fees for services rendered under the Convention,⁷ which provide:

The Special Commission reaffirmed that according to Article 12(1), a State party shall not charge for its services rendered under the Convention. Nevertheless, under Article 12(2), an applicant shall pay or reimburse the costs occasioned by the employment of a judicial officer or other competent person. The Special Commission urged States to ensure that any such costs reflect actual expenses and be kept at a reasonable level.

On June 1, 2003, the United States introduced a fee for all requests for service from any foreign country, including those submitted under the Convention.⁸ The Russian Federation did not support the Special Commission Recommendation and reserved its position in September 2004 refusing to grant request for service received by the Russian Central Authority, when the request was coming from the countries charging fees for serving according to the Convention, including the United States. Specifically, the Russian Reservation Declaration provides:

The Russian Federation assumes that in accordance with Article 12 of the Convention the service of judicial documents coming from a Contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed. Collection of such costs (with the exception of those provided for by subparagraphs a) and b) of the second paragraph of Article 12) by any Contracting State shall be viewed by the Russian Federation as refusal to uphold the Convention in relation to the Russian Federation, and, consequently, the Russian Federation shall not apply the Convention in relation to this Contracting State.

Due to this unresolved fee dispute, the Convention is now an ineffective way of service from the U.S. to Russia.⁹ Despite various bilateral meetings, this dispute remains unresolved. This is of substantial significance given that there is no controversy after 1988 the U.S. Supreme Court decision in *Volkswagenwerk Aktiengesellschaft v. Schlunk*, (486 U.S. 694 (1988) that when service is to be made in a foreign country that is a party to the Convention, the Convention is, though non-mandatory, but exclusive means of service.”¹⁰

IV. The Current Status of Processing the Requests for Service between the U.S. and Russia.

In addition to the Convention, there is an Agreement between the Union of Soviet Socialist Republics and the United States of America on Procedure for Execution of Court Requests of 22 November 1935 effected through the exchange of diplomatic notes (the “1935 Agreement”). On January 13, 1992, shortly after the break-up of the Soviet Union, the Russian Federation issued the Note to the Heads of Diplomatic Representations in Moscow which stated that Russia will “continue to perform the rights and fulfill the obligations following from the international agreements signed by the Union of the Soviet Socialist Republics” and requested that the Russian Federation be considered a party to all international agreements in force instead of the U.S.S.R.

Further, in the course of the January 2007 St. Petersburg Seminar on the Convention, Russia was requested to provide a list of binding bilateral or multilateral agreements (other than the Convention) which apply to cross-border. Russia listed the 1935 Agreement as a valid and binding bi-lateral treaty.¹¹ Thus, this 1935 Agreement is binding upon the Russian Federation.

Pursuant to the 1935 Agreement, service of a Summons and Complaint by a litigant in a United States court is proper in Russia only if it is accomplished by means of a letter rogatory. Pursuant to the 1935 Agreement, the service of U.S. judicial documents are to be sent through the diplomatic channels, *i.e.* through Ministry of Foreign Affairs to the appropriate court,¹² accompanied by Russian translation. The Russian court then shall give effect to the requests in accordance with its procedural rules. When executed, requests are to be returned through the same channel. Interestingly, Russia charges fees from \$5 to \$10 for execution of the letters rogatory issued out of courts of the U.S. (and sometimes other fees) payable by the U.S. Embassy upon receipt of executed letters rogatory.

In practice, the 1935 Agreement is not a working agreement. According to the U.S. Department of State, Russia has suspended all judicial cooperation with the United States in civil and commercial matters. The Russian Federation refuses to serve letters of request from the United States for service of process presented under the terms of the Convention or to execute letters rogatory requesting service of process transmitted via the diplomatic channel. According to the U.S. Department of State all the requests submitted to the Russian Federation via diplomatic channels are returned unexecuted.¹³

V. ALTERNATE MEANS OF SERVICE.

The U.S. Department of State suggests that litigants might explore service by an agent in the Russian Federation, such as a Russian attorney, who may execute an affidavit of service at the U.S. Embassy or a U.S. Consulate in Russia as a routine notarial service.¹⁴ However, given Russia's reservations to the Convention, it is hard to conclude that such service would be legally effective in Russia. Rather, it seems that this would be a direct infringement on Russia's sovereignty to attempt to affect service in this matter within its borders. Rather, a sounder approach may be to obtain orders from a U.S. court permitting alternative service within the territory of the United States, such as by service on a person deemed to be an agent of the Russian party, *i.e.* a subsidiary of a Russian company, or by publication in widely circulated media or on websites which are likely to provide notice to the Russian party.

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¹ Hague Convention on Civil Procedure concluded March 1, 1954, entered into force April 12, 1957. Soviet Union, and subsequently Russian Federation, is a party to the Hague Convention on Civil Procedure.

² Pursuant to Article 24 and 25 of the Hague Service Convention, any supplementary agreements between countries-parties to the Hague Convention on Civil Procedure of 1954 are applicable to the Hague Service Convention and do not interfere with international agreement to which the contracting states are parties to and which deal with the issues same or similar to those regulated by the Hague Service Convention.

³ See Federal Law dated February 12, 2001 No. 10-FZ "On Accession of the Russian Federation to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters."

⁴ See Decree of the President of the Russian Federation dated August 24, 2004 No.1101 "On the Central Authority of the Russian Federation under the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters."

⁵ See http://www.hcch.net/index_en.php?act=status.comment&csid=418&disp=resdn for the complete text of the “Reservation Declarations” posted by the Russian Federation in regard to the Hague Service Convention.

⁶ U.S.’s Response to “Questionnaire of July 2008 Relating to the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters.”

⁷ For the full text of the Special Commission’s Conclusions and Recommendations of November 4, 2003. See http://hcch.e-vision.nl/upload/wop/lse_concl_e.pdf.

⁸ http://travel.state.gov/law/info/judicial/judicial_3831.html

⁹ According to information posted with the Hague Conference on Private International Law by the United States, there are instances when service originating from Russia under the Convention is effected in the United States.

¹⁰ <http://hcch.e-vision.nl/upload/wop/2008usa14.pdf>

¹¹ See http://www.hcch.net/upload/quest14_ru2007e.pdf

¹² In practice, upon receipt of a request from a foreign state, the Foreign Ministry sent the request to the Ministry of Justice of the Russian Federation. The Ministry of Justice further sent the request to the appropriate court.

¹³ Our firm has independently obtained a response from the U.S. Department of State to this effect

¹⁴ http://travel.state.gov/law/info/judicial/judicial_3831.html

E-SHOPS IN UKRAINE: LEGAL FRAMEWORK*

Olena Kibenko

Electronic commerce, as one of the new forms of conducting business, is currently experiencing substantial growth worldwide and in Ukraine. On-line shopping is one of the most widespread forms of e-commerce. E-shop is a website with a catalog of products and a shopping cart. When browsing through the catalog, a web surfer can order a product and place it in his/her shopping cart. A system of on-line payments can be used to pay for the order, as well as bank/post remittance or cash on delivery payments.

ON-LINE SHOPPING IN UKRAINE: A BRIEF OVERVIEW

The development of e-shopping in Ukraine is directly related to the increase of Internet users in the country. That number increases every year. According to the data from BIGMIR report (http://i.bigmir.net/index/UAnet_global_report_102008.pdf), in October of 2008 the number of Internet users in Ukraine per month reached 10,164,517. The leader in that index is the Kiev Region (58.96%). Today Ukraine is included in the list of the 15 countries with the fastest development in the area of communication technologies (Global Information Technology Report 2007–2008).

There is no reliable statistics data about the quantity of existing Internet-shops in Ukraine. According to the data from BIGMIR, in January of 2008 there were 3,168 Internet-shops in Ukraine, the majority of which were located in Kiev. Some Internet-shops are established by private entrepreneurs (individuals registered as entrepreneurs by the State Registrar) or small companies; however, almost all big retailers have presence on the Internet. An interesting fact: the most popular Internet-shops abroad are the branches of regular retailers; meanwhile, in Ukraine pure online shops are more successful.

According to the GEMIUS Report Ukraine conducted in 2007¹, nearly one third of Internet users from Ukraine use online stores or auction portals as a place for purchasing various goods. Despite the high dynamics in the retail sales structure of Ukraine, Internet shopping occupies less than 0.4% of all retail sales. In the United States, for instance, this figure is more than 2%.

LEGAL FRAMEWORK

1. General Legislation on Trading

Unlike in the countries that have separate regulations on e-commerce, in Ukraine e-commerce is regulated by the same legislation as traditional trade. That is why many issues are left unregulated and unresolved.

Sale of goods via e-shops is a form of business activity, and it must be legalized in the established order. Thus, the owner of the e-shop must be registered as a business entity with a number of state agencies and funds, and obtain all required permits and licenses - depending on the types of commercial activity. In order to evade the rigid rules of the Ukrainian legislation, some businessmen prefer to register their companies abroad. But according to s. 2.3.3 of the On the Value Added Tax Act of Ukraine of April 3, 1997 No.168/97-BP, an entity is obligated to register as a Value Added Tax Payer, if it delivers products (renders services) within the customs territory of Ukraine via global or local computer networks, whereas a non-resident may implement such an activity only via its permanent representation office registered in Ukraine.

According to the Order of the Ministry of Economy and European Integration of Ukraine on the Rules on Sales of Ordered Goods and Sales of Goods Outside of Retail or Office Facilities of April 19, 2007 No.103, an agreement concluded via the Internet is defined as a distant agreement. The Rules stipulate that the business entity that concludes

distant agreements must comply with the requirements of the On Safety and Quality of Food Products Act of Ukraine of December 23, 1997 No.771/97-BP, On Sanitary and Epidemiological Welfare of Population Act of Ukraine of February 24, 1994 No.4004-XII, On Consumers Rights Protection Act of Ukraine of May 12, 1991 No.1023-XII, On Use of Registers of Accounting Operations in Retail, Public Catering and Services Act of Ukraine of July 6, 1995 No.265/95-BP, the Order of Retail Trade Execution and Rules of Retail Servicing, approved by the Decree of the Cabinet of Ministers of Ukraine of June 15, 2006 No.833 and other legal acts of legislature that regulate retail.

2. Form of Purchase Agreement

The process of product sales via the Internet becomes more complicated because of the statutory legislative requirements to conclude almost every purchase agreement in writing (s.208 of the Civil Code of Ukraine of January 16, 2003 No.435-IV (hereinafter referred to as "the Civil Code")).

The On Electronic Documents and Documentary Exchange Act of Ukraine of May 22, 2003 No.85-IV stipulates that an electronic document must be granted the same legal effect as its paper equivalent, as long as certain requirements set forth in the statute are met. In particular, an electronic digital signature must be affixed to an electronic document by its signatory. According to the On Electronic Digital Signature Act of Ukraine of May 22, 2003 No.852-IV, an electronic digital signature is based on cryptographic algorithms that utilize a pair of keys (private and public). In fact, the complicated procedure of certification of electronic signatures serves as an obstacle for its wide use in e-shopping (especially in sector B2C). Noncompliance with the requirements on written forms makes all e-agreements voidable.

3. Consumer Protection

S. 13 of the On Consumers Rights Protection Act of Ukraine of December 1, 2005 No.1023-XII sets forth that before conclusion of a distant agreement a seller must provide a consumer with the following information: name of the seller; its location; basic product characteristics; cost of the product including any delivery fees and conditions for payment; warranties and maintenance conditions; proposal acceptance period; procedure of the agreement termination; other essence of the agreement; rights and obligations of the parties to the agreement, etc. Obtaining of the above information must be confirmed by consumer in a written or electronic form.

The consumer has the right to terminate a distant agreement within 14 days from the date of the confirmation of the information or from the date of the receipt of a good or the first delivery of the good. If the disclosure of the information does not comply with the above-mentioned requirements the term for the termination of the agreement is 90 days. The section also provides for some cases when a consumer has no right to terminate a distant agreement.

If otherwise is not stipulated by the distant agreement, the seller must deliver the product to the consumer within the stipulated term, but no later than 30 days from the date of obtaining the consumer's consent on the conclusion of the agreement.

4. Payments

Many small shops often refuse to accept credit/debit cards because of complicated and expensive service (use of credit/debit cards in the electronic trade system is regulated by the Regulation on the Procedure of Credit/Debit Card Issue and Operation, approved by the Resolution of the Administration of the National Bank of Ukraine of April 19, 2005 No.137).

Yet credit/debit card payments are not profitable for sellers. E-shop owners risk more than card holders during payments on-line. When paying for a purchase in a traditional store, a consumer places his/her signature on the receipt, the document that serves as proof of purchase. There is no signature on the paper receipt when a consumer pays via the Internet, thus, the main proof of purchase is not available. Therefore, any consumer can change his/her mind about the purchase and by filling out a special bank form can return the payment. For the seller to get the product back is practically impossible (the procedure is very long and complicated). In such cases, the risks are born

not by the credit/debit card issuers (banks), but by the shops that under a bank's requests cannot provide the document confirming the purchase operation by a consumer.

The level of trust in the "electronic money" is also low. In spite of the fact that there are several systems in Ukraine that propose services on e-payments (the most well-known are WebMoney and iMoney), neither e-shops nor e-shoppers do not actively use these options. All the more, great changes are coming forth on this market. The Administration of the National Bank of Ukraine with its Resolution of June 26, 2008 No.178 has passed the Regulation on the Electronic Money in Ukraine. According to this Resolution, electronic money may be issued only by banks, and legal entities that issue electronic money in Ukraine and are not banking institutions must accord their activity with the requirements of this Resolution within one year from the date of this Resolution coming into effect.

At the same time shoppers are not in a hurry to use cards or e-money to pay for goods in e-shops. Taking into account the instability and the absence of proper state control over the Internet-shops, 55% of Ukrainians prefer to pay for the goods on delivery: after making sure about the quality of the ordered good. In addition, Ukrainians traditionally fear card fraud, especially when personal data is used in the Internet.

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¹ Source: Gemius SA, *E-commerce in the countries of Central and Eastern Europe: Ukraine*, March 2007, Warsaw, Poland.

TYPO-SQUATTING IN TWO ALPHABETS: “LUXOIL” AND “ЛУКОЙЛ” – A COMPETITION LAW MATTER?

Paul Jones

Are “LUXOIL” and “ЛУКОЙЛ” confusingly similar trade-marks for motor oil?

Yes, according to the Russian Patent Office (РОСПАТЕНТ), the 9th Arbitrazh Appeal Court of the Russian Federation, both in 2007, and as of December 12, 2008, the Russian Anti-Monopoly Service (“FAS”).¹

Лукойл (or “Lukoil” for those who do not read Cyrillic) is the largest oil company in Russia.² It even has a distribution system in the U.S. The “LUXOIL” brand is owned by another Russian company, the Delfin Industry Group, who uses it to market a variety of motor oils.³ If you look at the English and Russian versions of the LUXOIL web site you will notice that on the English version of their web site they use “LUXOIL” but on the Russian version they have changed the brand to “LUXE” (in Roman letters).

The Cyrillic alphabet that is used in Russia and much of Eastern Europe and Central Asia was actually developed by two 9th Century missionaries working in Bulgaria for the Orthodox Church based in Constantinople (as it was then known). Accordingly, they used the Greek alphabet as the model and applied it to the sounds that they found in the Slavonic languages of Eastern Europe.⁴ As a result, many of the letters used in the Cyrillic alphabet closely resemble those of the Roman alphabet. However, they often have a different pronunciation. For example, in Bulgarian, “restaurant” is written “ресторант” (Russian is “ресторан”). The letters “e”, “t” and “a” sound the same in both alphabets. But in Cyrillic the Roman letter “r” is written as “p”; “s” is written as “c”; and “n” is written as “h.” When I type in Russian, sometimes I make a mistake and use a letter from the Roman alphabet for a Russian sound.

The letter “x” in Cyrillic is usually transliterated as “kh” and is pronounced something like the “ch” in the Scottish “loch.” Thus, to the Russian consumer looking quickly and not too carefully for a familiar brand the mark “LUXOIL” can be pronounced “lukhoil.”

The more interesting aspect of this case is that the Russian Federal Anti-Monopoly Service (FAS) became involved in this case in addition to the Russian Patent Office. Many competition agencies leave these matters to the intellectual property agencies. What is known as the interface between intellectual property law and competition law is an area of much debate. The most prominent example of such debate is the different attitudes regarding the activities of Microsoft Corporation held by the American and European agencies.

But in this case, the Russian Law “On the Protection of Competition”⁵ Article 14(1)(4) provides that:

Article 14. Prohibition of Unfair Competition

1. Unfair competition is not permitted, including:

.....

4) the sale, exchange or other introduction of a commodity into circulation if there was illegal use of the results of intellectual activity and the means of individualization of a legal person, means of product differentiation individualization of production, works, or services;

Статья 14. Запрет на недобросовестную конкуренцию

1. Не допускается недобросовестная конкуренция, в том числе:

.....

4) продажа, обмен или иное введение в оборот товара, если при этом незаконно использовались результаты интеллектуальной деятельности и приравненные к ним средства индивидуализации юридического лица, средства индивидуализации продукции, работ, услуг;

Since the submission of the “Report on the State of Competition in the Russian Federation”⁶ and the demand by Prime Minister Putin to the FAS to “wake-up,” FAS has been very active recently in many ways.

Investigations were commenced in many areas, such as coking coal, fertilizer, gasoline for automobiles, milk, natural gas, and steel. But these are all about traditional anti-competitive actions cartels, abuse of dominant position, refusal to deal and exclusive dealing.

In transitional economies such as China and Russia many of the impediments to a competitive market economy come from actions of state agencies. In developed economies such as the United States the regulatory actions of state agencies receive some protection under the “state action doctrine.”⁷ But in recent Russian developments the FAS has even been bringing actions against Russian state agencies for abusing their powers.⁸

Thus, the “LUXOIL” and “ЛУКОЙЛ” case suggests that the FAS is moving into another area on the edge of the authority of traditional competition law enforcement agencies. The involvement of the FAS in intellectual property matters extends further. On December 29, 2008, it issued a press release calling for amendments to Article 1487 of the new Part IV of the Russian Civil Code that enshrines the principle of national exhaustion of IP rights.⁹

The Federal Anti-monopoly Service is thus becoming a significant factor in the development of a competition based market economy in Russia, and potentially in the role that IP rights will have in such an economy.

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¹ In Russian - Федеральная антимонопольная служба. Press Releases in English: http://www.fas.gov.ru/english/news/n_21469.shtml, and in Russian: http://www.fas.gov.ru/news/n_21445.shtml.

² Company Web site: <http://www.lukoil.com/>.

³ Company web site in English: <http://eng.luxoil.ru/PgProd.php>; and in Russian <http://www.luxe-oil.ru/PgProd.php>.

⁴ For further information on this topic see: http://en.wikipedia.org/wiki/Cyrillic_alphabet.

⁵ О защите конкуренции – On the Protection of Competition, adopted 26.07.2006 as Federal Law No. 135 FZ, available on line in English at: <http://www.fas.gov.ru/english/legislation/8955.shtml>; and in Russian at: <http://www.fas.gov.ru/law/9498.shtml>.

⁶ Доклад о состоянии конкуренции в Российской Федерации, submitted to the Government in June, 2008 and released publically October 31, 2008 and available in Russian at <http://www.fas.gov.ru/competition/goods/20916.shtml>.

⁷ As it originated in the case of *Parker v. Brown*, 317 U.S. 341, 362 (1943).

⁸ See for example *Управления по лицензированию Мурманской области против Управления Федеральной антимонопольной службы по Мурманской области*, Тринадцатый арбитражный апелляционный суд, от 17 сентября 2008 г. по делу N А42-1352/2008; and *Комитета по управлению городским имуществом Санкт-Петербурга против Управления Федеральной антимонопольной службы по Санкт-Петербургу и Ленинградской области*, Тринадцатый арбитражный апелляционный суд, от 13 августа 2008 г. по делу N А56-2819/2008. Many more cases are mentioned in the FAS press releases available online.

⁹ Press Release in English: http://www.fas.gov.ru/english/news/n_21657.shtml, and in Russian: http://www.fas.gov.ru/news/n_21654.shtml.

KHODORKOVSKY TRIAL: WHO IS THE CRIME VICTIM?

Sergey Budylin

This article is devoted to recent developments in the Khodorkovsky case, or rather cases.

Khodorkovsky is the former head and major shareholder of a former big Russian oil company, Yukos. In 2003, his fortune was estimated by Forbes at \$8 bln. In October 2003 he was arrested and in 2005 sentenced to nine years of imprisonment, later reduced to eight years, on various charges, including criminal fraud and tax evasion. He was sent to serve his term to a “correction colony” (a prison camp) in Krasnokamensk, 700 kilometres off Chita, a city in eastern Siberia.

However, already in 2006 he was sent from the camp (with a relatively mild regime) back to an investigation prison in Chita, because of new charges brought against him. There, Khodorkovsky, together with his former colleague Platon Lebedev, was charged with embezzlement and money laundering related to their activities in Yukos. In March 2009 the new trial began in Moscow.

As for Yukos itself, in 2006 it went bankrupt, mostly because of tax claims, and its oil-extraction assets were acquired at a bargain price by a state-owned oil company, Rosneft.

The Russian liberal opposition generally believes the charges were politically motivated: unlike the other Russian “oligarchs,” Khodorkovsky participated in the political life on the liberal side and financed liberal parties instead of the ruling party.¹

The first part of this article deals with the issues related to Khodorkovsky’s parole petition in his first term. Normally, prisoners who behave properly are routinely released early on parole. However, Khodorkovsky’s petition was denied. That part was mostly written in September 2008, but I think it still may be of some interest for the reader. The second part of the article is about the new trial which is now in progress. The third part, providing “international background,” is about several Yukos-related cases brought to international tribunals. The fourth part briefly discusses the attitude demonstrated by the current Russian authorities toward the Khodorkovsky case.

I. Khodorkovsky's Parole Petition Denied

On August 22, 2008, a court in Chita (a regional center in Siberia) after two-day hearings turned down a parole petition from Mikhail Khodorkovsky.² Khodorkovsky’s appeal was dismissed in October.³

A. *The Law*

According to Russian criminal law, a convict serving his term may be released on parole if the court finds that he “need not” complete the term for his “correction.”⁴ In case of a “gross” crime, like that of Khodorkovsky, the convict must serve at least a half of the term to become eligible for the parole.⁵

In his parole petition, a convict must present information showing that he “need not” complete his term, such as that he compensated the inflicted harm, “repents” his crime, or other relevant information.⁶ Nevertheless, the admission of the guilt is not formally required for parole.

The administration of the penitentiary institution presents a “reference” informing about the behavior of the convict, his “attitude to education and work” during the term and his attitude to the committed crime, and drawing a conclusion about the parole appropriateness.⁷ While the court is not strictly bound by such a reference and generally has a broad discretion in its judgment, the reference normally has much weight in the outcome.

B. *The Process*

The judge in Khodorkovsky’s parole hearings was Igor Falileyev.

In court, Khodorkovsky declared that he did not “repent” because there had been no wrongdoing. “I can not repent the crimes that were not,” said the former oligarch. As for the harm compensation, Khodorkovsky stated that any possible harm had been “more than compensated” by the transfer of Yukos to the state, and there was “nothing more to take” from him.

Petitioner's mother, Maria Khodorkovskaya, 74 years old, asked the court to uphold the petition, arguing that Khodorkovsky is "a good son and citizen," and describing in detail his charitable activities.

The references on Khodorkovsky presented to the court by the investigation (pre-trial) prison administration and by the "correction colony" administration were generally positive. However, according to both documents Khodorkovsky "has not taken the root of correction, because he has not repented the acts he committed."

The prison administration and the prosecution representatives asked the court to dismiss the petition.

Alexey Fedorov, a prosecutor, argued that Khodorkovsky did not compensate the harm he inflicted. The prosecutor attempted to introduce as evidence photocopies of certain claims filed against the petitioner in Moscow by state authorities. Khodorkovsky explained that he had been unable to satisfy the claims because by that time substantially all his assets had already been seized by the authorities. As a result, Judge Falileyev refused to accept the claims as evidence.

The rest of the argument in court related to whether Khodorkovsky behaved properly when being imprisoned.

Lieutenant-colonel Vladimir Klyukin, for the prison administration, attempted to introduce four witnesses, Khodorkovsky's inmates, brought to the court from Krasnokamensk, to characterize Khodorkovsky's behavior. (One of those four prisoners, Mr. Kuchma, became known to the mass media when in 2006 he attacked Khodorkovsky with a knife and wounded his face.) Khodorkovsky objected on the grounds that the prisoners were dependent on the colony administration, and the judge refused to hear them.

During his term, in an investigation prison and in the colony, Khodorkovsky received six penalties (normally meaning a punishment cell) and no commendations from the administration. The punishments included those for (1) cutting bread with a "sharpened plate" (according to Khodorkovsky, that plate was regularly used for that purpose by other prisoners); (2) leaving the work place without permission (according to Khodorkovsky, he went to look for a technician to repair his broken sewing machine); (3) possessing printed materials not allowed by the prison rules (in fact, they were official governmental instructions related to prisoners' rights); (4) drinking tea together with another prisoner after time; (5) possessing two lemons and one apple above the list of the foodstuff lawfully received in a parcel from outside the prison. Khodorkovsky's attorneys argued that all penalties were ungrounded and far-fetched. In fact, four of them were successfully challenged by the attorneys in courts, and one expired (penalties are deemed to expire after one year).

The only remaining censure was made shortly before the end of Khodorkovsky's half-term. (Khodorkovsky's attorneys suggested it had been made purposefully to prevent the parole.) The penalty was imposed for not holding hands back, as the prison rules require, when returning to the cell after exercises. The punishment was partly based upon a written explanation of a Khodorkovsky's cell-mate, Igor Gnezdilov, returning to the cell together with Khodorkovsky. Gnezdilov, since then released on parole himself, became the main witness of Khodorkovsky on the first day of the hearings. Gnezdilov testified in court that his written statement had been false and that he had signed it under pressure of the colony administration: his own parole "got endangered."

The next day Lieutenant-colonel Klyukin countered by triumphantly pulling out, quite literally, a new piece of evidence from the back pocket of his uniform trousers. It was a DVD disk with a video record of the alleged violation. Over a fierce objection of Khodorkovsky's attorneys who questioned the authenticity of the footage (they unsuccessfully asked to produce it all the time since the censure), the evidence was allowed by the court.

The disk was played. It appeared to be a poor-quality surveillance record showing a man, resembling Khodorkovsky, walking along a prison corridor without holding his hands back.

Khodorkovsky admitted that he might indeed have failed to take his hands back, but pointed out that in practice the "hands-back" rule was not strictly enforced, and categorically denied that he had failed to take his hands back in violation of a guard's command (anyway, no sound was present in the record).

Khodorkovsky added that he was especially offended by the statement in the administration's "reference" that he had not participated in the "beautification of the territory" of the colony. In fact, he volunteered to wash windows in the prison camp building (and all prisoners gathered round to see the show). Khodorkovsky explained that he liked washing windows: before becoming a billionaire, he used to earn money by steeple-jacking.

In his final speech, prosecutor Fedorov admitted that the harm inflicted by Khodorkovsky was perhaps compensated, albeit not voluntarily. However, according to the prosecutor, the second condition for the parole, the correction of the convict, was not met. The prosecutor pointed again to six penalties and no commendations. Also, a convict must work for the parole. According to the prosecutor, Khodorkovsky was offered training as a sewer, but chose instead to take the low-qualification job of packaging clothing. As a result, the administration was able to withdraw from his salary as harm compensation only 1,878 roubles (cr. \$80). (In his testimony, Khodorkovsky said he had never refused sewing assignments.) Fedorov also said that if Khodorkovsky were released, he could interfere with the investigation into other charges and try to hide his ill-gotten gains.

Judge Falileyev substantially agreed with the prosecution and turned down the parole request. He pointed out that Khodorkovsky has one un-lifted penalty and no commendations. Also, "since prisoner Khodorkovsky showed no desire to take part in the professional educational program offered to him in detention ... he does not deserve conditional early release," Falileyev said.

"The law says that prison authorities have to take prisoners' education and experience into consideration when choosing work for them," said Vadim Klyuvgant, one of Khodorkovsky's attorneys. "Khodorkovsky may not have shown any personal interest in the tailoring work, but he didn't resist either." In fact, Khodorkovsky had reached a preliminary agreement with a popular science journal *Khimiya i Zhizn* to write articles for it (he is a chemist by education), but the administration refused to allow him to work as a journalist.

"Our justice system is not being reformed as quickly as I would like to see it reformed," commented Khodorkovsky to journalists before being brought back to prison.⁸

C. The Postscript

The bizarre process had a bizarre postscript.

On August 22, 11:24 a.m. Moscow time (which is 5:24 p.m. Chita time), the Interfax news agency reported that Khodorkovsky's parole request had been *granted*. Over the next seven minutes the Russian stock market jumped up (MICEX+1.3%; RTS+0.6%), many "blue chips" rising by 2%. Seven minutes later, at 11:31 a.m., Interfax posted a correction, reporting that the request had in fact been *denied*. The indexes surrendered most of the gain in the next several minutes. The day closed in the negative.⁹

II. Khodorkovsky's Second Trial

Even if Khodorkovsky had been paroled in his first term, he would not have been released. When being imprisoned, he was additionally charged with the embezzlement of some \$30 bln and of money laundering, and formally arrested under the new charges. A new conviction might bring a sentence of further 22 years in prison. The defense calls the charges "absurd": the prosecution, rather straightforwardly, assumes that Khodorkovsky and accomplices stole substantially *all* oil Yukos had extracted in 1998-2003.¹⁰

The proceedings are now in progress. Perhaps the most controversial issue raised by the defense during the initial portion of the trial was: "Who exactly are the crime victims?"

A. The Charges

In February 2009, the RF General Prosecutor Office has approved an indictment bill in the second criminal case of former Yukos top managers Mikhail Khodorkovsky and Platon Lebedev. The size of the indictment bill is unprecedented: the document, only listing the accusations, consists of 14 volumes. The case file itself, additionally containing the evidence the prosecution has collected, consists of 168 volumes.¹¹ The new charges are theft in the form of misappropriation and embezzlement,¹² and money laundering.¹³

The numerical amount of the accusations, about 900 bln rubles (cr. \$30 bln), is also hard to beat. In essence, the prosecution insists that Khodorkovsky and Lebedev stole the oil extracted by Yukos subsidiaries, and then laundered the money. They are also accused of stealing and laundering Yukos subsidiaries' shares. The defense characterizes the indictment as a "large-scale falsification" committed "with the purpose of reprisal." According to the defense, the prosecution attempts to "artificially criminalize ordinary commercial activity of the Yukos holding group." Even before the trial the defense has formally filed with the investigators a petition for the termination of the prosecution because of no crime committed,¹⁴ but to no avail.

Indeed, the charges may seem extravagant, at least facially. The accusations are apparently based on the fact that trading Yukos subsidiaries incorporated in low-tax Russian regions bought oil from oil-extracting Yukos subsidiaries at relatively low price and then resold it to customers at a market price. This tax optimization technique was later held unlawful; as a result, Yukos went bankrupt, and Khodorkovsky and Lebedev went to jail for tax evasion. The new "theft of oil" accusations are based on the same factual pattern but now this is interpreted as embezzlement, apparently because the oil was sold cheap by oil-extracting subsidiaries. Similarly, the "theft of shares" charges apparently refer to a corporate acquisition where the shares were bought cheap. The receipt of the revenue for the oil and shares by Yukos subsidiaries has been qualified as "money laundering." (Unfortunately, further details of the charges are not publicly available.)

B. The Process

Although proposals have been discussed to organize the Moscow trial in the absence of Khodorkovsky (he was supposed to communicate with the other trial participants from Chita via teleconference facilities), upon fierce objections of the defense, the defendants were brought to Moscow by a specially chartered plane. Usually, prisoners are transported by train, but a railway trip from Siberia could take a week.¹⁵

On March 3, 2009 preliminary hearings in the new trial of Mikhail Khodorkovsky and Platon Lebedev began in Moscow in the Khamovnicheskiy District Court.¹⁶

At the outset, the defense moved for the removal of the prosecutors presenting the case (Dmitry Shokhin and Valery Lakhtin), arguing they were personally interested in the outcome. The matter is that the prosecutors are the same as in the first Khodorkovsky case, tried back in 2005.

"The defense is totally sure of prosecutors' personal interest in the outcome of the process," said Vadim Klyuvgant, Khodorkovsky's lead lawyer. "The prosecutors aren't observing the law, but are striving at any cost to achieve the result they have been tasked with."

Judge Viktor Danilkin denied the motion. Then the defense moved for the removal of Danilkin himself (accusing him of certain procedural violations), but with the same result.¹⁷ Finally, the defense moved for the termination of the criminal procedures because of the absence of the *corpus delicti*, or at least for the return of the case to the prosecution for the preparation of a more reasonable indictment bill. All defense motions were denied.¹⁸

On March 31, 2009, the court began hearings on the merits.¹⁹

The defense immediately moved to call as witnesses a number of high-ranking officials, including former president, now-prime minister, Vladimir Putin, former prime minister Viktor Chernomyrdin, and others. The total number of defense witnesses is 179. Khodorkovsky stated that all oil trading transactions had been carried on under a thorough control of the relevant ministry, and that he personally had received approvals of state officials for oil prices and distribution schemes. The judge denied the motion in its totality, but filed the witness list and declared that the decision whether or not to call each particular witness would be made individually.

The defense also moved to exclude from the list of crime victims and civil plaintiffs the state-run oil company Rosneft and the Federal Agency for State Property. Khodorkovsky pointed out that they had not owned the assets he allegedly stole. Accordingly, they can not be considered as crime victims. In fact, Rosneft is known for acquiring at, arguably, a heavily discounted price the best oil-extracting assets of Yukos when it went bankrupt because of tax claims. The court denied the motion, pointing out that whether or not those entities were victims should be proved in court.

Referring to the accusations that Yukos subsidiaries sold oil cheap, Khodorkovsky said that then even the prosecutors had been accomplices in the crime, because of buying gasoline at Yukos gas stations in 1998-2003 at prices “below Rotterdam.”²⁰

Later on, Khodorkovsky pointed out that about 15 million tons of the oil and oil products he allegedly stole and laundered had been in fact sold to state entities, such as the Ministry of Defense, State Prosecution offices, etc. He moved to request relevant contracts from the state entities in question. The motion was denied (as being “premature”).

Khodorkovsky also moved to request the lists of shareholders of Yukos subsidiaries. Apparently, following the logic of the prosecution, those shareholders were the main victims of the embezzlement committed by Khodorkovsky and Lebedev. Although the shareholders had in fact approved the oil transaction in accordance with the corporate legislation, the prosecution may wish to argue that they had been deceived by the defendants. “If you say I defrauded somebody, I want to know their names!” explained Khodorkovsky. The motion was denied (because of “no legal grounds”).

Since the prosecution alleges that Yukos “administrative personnel” was involved in criminal activity, Khodorkovsky moved to request the list of all former Yukos employees (including three thousand people only in the head office). According to the defense, those people could testify whether or not they had participated in an organized criminal group headed by Khodorkovsky. The motion was denied.²¹

In the end, Khodorkovsky declared that he did not understand the charges brought against him and nobody had explained the charges to him. Khodorkovsky characterized the indictment bill as vague and self-contradictory. Prosecutor Lakhtin countered by declaring that since both defendants have higher education, they surely understand the charges.

Khodorkovsky went on to express sympathy to Judge Danilkin: “I think an acquittal sentence is a nightmare for you. On the other hand, the indictment is obviously outrageous. It is impossible to enter an honest but accusatory sentence on it . . .” *Inter alia*, Khodorkovsky pointed out that in relation to one count the statute of limitations had already expired.²²

After finishing with the parties’ motions (or rather the defense motions) the court moved on to hearing the indictment bills against both defendants. Because of the huge volume of the documents the reading took several days.²³

On April 21 both defendants pleaded not guilty. Khodorkovsky reiterated that the prosecution had failed to explain what exactly the indictment bill means. As for Lebedev, he simply called the indictment bill a “schizophrenic falsification.”²⁴ In response, prosecution representative Gylchekhra Ibragimova asked the judge to “put an end to political slogans.” “All this is said with the only purpose: for the politicians, journalists, writers, who are present here, to clearly understand how ungrounded the indictment is!” complained the prosecutor.²⁵

A somewhat unexpected turn of the trial happened on April 24. Khodorkovsky and Lebedev’s defense informed the court that the former president of a Yukos subsidiary Antonio Valdez Garcia had sent a written statement to the General Prosecutor. In the statement Valdez Garcia formally reports to the General Prosecutor the crime committed by investigators and operative officers, who allegedly pressed Valdez Garcia to give false testimony against Khodorkovsky, Lebedev, and other Yukos top managers.²⁶

Valdez Garcia, having both Russian and Spanish citizenship, was the president of a Yukos subsidiary, Fargoil, incorporated in Mordovia. Mordovia, a Russian constituency, then offered substantial corporate tax concessions, and Yukos exploited several Mordovian subsidiaries as oil-trading vehicles to minimize Yukos overall tax liabilities. As mentioned before, this tax-optimization technique was later held abusive, which was a ground for Khodorkovsky and Lebedev’s going to jail. In 2004 Valdez Garcia resigned and went to Spain.

When the prosecution had decided to additionally qualify the activity of low-tax subsidiaries as corporate theft and money laundering, the General Prosecutor Office investigators invited Valdez Garcia to visit Russia to testify, reportedly promising he would not be jailed (although formal non-prosecution agreements are impossible in Russia).

Upon arrival to Moscow, he was met in the airport by state security officers and brought to police hands, although not formally arrested. Apparently, he was being actively interrogated. Valdez Garcia states he was heavily beaten; the prosecution says he simply fell from a police sanatorium window when being drunk; some sources suggest he attempted to commit a suicide jumping from the window. At any rate, he was placed to a hospital with multiple fractures and other traumas and then had to walk on crutches. Thereupon he was moved to his own apartment in Moscow, but two police guards were attached to look after him.

Valdez Garcia was prosecuted. Together with two other Yukos managers he was charged with theft and money laundering in the billions of dollars. The trial, being a kind of a pilot of the second Khodorkovsky and Lebedev's trial, began in 2006. The prosecution asked the court to sentence Valdez Garcia to 11 years of imprisonment. Amidst the trial, Valdez Garcia managed to break away. He locked his guards in his apartment and disappeared. Apparently, Valdez Garcia somehow escaped from Russia. In 2007 the other two defendants, Vladimir Malakhovsky and Vladimir Pereverzin, were sentenced to 12 and 11 years, respectively.

Recently the trial of Valdez Garcia was resumed *in absentia* in a Moscow court. The defendant communicates with his attorney by email. The discussed statement to the General Prosecutor was sent in relation to that trial.

Prosecutor Valery Lakhtin (in the Khodorkovsky and Lebedev trial) denies any pressure was put upon Valdez Garcia. The defense reiterates its motion to remove Lakhtin.

Noteworthy, when Khodorkovsky and Lebedev's defense was moving to obtain testimony from foreign-resident witnesses, the prosecution objected, saying that witnesses must come to Russia to testify. (Judge Danilkin denied the defense motion.)

III. International Background

The second trial of Khodorkovsky and Lebedev is developing against a noteworthy international background. Several international judicial bodies have been asked to evaluate the results of the original Yukos case, having resulted in the bankruptcy and dissolution of the biggest Russian oil company. This, in a sense, changes the focus in the question: "Who is the crime victim?" Essentially, the international tribunals are called to decide whether Khodorkovsky himself, together with other Yukos shareholders, was illegally deprived of his property under the disguise of the process of law.

To understand the following, some information on the original Yukos case is needed.

Yukos was a major Russian oil-extracting and oil-processing company. For a number of years, it (like many other oil companies) exploited a transfer-pricing scheme to decrease its tax liability. The scheme was exploited openly and was approved by Yukos auditors (PricewaterhouseCoopers). Specifically, Yukos sold the oil its subsidiaries extracted through shell companies incorporated in Russian regions with a low level of income taxation. Then-current (and now-current, for that purpose) Russian anti-transfer-pricing rules directed to reconsider the tax results of transactions only where the price deviates from the "market price" by more than 20%.²⁷ Apparently, Yukos transfer prices had been within the statutory limits; at any rate tax authorities did not rely on the statutory anti-transfer-pricing rules. Instead they relied on a court-made doctrine of "bad-faith taxpayer" legally grounded on a 2001 Constitutional Court ruling.²⁸ Although the 2001 decision related to a very different tax scheme, it generally allowed courts to deny application of beneficial tax law provisions to taxpayers held to be "bad-faith" taxpayer (no criteria of "bad faith" were specified). In 2006, the doctrine was refined by the RF Supreme Arbitrazh (Economic) Court, which introduced into the Russian tax law the "business purpose" doctrine, also uncodified.²⁹ Notably, the tax claims to Yukos related to the years 2000-2003. As a result of the backward application of the uncodified judicial doctrines, the Yukos taxes were recalculated, with interest and fines imposed. Courts have sustained the tax authority reasoning.

This ultimately led to the bankruptcy of Yukos, and to the imprisonment of its head Mikhail Khodorkovsky and other Yukos officers on the charges of, *inter alia*, corporate tax evasion. One of major Yukos owners, Leonid Nevzlin, fled to Israel. In Russia, he was sentenced *in absentia* to the life imprisonment on the conspiracy to murder charges. Recently, the judgement was affirmed by the RF Supreme Court. Israel denies Russian requests to extradite Nevzlin saying the evidence of guilt is insufficient.³⁰

A. *The Hague: GML v. Russian Federation*

In November 2008, former shareholders in Yukos sued the Russian government for \$50 bln in relation to the alleged seizure of Yukos assets. Apparently, this is the world's largest commercial suit ever. The suit has been filed an arbitration tribunal in the Hague, Netherlands, in accordance with the provisions of the Energy Charter Treaty (ECT).³¹

The suit was filed by GML, formerly Group Menatep, based in Gibraltar and controlled by Nevzlin. GML alleges that Yukos assets were illegally seized by the Russian authorities, which made Yukos shares belonging to GML (amounting to 51% of the Yukos stock) worthless. GML is seeking compensation under the ECT, an international treaty signed by 52 countries which came into force in 1998.

Russia signed, but so far has not ratified, the ECT. However, it has accepted "provisional application" of the ECT pending ratification. This means that Russia has agreed to apply the provisions of the ECT to the extent that they are consistent with Russia's constitution, laws and regulations.³²

The ECT generally prohibits "expropriation" of foreign investments, save under certain specific conditions (public interest; not discriminatory; due process of law; and prompt, adequate and effective compensation).³³ The ECT contains dispute settlement provisions, including the disputes between foreign investors and host countries, with several arbitration tribunal options available (International Center for Settlement of Investment Disputes (ICSID); *ad hoc* arbitration tribunal under the UNCITRAL rules; Arbitration Institute of the Stockholm Chamber of Commerce).³⁴

The perspectives of the case are rather vague. Even in case of a positive decision by the arbitration tribunal the plaintiff will probably receive nothing. It seems unlikely that Russia will comply with the dispute-resolution provisions of a non-ratified treaty where it does not like the outcome.

B. *Strasbourg: Yukos v. Russian Federation*

In January 2009, the European Court of Human Rights (ECHR) ruled that a claim brought by the long-ago-collapsed Yukos against Russia was admissible and would be considered on the merits. Yukos, represented by its former managers, accused Russian authorities of the deprivation of the company's property and sought damages in the amount of \$42 bln.³⁵

Yukos filed its claim against Russia with ECHR back in 2004. Later, in the process of bankruptcy, the management in the company was taken over by an official receiver. Eduard Rebgun, the former official receiver of Yukos, attempted to disclaim the application of the former management, but to no avail. Moreover, in 2007, Yukos was formally dissolved and now *does not* exist as a legal entity (which of course raises questions as to its ability to sue anybody). Despite that, ECHR accepted the Yukos claim for consideration on the merits. The case is expected to be heard later this year.

ECHR is a judicial body established by the European Convention of Human Rights (Convention). A person may sue a country in ECHR for human rights violations. Russia is by far the most sued country: in 2008 more than 10,000 suits (of 50,000) were filed against Russia, making the total of more than 27,000 (of 97,000) pending cases against Russia.³⁶ Essentially, ECHR is overloaded by Russian suits. At the same time, Russia consistently blocks the adoption of the 14th Protocol to the Convention which is supposed to significantly accelerate the proceedings.³⁷

ECHR cannot reverse decisions of national courts: it can only award damages to injured persons. On the other hand, an ECHR ruling *may* be a basis for reconsideration by a Russian court of a case in relation to the person whose human rights were violated.³⁸

While the acceptance of the case by ECHR does not predefine the outcome of the hearings, usually it is a strong indication that the case will be resolved in favor of the applicant.

C. Stockholm: Renta 4 S.V.S.A. v. Russian Federation

In March 2009, the Arbitration Institute of the Stockholm Chamber of Commerce accepted jurisdiction in a case filed by several Spanish investment funds against Russia. The claim is based on the arbitration clause of the bilateral investment treaty (BIT) between Spain and the USSR (of which Russia is a successor).³⁹

The Spanish funds were holders of American Depositary Receipts (ADRs) of Yukos. After Yukos had been brought to bankruptcy by tax claims, the ADRs became worthless.⁴⁰ The claimants believed that the governmental attack against Yukos had been “expropriation” of their investments in terms of the treaty (BIT art 6) and wanted to arbitrate the amount of their compensation under the arbitration clause of the treaty (BIT art 10). Russia denied there had been “expropriation” and argued that, according to the BIT language, the arbitration might relate only to the “the amount or method of payment” of the compensation due, but not to the presence or absence of the “expropriation.” The tribunal disagreed, in contrast with certain earlier cases related to other Russian BITs.

A three-person panel ruled that the dispute fell within the scope of the arbitration clause of the Spain-Russia BIT, and that the Stockholm tribunal therefore had jurisdiction. The case is to be considered on the merits. Again, the acceptance of the case by the tribunal may be in itself an indication of its willingness to enter a decision for the plaintiffs.

D. Washington, D.C.: Russian Finance Minister Subpoenaed

On April 24, 2009, Russian Finance Minister Alexey Kudrin was in Washington, D.C., to participate in the International Monetary Fund’s spring meeting and other political events. During an open-air meeting with Anders Åslund, representing Peterson Institute for International Economics, a man, later identified as court marshal David Felter, approached Kudrin and handed to him an envelope. “As was established later, the papers were a notification, issued by the District of Columbia Federal Court, to testify in the criminal case against Mikhail Khodorkovsky, which is being heard in a Russian court,” Kudrin’s spokesman Pavel Kuznetsov said. (Earlier the Finance Ministry denied Kudrin’s receiving any papers, by the event appeared to have been recorded by TV journalists.)⁴¹

Apparently, Khodorkovsky and Lebedev’s defence, doubting the possibility to obtain Kudrin’s testimony in Russia, decided to attempt doing it abroad. Kudrin, however, enjoys diplomatic immunity and can not be brought to a U.S. court against his will.

This is the second time when Kudrin is subpoenaed in the U.S. in relation to Yukos. In 2006 Felter (the same marshal) handed Kudrin a subpoena related to a suit of Yukos minority shareholders who sought compensation of damages resulting from Yukos asset expropriation. Kudrin then denied receiving any papers and failed to appear in court. In the end (in 2007) the D.C. District Court declined jurisdiction in that suit.

IV. Medvedev and Khodorkovsky

Now-President Dmitry Medvedev at the very moment of his inauguration in May 2007 declared the fight against “legal nihilism” to be on top of his priorities.⁴² Some observers immediately jumped to the conclusion that Khodorkovsky would be freed.⁴³ However, whether or not this is what Medvedev in fact had in mind is still to be seen. Perhaps the second trial of Khodorkovsky and Lebedev may be seen as a test as to what extent President Medvedev’s intents were serious.

Noteworthy, on April 14, 2009, amidst the trial, President Medvedev in his first interview given to a newspaper (previously he was interviewed only by electronic media) said several words about the Yukos case. While the words themselves are befittingly neutral (Medvedev declared that since the court was independent, its decision could not be known beforehand) the astonishing fact is to *what* newspaper the interview was given. This is the *Novaya Gazeta*, known as a mouthpiece of the liberal opposition and a consistent supporter of Khodorkovsky. Arguably, this fact in itself is capable of putting a pressure upon a Russian court.⁴⁴

V. Conclusion

Khodorkovsky, having served more than a half of the original term and having been denied a parole, now faces new charges related to essentially the same facts but based on different legal theories. The charges may seem bizarre: Khodorkovsky and Lebedev are accused of stealing million tons of crude oil and oil products that in fact were duly delivered by Yukos to its customers, including Russian state entities. The defendants pleaded not guilty. The second trial is now in progress. So far, the net result is that substantially all defense motions have been denied. There are, however, some arguable indications that current Russian authorities would like to avoid blatant injustice in this high-profile case.

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¹ <http://www.lenta.ru/lib/14159417/full.htm>; <http://www.lenta.ru/articles/2007/10/29/yukos/>.

² <http://www.moscowtimes.ru/article/600/42/370376.htm>.

³ <http://www.kommersant.ru/doc.aspx?DocsID=1041885&ThemesID=237>.

⁴ RF Criminal Code, art. 79(1).

⁵ *Id.* at 79(2).

⁶ RF Criminal Execution Code, art 175(1).

⁷ *Id.* at 175(2).

⁸ The case is unpublished. The article is based on media reports: <http://www.kommersant.ru/doc.aspx?DocsID=1014180&ThemesID=237>; <http://www.kommersant.ru/doc.aspx?DocsID=1014615&ThemesID=237>; <http://www.kommersant.ru/doc.aspx?DocsID=1014312&ThemesID=237>; <http://www.kommersant.ru/doc.aspx?DocsID=1014910>.

⁹ <http://www.kommersant.ru/doc.aspx?DocsID=1015655>.

¹⁰ <http://lenta.ru/news/2008/07/01/absurd/>.

¹¹ <http://www.kommersant.ru/doc.aspx?DocsID=1119814&NodesID=6>; <http://lenta.ru/news/2009/02/16/genproc/>.

¹² RF Criminal Code, art 160.

¹³ RF Criminal Code, arts 174, 174-1.

¹⁴ <http://www.khodorkovsky.ru/cassation/petitions/9272.html>.

¹⁵ <http://www.kommersant.ru/doc.aspx?DocsID=1123206&ThemesID=237>.

¹⁶ <http://www.kommersant.ru/doc.aspx?DocsID=1129171&ThemesID=237>.

¹⁷ <http://www.kommersant.ru/doc.aspx?DocsID=1129517&ThemesID=237>.

¹⁸ <http://www.kommersant.ru/doc.aspx?DocsID=1139738&ThemesID=237>.

¹⁹ <http://lenta.ru/news/2009/03/31/deny/>.

²⁰ <http://www.kommersant.ru/doc.aspx?DocsID=1147489>; <http://www.kommersant.ru/doc.aspx?DocsID=1147527>.

²¹ <http://www.kommersant.ru/doc.aspx?DocsID=1148526&ThemesID=237>; <http://www.novayagazeta.ru/news/488265.html>.

- ²² <http://www.kommersant.ru/doc.aspx?DocsID=1151740&ThemesID=237>.
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- ²⁴ <http://www.kommersant.ru/doc.aspx?DocsID=1159134&ThemesID=237>.
- ²⁵ <http://www.kommersant.ru/doc.aspx?DocsID=1159795&ThemesID=237>.
- ²⁶ <http://kommersant.ru/doc.aspx?DocsID=1160252&NodesID=6>; <http://kommersant.ru/doc.aspx?DocsID=1160004>; <http://kommersant.ru/doc.aspx?DocsID=734216>; <http://www.lenta.ru/lib/14166083/>.
- ²⁷ RF Tax Code art 40(3).
- ²⁸ RF Constitutional Court, Decision of July 25, 2001 No. 138-O.
- ²⁹ RF Supreme Arbitrazh Court, Decision of October 12, 2006 No. 53.
- ³⁰ <http://en.rian.ru/russia/20090127/119824013.html>.
- ³¹ <http://business.timesonline.co.uk/tol/business/law/article5172520.ece>.
- ³² <http://www.encharter.org/index.php?id=18>.
- ³³ ECT art 13(1).
- ³⁴ ECT art 26.
- ³⁵ <http://www.kommersant.ru/doc.aspx?DocsID=1110317>; <http://online.wsj.com/article/SB123328338060232113.html>; <http://www.forbes.com/feeds/afx/2009/01/29/afx5984207.html>. See also: <http://www.kommersant.ru/doc.aspx?DocsID=1122546>.
- ³⁶ http://www.echr.coe.int/NR/rdonlyres/B680E717-1A81-4408-BFBC-4F480BDD0628/0/Annual_Report_2008_Provisional_Edition.pdf.
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- ³⁹ СОГЛАШЕНИЕ МЕЖДУ СОЮЗОМ СОВЕТСКИХ СОЦИАЛИСТИЧЕСКИХ РЕСПУБЛИК И ИСПАНИЕЙ О СОДЕЙСТВИИ ОСУЩЕСТВЛЕНИЮ И ВЗАИМНОЙ ЗАЩИТЕ КАПИТАЛОВЛОЖЕНИЙ (Мадрид, 26 октября 1990 года), http://lawrussia.ru/texts/legal_574/doc574a781x560.htm (Russian), www.comercio.es/NR/rdonlyres/80A7936E-A8B3-4B53-917A-ECD16F75667A/0/RUSIA.pdf (Spanish).
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- ⁴³ http://community.livejournal.com/golos_ameriki/57415.html.
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