Access to Justice: Foreign Persons and Russia’s New Arbitration Procedure Code
(Part I)

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Abstract

This article deals with the new rules—and court practice—for the hearing of disputes involving foreigners in state arbitration (commercial) courts of the Russian Federation. It is these courts that have been entrusted with the administration of justice in cases involving entrepreneurship as well as other business and commercial activity in Russia.

The author examines, inter alia, questions of the legal status of foreign persons in Russian courts, as well as the enforcement of foreign arbitral awards and court judgments. He also analyzes the mutual relationship between Russian law and international treaties to which Russia is a party that deal with the participation of foreign persons in arbitration courts.

Keywords
access to justice, arbitration courts, civil procedure, commercial arbitration tribunals, foreign legal persons, foreign natural persons, Russian judicial system

1. Introduction


Russia’s new 2002 Arbitration Procedure Code has significantly broadened the scope of the legal rules and regulations governing the participation of foreign persons in arbitration proceedings as compared with the 1995 Arbitration Procedure Code. In addition to Section V (Proceedings Involving Foreign Persons) of the 1995 Code, a number of articles established,
inter alia, rules on the priority of international agreements (Arts. 3 and 11), on the application of foreign law (Art. 12) and on jurisdiction in matters involving foreign persons (Art. 22).

The new Code introduces three specialized chapters that deal specifically with foreign persons: Chapter 31 (Proceedings in Matters on the Recognition and Enforcement of Foreign Court Judgments and Foreign Arbitral Awards), Chapter 32 (Competence of Arbitration Courts in the Russian Federation to Consider Matters Involving Foreign Persons) and Chapter 33 (Special Features of the Consideration of Matters Involving Foreign Persons). Together, the last two chapters comprise Section V (Proceedings in Matters Involving Foreign Persons).

In addition, there are numerous other articles containing rules that are applicable to matters involving foreign persons, e.g., Articles 3 and 13 (on the priority of the rules of international agreements), Article 14 (on the application of foreign law), Article 16 (on the recognition of and obligation to enforce foreign court judgments and arbitral awards), Articles 27 and 32 (on jurisdiction), Article 75 (on the specific features related to the examination of documents that are in foreign languages and/or have been received from abroad), and Article 230 (on the possibility of appealing, in cases foreseen by an international agreement, a foreign arbitral award for which Russian legislation was applied).

Thus, the new Code has expanded the scope of international civil (arbitration) procedure, constituting a system of rules of domestic and private international law that is connected with the judicial (and other jurisdictional) protection of the rights of participants in business and commercial activity and that contains a foreign element.

When the rules of international civil procedure are being applied, it is important to keep in mind that both the new Arbitration Procedure Code and Section VI of the RF Civil Code, as well as multinational and international bilateral agreements, have priority in the process of exercising and enforcing rights.

Because of the wealth of new rules and regulations, we will limit our commentary to those chapters that deal specifically with matters involving foreign persons (Chapters 31-33, 2002 APK), as well as certain other related provisions.

1.2. The Influence of International Law and Instruments of the Council of Europe on the APK

To begin with, one should not fail to note the influence of international law on the Arbitration Procedure Code. The Code takes into account the
development of the modern conception of human rights and the direct influence thereof on the process of regulating and exercising rights, as well as on the formulation and implementation of legal policy. This, in our opinion, lends importance to the judicial system as the only full-fledged guarantor of respect for human rights—as well as of other legal institutions that are similar in terms of the significance thereof—which, together, are called upon to guarantee the realization of human rights. Since the justice system is the guarantor of the protection of human rights, this explains the attention that is being devoted to the problem of access to justice. If this issue is left unresolved, human rights cannot be fully guaranteed and the normal functioning of civil society and of commercial relations will be impossible.

Access to justice is a complex issue that has many different aspects; engineering a solution will require financial, legal and organizational approaches as well as resources. There are legal standards regarding access to justice which, for example, can be found in instruments of the Council of Europe, in decisions of the European Court for Human Rights and in resolutions and recommendations of the Committee of Ministers of the Council of Europe. Access to justice has also been treated as a significant social issue in the academic literature outside Russia, where it is seen as a fundamental problem.

For Russia, the problem of access to justice—in the modern sense of the term—appeared at the beginning of the 1990s, when both the economic and legal models of Russian society began to change. The introduction of the competitive model of commercial relations and of civil and arbitral procedure requires fundamentally different motivations and behavior from the parties in legal proceedings. This model requires participants in legal proceedings to be more active and more willing to spend money, since protecting their rights in modern legal proceedings requires no small level of professional legal assistance.

For more details, see S.S. Alekseev, Pravo. Opyt kompleksnogo issledovaniia (Statut, Moscow, 1999), 608 et seq.

In this context, mention can also be made of the human rights commissioner of the Russian Federation and similar institutions in other countries.

For a modern interpretation of this issue, see Problemy dostupnosti i effektivnosti pravosudiia v arbitrazhnom i grazhdanskom sudoproizvodstve. Materialy Vserossiiskoi nauchno-prakticheskoi konferentii (Moscow, 2001); V.M. Sidorenko, “Printsip dostupnosti pravosudiia i ego realizatsiia v grazhdanskom i arbitrazhnom protsesse”, unpublished summary of Candidate of Science Dissertation, Ekaterinburg, 2002.

See, for example, V.A. Tumanov and L.M. Entin (eds.), Kommentarii k Konventzii o zashchite prav cheloveka i osnovnykh svobod i praktike ego primenenia (Norma, Moscow, 2002).

See articles in Rossiiskaia iustitsiia (1997) Nos.6-11.

In the first half of the 1990s, the judicial system was at a stage of development that was more concerned with strengthening and changing the status of judges, the organization of the legal system and with implementing the principle of the separation of powers in legislation rather than with improving judicial procedures themselves, not to mention transforming the entire infrastructure so as to allow the judicial system to function more effectively. The authorities began turning their attention to the question of access to justice and compliance with international legal standards after Russia’s accession to the Council of Europe, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and other basic documents of the Council of Europe and following its recognition of the jurisdiction of the European Court of Human Rights. The most important point here is Article 6 of the ECHR; this enshrines the right to a fair trial which, in essence, encompasses the entire judicial process and the enforcement of the final result thereof: namely, a court judgment (судебное решение).

How were these provisions incorporated into the 2002 Arbitration Procedure Code? After all, there was no direct reference in the 1995 APK to the European Court of Human Rights since Russia ratified the ECHR only on 30 March 1998.

First, this can be seen in Article 2 of the Code, where the guarantee of access to justice is enumerated as one of the tasks of proceedings in arbitration courts.

A second example is Article 311, which renders a violation of any of the provisions of the ECHR—during a particular case being heard in an arbitration court—as grounds for a review (пересмотр) of the judgment rendered in the case provided the petitioner appeals to the European Court of Human Rights.

Third, many of the provisions of the ECHR should be applied directly in arbitration courts, especially in matters that are not directly regulated by legislation on arbitration procedure. For example, Article 6 of the ECHR enshrines the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. In this context, the possible role of the ECHR was noted in Letter No.51/SI-7/SMP-1341 of the RF Supreme Arbitration Court of 20 December 1999 on the Fundamental Provisions Applied by the European Court of Human Rights in Defense of Property Rights and the Right to Justice. Up until now, however, the provisions of the ECHR have not been applied extensively by arbitration courts.

An example comes from Point 5 of Ruling No. 38 of the Presidium of the Federal Arbitration Court of the Northwest Federal Okrug of 3 November 2000, which recommends that, in resolving questions concerning the remand of a case or the refusal of a cassation appeal (kassatsionnaya zhaloba), arbitration courts should keep in mind the position of the European Court of Human Rights on the inadmissibility of excessive legal or practical barriers in the consideration of a dispute.11

In looking at the APK as a whole, one can see a number of new solutions that appear to be based on an attempt to enhance access to justice in Russia. It is likely, for example, that such considerations were the basis for changing the procedure for initiating supervisory proceedings, as well as the procedure for the consideration of matters by the Presidium of the RF Supreme Arbitration Court, as contrasted with the procedures contained in the 1995 APK. The new Code not only refers to guaranteeing access to justice as an important task of the legal system but it also provides specific technical instructions on procedural rules.

Foreign persons participating in arbitration proceedings in Russia can now resort to instruments of the Council of Europe and decisions of the European Court of Human Rights in defending their rights and interests in Russia’s arbitration courts. This was not possible in the past since, as mentioned above, this has become a legal reality for Russia only after its ratification of the Convention in March 1998.

2. Proceedings in Matters of the Recognition and Enforcement of Foreign Court Judgments and Foreign Arbitral Awards (Chapter 31, APK)

2.1. General Conditions for Recognition and Enforcement

Chapter 31 deals with questions that could be referred to as international enforcement proceedings, which encompass both recognition and enforcement of foreign court judgments and arbitral awards, as well as the rules of enforcement proceedings involving a foreign element.

Under Article 241 of the APK, the judgments of foreign courts that are rendered in disputes and other matters arising out of commercial or other economic activity—and the awards of ad hoc arbitration tribunals (treteiskie sudy) and international commercial arbitration tribunals that are adopted on the territory of foreign states involving such matters—are recognized (and enforced) in the Russian Federation by arbitration courts if the recognition (and enforcement) thereof is envisioned by an international agreement of the Russian Federation or by a federal law. In previous versions of the APK, there were virtually no provisions on issues related to

11 Taken from <www.kadis.net/asp>.
the enforcement of foreign court judgments and arbitral awards because such issues fell under the competence of courts of general jurisdiction.

Article 241 of the APK sets out the general conditions for the recognition and enforcement of foreign court judgments and foreign arbitral awards. Once a party seeking damages has received a favorable judgment from a foreign court or arbitrator, s/he has to complete two tasks. The first is to obtain leave from a competent court for the recognition and enforcement of the judgment in accordance with the terms established by the relevant international treaty, agreement or domestic legislation of the country in which enforcement is being sought. The second task concerns the actual enforcement of the judgment within the framework of the domestic enforcement proceedings which, in Russia, are governed by the rules of the 1997 RF Federal Law on Enforcement Proceedings (Ob ispolnitel’nom priznanii i izpolnenii, as amended). In this context, the title of Chapter 31 of the APK is more precise (in comparison with the title of Chapter 45 of the Code of Civil Procedure of the Russian Federation) in that it mentions not the recognition and enforcement of foreign judicial judgments and arbitral awards (priznanie i izpolnenie) but their recognition and entry into force (priznanie i privedenie v izpolnenie). This change in terminology is both justified and logical, since a competent court simply recognizes and executes foreign court judgments, whereas enforcement occurs outside of judicial proceedings, within the framework of enforcement proceedings.

To properly understand the general rules of international enforcement proceedings, a distinction should be made among the following points: first, the grounds for compulsory enforcement (prinuditel’noe izpolnenie); second, the rules (procedures) for permitting the enforcement of a foreign court judgment or arbitral award. Whereas the grounds establish that the recognition and enforcement of a foreign court judgment or arbitral award are possible, the procedure determines the process through which recognition and enforcement are carried out. Third, it is important to analyze jurisdictional acts, which are the basis for recognition and enforcement. The phenomenon of forum shopping can, at present, be witnessed in relation to enforcement proceedings since, if a debtor has property on the territory of several states or if one state has a variety of judicial systems, a claimant can choose the most expedient and convenient domestic procedure for enforcement proceedings. In this context, if a debtor has property on the territory of several states, a claimant can seek recognition and enforcement of a judgment by taking recourse to the courts of several countries.

12 Sobranie zakonodatel’stva RF (1997) No.30 item 3591.
2.2. Grounds for the Recognition and Enforcement of Foreign Court Judgments and Foreign Arbitral Awards

The first grounds include international agreements, when enforcement of a foreign court judgment or arbitral award in another state is possible only on the grounds of a bilateral (or multilateral) agreement of the Russian Federation. This provision was previously found in Article 1 of Edict No.9131 (No.XI) of the Presidium of the USSR Supreme Soviet of 21 June 1988 on the Recognition and Enforcement in the Soviet Union of Foreign Court Judgments and Arbitral Awards.

In the absence of such an agreement, it is normally impossible to enforce foreign court judgments in Russia (or Russian court judgments in other countries). Moreover, agreements can contain a wide variety of rules and regulations. For example, there are major differences among the provisions governing enforcement\(^{13}\) in the Agreement on the Procedure for Resolving Disputes Related to Conducting Economic Activities (Kiev, 20 March 1992)\(^{14}\) and in bilateral agreements between the Russian Federation and Belarus,\(^{15}\) Spain\(^{16}\) and Italy.\(^{17}\) The basis for enforcing judgments of international commercial arbitration tribunals is not only the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter, the “New York Convention”)\(^{18}\) but also a number of bilateral agreements, e.g., with the Federal Republic of Germany\(^{19}\) and with Algeria.\(^{20}\) A list of such agreements can be found through the medium of

\(^{13}\) For an interpretation and classification of various provisions on enforcement, see Section 2.3.

\(^{14}\) Hereinafter referred to as the “Kiev Agreement”, which entered into force for Russia on 19 December 1992; \(\text{VIS} (1992) \text{No.1}\).


\(^{16}\) Agreement between the Soviet Union and the Kingdom of Spain on Legal Aid in Civil Matters, Madrid, 26 October 1990.

\(^{17}\) Convention between the Soviet Union and the Republic of Italy on Legal Aid in Civil Matters, Rome, 25 January 1979.

\(^{18}\) The Soviet Union signed the Convention on 29 December 1958. It entered into force for the Soviet Union on 22 November 1960; \(\text{Vedomosti VS SSSR (1960) No.46 item 421}\).

\(^{19}\) Agreement on General Issues of Commerce and Shipping between the Soviet Union and the Federal Republic of Germany, Bonn/Moscow, 25 April 1958. This Agreement was ratified by the Soviet Union on 18 September 1958 and entered into force on 24 April 1959; \(\text{Vedomosti VS SSSR (1959) No.17 item 102}\).

online data bases such as Garant (<www.garant.ru>) as well as in specialized literature.21

The second point is when enforcement of a foreign court judgment or arbitral award is permitted in cases stipulated by a federal law. Such cases take into account the principle of reciprocity where—even in the absence of a bilateral or multilateral agreement—a foreign court judgment or arbitral award will be enforced upon condition that it meets certain requirements and complies with the procedural rules for obtaining leave for enforcement. Since the principle of reciprocity was—unfortunately, in our view—not included as a general rule22 during the drafting of the APK, this principle can be applied only in cases stipulated by a federal law, which complies with the first part of Article 241 of the APK.

For the time being, there are two grounds for reciprocity in Russian legislation. The first provision of this kind is enshrined in Article 1 of the 2002 RF Federal Law on Insolvency (Bankruptcy) (as amended).23 The second can be found in the declaration of the Soviet Union upon ratification of the 1958 New York Convention. Here, the government stated that “the Soviet Union will apply the provisions of this Convention in relation to arbitral awards rendered on the territory of states that are not party to the Convention only under the condition of reciprocity”.24 Therefore, in our view, Dr. B.R. Karabel’nikov was correct when he concluded that arbitral awards rendered on Russian territory and in countries that are not contracting parties to the New York Convention may nevertheless be recognized and enforced in Russia.

There was one such precedent for this in 1966, when an award of the Foreign Trade Arbitration Commission under the Chamber of Commerce and Industry of the Soviet Union was recognized and enforced in Ghana, which, at that time, was not yet a party to this Convention.25

21 See, for example, the special insert in VVAS (1999) No.3; and T.N. Neshataeva, Mezhdunarodnyi grazhdanskii protsess (Delo, Moscow, 2001).

22 It is difficult for us to judge the reasons for not including rules on reciprocity in the draft APK. This is not a purely legal issue; it obviously has a certain political importance and is related to the openness of the legal space in Russia for foreign judicial decisions.


24 See S.N. Lebedev, Mezhdunarodnyi torgovyi arbitrazh (Mezhdunarodnye otnoshenia, Moscow, 1966), 191-192.

Allowing reciprocity is more justifiable from the point of view of reciprocity in international legal relations (*comitas gentium*), in that—even in the absence of a treaty—it allows for the enforcement of a foreign judgment upon condition that certain requirements of domestic law (of the state where the judgment is to be enforced) are met and that there is compliance with certain judicial procedures.

In this context, one can also cite a landmark Ruling No.5-G02-64 of the Judicial Collegium on Civil Matters of the Supreme Court of Russia of 7 June 2002. According to this judgment:

“A petition for recognition and enforcement of a foreign court judgment may be satisfied by a competent Russian court even in the absence of a corresponding international treaty if, on the basis of reciprocity, the courts of the foreign state recognize the judgments of Russian courts. In relation to this, during the resolution of the case in question, the court should verify whether judgments of Russian courts have been recognized by the courts of the United Kingdom of Great Britain and Northern Ireland, or whether such cases are not allowed in accordance with that country’s legislation.”

The judgment was based on Article 98(1) of the Partnership and Cooperation Agreement between the Russian Federation, on the one hand, and the European Communities and their member states, on the other, of 24 June 1994, which stipulates that:

“[W]ithin the scope of this Agreement, each Party undertakes to ensure that natural and legal persons of the other Party have access free of discrimination in relation to its own nationals to the competent courts and administrative organs of the Parties to defend their individual rights and their property rights, including those concerning intellectual, industrial and commercial property.”

Furthermore, upon consideration of the claimant’s petition for enforcement of a judgment of the High Court of Justice of England and Wales in the Commercial Arbitration Court of Moscow (rulings of 10 October 2002 and 21 March 2003) and the Federal Arbitration Court of the Moscow Okrug (judgment of 2 December 2002), the legality of the claimant’s petition for recognition and enforcement of a foreign court judgment in the absence of a specialized international treaty between Russia and the United Kingdom was never doubted.

Considering the application of reciprocity to be, on the whole, a positive phenomenon, we shall identify a number of conditions under which reciprocity may be applied.

*First*, a petition for recognition and enforcement of a foreign court judgment may be considered by a competent arbitration court even in the

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26 See A.I. Muranov, *Mezhdunarodnyi dogovor i vzaimnost’ kak osnovaniia privedeniiia v ispolneniia v Rossii inostrannykh sudebnikh reshenii* (Statut, Moscow, 2003), 90–93.

27 For these legal acts, see ibid., 90–104.

28 For more detailed research, see Muranov, *op. cit.* note 26.
absence of a specialized bilateral or multilateral agreement if it complies with the requirements established by the APK and with the procedure for obtaining leave for enforcement (exequatur), as defined in Chapter 31 of the APK. As Dr. A.I. Muranov has correctly remarked, the courts—as an organ of state power—are entitled to resolve issues dealing with reciprocity. 

Second, reciprocity does not require—from either of a foreign state or a petitioner—any absolute guarantees that every judgment of a foreign court requiring enforcement in Russia will be recognized; nor does it require—of a foreign party—similar actions in resolving such issues. Reciprocity suggests only that the position of a foreign state in relation to Russian court judgments will be equivalent to the position taken by Russia in relation to the court judgments of this same foreign state.

Third, there is the issue of how to establish reciprocity if, for example, a court in the United Kingdom earlier refused to recognize or enforce a court judgment from Russia, at the same time that a claimant from England is seeking enforcement in Russia. Is absolute reciprocity necessary when enforcing foreign court judgments on both sides of the border or is partial reciprocity sufficient?

Clearly, it is important to distinguish between full and partial reciprocity since the enforceability of no small number of foreign court judgments, although not all, will depend on this. In addition, it is also important to distinguish, depending on the grounds, between procedural and substantive prerequisites for reciprocity. As a result, when evaluating the rules on reciprocity in the area of recognition and enforcement of foreign court judgments, Russian courts should not base their determination of whether or not there is reciprocity on individual, episodic judgments of the courts of other states in refusing exequatur in relation to judgments of Russian courts; instead, they should evaluate existing practice on the whole (on the basis of the data presented by the representatives of the parties, with the aid of expert opinions and other permissible evidence).

Fourth, the issue of the burden of proof with respect to reciprocity is not unimportant. In an earlier work, I have suggested using the analogy of substantive reciprocity (Art.1189(2), RF Civil Code) and have argued that the burden of refuting procedural reciprocity be imposed upon the judgment debtor. A more detailed study of this issue shows that the bur-

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29 See ibid., 56 et seq.
31 V.V. Yarkov (ed.), Kommentarii k Arbitrazhnomu Protsessual’nomu Kodeksu Rossiiskoi Federatsii (Izdatel’stvo Beck, Moscow, 2003), 531.
den of proving the existence of reciprocity should be imposed upon the claimant since—in the absence of an international treaty—it is, indeed, the claimant who raises the question of recognition and enforcement of a foreign court judgment. This is precisely the manner in which this issue is resolved in Article 328(5)(1) of the Code of Civil Procedure of the Federal Republic of Germany, which provides that recognition of a foreign court judgment is not permitted unless reciprocity is guaranteed.

In its Ruling on Case No. 5-G02-119 of 13 September 2002,33 the Judicial Collegium on Civil Matters of the Supreme Court of the Russian Federation upheld the ruling of the Moscow City Court. Under this Ruling, the petition of the limited-liability company Nörr Stiefenhofer Lutz for recognition of the judgment of the Cologne Court of First Instance of 30 May 2001 on the initiation of bankruptcy proceedings in relation to Nosta Metallhandels GmbH was denied, since this company’s property was located in Moscow. The Judicial Collegium indicated that no evidence had been submitted in court to suggest that the judgments of Russian courts are recognized on the territory of the Federal Republic of Germany. The Court did not find convincing the petitioner’s reference to Article 102 of the Introductory Act to the German Statute on Insolvency—as well as to resolutions of the Senate on Civil Matters of the Supreme Court of the Federal Republic of Germany of 14 November 1996 and 21 November 1996 on recognition of a Swedish court judgment in a bankruptcy case—as confirmation of the applicability of the principle of reciprocity between the Federal Republic of Germany and the Russian Federation. It also failed to find convincing a reference to Article 1189 of the RF Civil Code since this Article regulates issues related to the application of foreign law during the resolution of disputes with respect to the merits of the case. However, in this case, what was being considered was the issue of recognition and enforcement of a foreign court judgment with respect to a dispute that had already been resolved on the merits.

Fifth, there is the relationship between reciprocity and public policy. In our view, the denial—in individual cases—of recognition of Russian or foreign court judgments on the grounds of public policy should not influence our understanding of the principle of reciprocity. Recognition and enforcement of a foreign court judgment may be denied on the grounds of public policy if the consequences of the enforcement of said judgment will be incompatible with domestic law. In this sense, a refusal on the grounds of public policy can be seen as a special case under the principle of reciprocity.

Sixth, the process of establishing reciprocity is important. In order to confirm that reciprocity exists, a court must be guided by certain criteria. In Germany, for example, the main criterion for the recognition and enforcement of foreign court judgments is equivalency (Gleichwertigkeit), which harmoniously combines overall compliance of court judgments

32 For example, almost all the commentaries on Art. 328 of the Code of Civil Procedure of the Federal Republic of Germany contain lists of states in relation to which there is reciprocity, with references to judicial practice.

33 Taken from the website of the RF Supreme Court at <www.supcourt.ru>.
(wesentliche Übereinstimmung) and internal reciprocity on the part of the foreign state (innere Gegenseitigkeit).\(^{34}\) A foreign court judgment, which is subject to recognition or enforcement, must be equivalent to the judgments of German courts that have been recognized and enforced in this same foreign country. A person filing a petition for *exequatur* in a German court would, then, cite the recognition and enforcement of these judgments as evidence of the existence of reciprocity.

Overall compliance concerns, first of all, the nature of the court judgment itself which, in general, should be in accordance with a judgment that is subject to recognition in Germany, both in relation to the subject matter on which the judgment was rendered and in relation to the conditions necessary for its recognition or enforcement. The necessity for a correlation—between the laws on recognition of the first country with those of Germany—encompasses all rules and regulations, both substantive and procedural, although, as a rule, their full and complete equivalence is, of course, possible only in theory.\(^{35}\)

Thus, in establishing reciprocity, a claimant has to prove and a Russian arbitration court has to establish, the following conditions:

1. Whether there have been cases of recognition and enforcement of judgments of Russian courts and of the other state on the basis of reciprocity;
2. Whether these cases of recognition and enforcement were relatively systematic in nature, *i.e.*, whether at least partial reciprocity exists in relations between the Russian Federation and the other state;
3. Whether the judgments of Russian courts, recognized in the other state, were basically equivalent (in substance) to the case in question;
4. The procedure of *exequatur* with respect to a foreign court judgment on the basis of reciprocity must, in any case, comply with the conditions for recognition and enforcement of judicial acts, as established in Chapter 31 of the *APK*;
5. Even if evidence of reciprocity is submitted to the court, there may not be any other legal obstacle to satisfaction of a petition (*Art.\,244, *APK*), including that enforcement of the judgment in question may not contravene the public policy of the Russian Federation.

\(^{34}\) D. Martiny, *Handbuch des Internationalen Zivilverfahrensrechts* (Mohr Siebeck, Tübingen, 1984), 526.

2.3. Legal Provisions for Recognizing and Enforcing Foreign Court Judgments and Foreign Arbitral Awards

The legal provisions governing recognition and enforcement differ depending on the type of judgment and the nature of the underlying contract or agreement that is the subject of the judgment.

In doctrine and in legislation, a distinction is made between two types of judgments: on recognition and on enforcement. With respect to judgments on recognition, the 1988 USSR Edict on Recognizing and Enforcing Foreign Court Judgments and Arbitral Awards, mentioned above, established special rules for granting such judgments legal force (Art.10). However, the APK fails to provide an answer to the question of how a foreign court judgment on recognition should be enforced, e.g., if it has to be registered in a special registry on the territory of the Russian Federation. In this case, is it necessary to follow a specific procedure for recognition and enforcement under general rules or can such a judgment be enforced without going through a special procedure under the rules established in Article 10 of the above-mentioned Edict?36

Following the entry into force of the new APK, a question arose in the judicial practice of Russia's Primor'e Krai as to the procedure that interested persons should follow in order to challenge a judgment of a foreign court.37 The case concerned registration of the right of ownership in the port of Sovetskaia Gavan' of the new owner of a ship that had been sold on the basis of a ruling of the Pusan Regional Court of South Korea. The Primor'e Krai Court, which had accepted the petition prior to the entry into force of the APK in accordance with the rules established by the 1988 Edict of the Presidium of the USSR Supreme Soviet, stayed proceedings in the case after 7 August 2002 and transferred it to an arbitration court for consideration. Citing the fact that the APK did not foresee the consideration of challenges to recognition of foreign court judgments and that, according to Article 10 of the 1988 USSR Edict, such cases fall under the jurisdiction of courts of general jurisdiction, the arbitration court stayed proceedings in the case for lack of jurisdiction.

The Judicial Collegium on Civil Matters of the Supreme Court of the Russian Federation (Judgment No.56-G02-32 of 19 February 1998) upheld the judgment of the Primor'e Krai Court, noting that the provision established in Article 10 of the 1988 Edict on the possibility of accepting and considering challenges in relation to this category of cases (which are not subject to compulsory enforcement) is a part of the rules for court hearings established in Chapter 31 and Articles 241-246 of the APK. Under the APK, this procedure—filing a challenge—is stipulated as a general rule in Article 41.


37 The case described herein has not (yet) been published. The author discovered this material during his research in the records of the RF Supreme Court.
In our view, this situation could be resolved in the following manner. According to Article 3 of the 2002 RF Federal Law on the Entry into Force of the Arbitration Procedure Code of the Russian Federation, the 1988 Edict is applicable insofar as it does not contravene the APK. Therefore, since the procedure for considering challenges to the recognition of foreign court judgments that are not subject to compulsory enforcement is reflected in Article 10 of the 1988 Edict, this part of the Edict is therefore applicable. The jurisdiction (podvedomstvennost') of arbitration courts in such cases stems from the criteria established under Article 27 of the APK, which are connected with other forms of economic activity. It would be illogical to divide jurisdiction in cases in the realm of international enforcement proceedings between two judicial systems, which would contradict the very logic of the reform that was carried out in the sphere of jurisdiction.

Legal provisions on the recognition and the entry of judgments into force can be distinguished in the following manner.

First, this concerns enforcement of a foreign court judgment as if it had been rendered by a Russian court, without any reservations whatsoever. Such a domestic regime on enforcement was established by the Agreement between the Russian Federation and the Republic of Belarus on the Procedure for the Mutual Enforcement of the Judicial Decisions of Commercial Arbitration Courts of the Russian Federation and Economic Courts of the Republic of Belarus, as ratified by Russia on 11 July 2002, No.90-FZ, and by Belarus on 13 June 2002, No.109-Z. According to Article 1, court orders of competent courts do not need to be subject to a special procedure for recognition but, rather, are enforced by way of the same procedure as if they were orders of courts in that state (on the basis of enforcement documents of the court that rendered the judgment). Enforcement documents are signed by a judge, sealed and filed in Russian; they do not require legalization.38

38 The main provisions are contained in Arts.1-3 of the Agreement between Russia and Belarus:

"Article 1: Judicial acts of competent courts of the contracting parties do not need to be subject to a special procedure for recognition but are enforced in the same procedure as if they were judicial acts of the courts in that state on the basis of enforcement documents of the court which rendered the decision. Economic courts of the Republic of Belarus and arbitration courts of the Russian Federation, which are entitled to consider disputes in accordance with the rules established by Art.4 of the Agreement of 1992, are deemed to be competent courts.

Article 2: Enforcement documents signed by a judge and stamped with the seal of the competent court are filed in Russian and do not require legalization.

Article 3: An enforcement document for the recovery of funds shall be sent by the claimant directly to a bank or other credit organization servicing the debtor if the claimant has information on the accounts of the debtor held there and on the existence of funds therein. The bank or other credit organization shall, on the basis of the enforcement document, withdraw
Second, this concerns enforcement of a foreign court judgment through a simplified procedure of verification in response to a petition from an interested party, with consideration of possible objections on the part of the debtor. Such a procedure was established, *inter alia*, by the Kiev Agreement between the member states of the CIS that are signatories thereto. A similar procedure was established by the Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Matters (Minsk, 22 January 1993).\(^{39}\)

Third, this concerns the case of redress to a court in the state where enforcement is sought through the procedure of *exequatur*, in which both the petition of the claimant and the objections of the debtor are examined. This procedure is applied in relations between states that, as a rule, are not unified by a common economic space and the legal systems of which have significant differences. Such a procedure has been established, for example, by the Convention on Recognition and Enforcement of Foreign Arbitral Awards as well as by a large number of bilateral agreements with Russia on legal aid and legal relations with other states (for example, with Italy\(^ {40} \) and with Spain\(^ {41} \)).

Fourth, it is possible to identify one more procedure for recognition and enforcement of foreign court judgments, keeping in mind the specifics of this particular type of judgment against a state. This refers to the decisions of several international courts and arbitration tribunals that were created on the basis of international agreements and treaties.

the amount of the award from the debtor’s account in the same procedure as it would upon receipt of the indicated documents from an organization located on the territory of the same state as that bank or credit organization.

If the claimant does not have such information or if there are insufficient funds in the debtor’s account for payment of the entire award, as well as in other instances, the enforcement document is sent by the claimant (or upon his instruction by a bank or other credit organization) to a bailiff (bailiff-enforcers *sudebnyi pristav-ispolnitel’*) for enforcement in accordance with the legislation of the contracting party on whose territory enforcement is required.\(^ {42} \)


\(^{39}\) Hereinafter referred to as the “Minsk Convention”. This Convention was ratified by Russia on 4 August 1994 and entered into force (for Russia) on 10 December 1994. See *Sobranie zakonodatel’stva RF* (1999) No.17 item 1472. The Minsk Convention will lose force for Russia after ratification of the Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Matters, Chisinau, 7 October 2002.

\(^{40}\) Op.cit. note 16.

As a first example, one can refer to the decisions of the European Court of Human Rights, which are enforced directly on the territory of the member states of the Council of Europe. The compulsory enforcement of decisions of the European Court of Human Rights—concerning, for example, payment of compensation by a state to a claimant—is guaranteed by the international obligations of states which (in theory, face the threat of having their membership in the Council of Europe suspended or even of being excluded from the organization) are obliged to enforce the decisions of the Court.

The International Center for the Settlement of Investment Disputes (ICSID)—founded on the basis of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention of 1965)—is a second example of an international arbitration body whose judgments are not subject to exequatur or any other verification procedure.

According to Article 54 of the Washington Convention:

“Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.”

It follows from the substance and meaning of the Convention that it is impossible to refuse enforcement of an arbitral award rendered in accordance with the conditions thereof, insofar as such awards are not subject to review by domestic courts. With respect to Russia’s attempt to join a number of other international organizations, such as the World Trade Organization (WTO), for example, it is important to keep in mind that the WTO has also established an arbitration procedure for the resolution of disputes that involves the enforcement of arbitral awards without any sort of verification procedure on the part of domestic courts.

2.4. Objects of Enforcement

According to the first part of the article which is the subject of our comments, the object of enforcement is determined in the following manner.

First, this involves foreign court judgments in disputes (or other matters) arising during the performance of business or other economic activities.

42 On 7 May 2002, for example, the European Court of Human Rights rendered its judgment in the case of Burdov v. the Russian Federation, under which Russia—as the state–respondent—was required to pay Burdov EUR 3,000. The judgment has been published in Rossiiskaia gazeta, 4 July 2002.

43 For a similar conclusion, see E.V. Bruntseva, Mezhdunarodnyi kommercheskiy arbitrazh (Izdatel’skii dom “Sentiabr”, St. Petersburg, 2001), 247, 248.
Accordingly, other foreign court judgments in cases involving other subject matter, such as family or inheritance matters, for example, are recognized and enforced by courts of general jurisdiction.

Second, this involves awards of (commercial) arbitration tribunals (treteiskie sudy) and international commercial arbitration tribunals that are rendered on the territory of foreign states in disputes (or other matters) involving business or other economic activities.

Third, there is the issue of amicable agreements confirmed by a court as an object of enforcement in international enforcement proceedings. For example, amicable agreements are specifically mentioned in the Convention (but not in the Kiev Agreement). Moreover, many bilateral agreements on legal aid have specific clauses on the possibility of recognizing and enforcing amicable agreements, such as those, for example, with Georgia (Art.57) and Italy (Art.26). Thus, in those instances where a bilateral agreement establishes the possibility of enforcing amicable agreements, they are unquestionably an object of recognition and enforcement in the procedure established by Article 31 of the APK. It is possible that this is a desired and broad interpretation of the Kiev Agreement, since Russia does not have bilateral agreements on legal aid with all of the countries of the CIS.

Somewhat more complicated is the issue of amicable agreements confirmed by a ruling (opredelenie) of an international commercial arbitral tribunal. The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards covers only arbitral awards, not rulings. As a result, a ruling of an arbitral tribunal—confirming an amicable agreement—may not be the object of recognition and enforcement. In this case, in order to protect the interests of the parties—even if the parties in arbitration proceedings have concluded an amicable agreement—said agreement must be included in the main body of the arbitral award, although, in practice, we have encountered instances where the reverse was true. A ruling of an arbitration court confirming an amicable agreement—in contrast to a similar ruling by a state court—may not be enforced within Russia since Russian legislation establishes the possibility of issuing a writ of execution only in relation to awards of international commercial arbitral tribunals.

Fourth, there is the issue of court orders (prikazy), which are court decrees (postanovleniia) issued in response to a petition of a creditor for payment of monies or reclamation of property from a debtor. Can a court order be grounds for recognition and enforcement in other states, in Russia, for example, where a debtor’s property or money is located, since claims are also permitted in the realm of business and commerce?
The legislation of many CIS countries foresees the issuing of court orders, e.g., Chapter 14 of the Business (Khoziaistvennyi) Procedure Code of Uzbekistan, Chapter 15 of the Business Procedure Code of Belarus and the Civil Procedure Codes of Kazakhstan and Azerbaijan, where there exists a unified civil jurisdiction. For example, the Agreement between Belarus and Russia envisions mutual enforcement of judicial acts, by which can be understood not only court judgments and rulings but also court orders. As far as other CIS states are concerned however, this is not the case; court orders do not have the force of a court judgment, as a result of the simplified legal procedure under which they are rendered. In the end, judicial practice will indicate the direction of potential development in this area.

Fifth, the article—upon which we are offering out comments to the reader—does not provide an answer to the question of whether notary acts related to monetary obligations can be an object of mutual recognition and enforcement for Russia. The enforcement power and cross-border legal force of notarial acts involving monetary obligations are provided for in Article 51 of the Minsk Convention and in Article 26 of the Convention between the Soviet Union and Italy on Legal Aid in Civil Matters. Reference is clearly made to the enforcement order (ispolnitel’naia nadpis’) of a notary. Article 52 of the Agreement between Russia and Poland on Legal Aid and Legal Relations in Civil and Criminal Matters also states clearly that notary acts that have the force of an enforcement order in accordance with the legislation of the contracting state on the territory of which such acts were concluded are also considered to be judicial decisions. Yet, there is no clear-cut answer to the question of the legal force of enforcement orders which, according to Russian legislation, is not a simple one. Nevertheless, this issue is of interest if only for the reason that, in Italy—a country with which Russia has such an agreement—notary agreements have the effect of an enforcement order when one of the parties thereto fails to fulfill the conditions thereof, including those involving monetary payments.

In the European Union, notary acts for the recovery of funds also have cross-border force. Detailed separately in the Brussels Convention (Art. 50) as well as the Lugano Convention (Art. 50)—and now in Regulation No. 44 of 200145 (Art. 57)—they are seen as authentic acts and their enforcement can be refused only for reasons of public policy.

44 See V.V. Yarkov, Kommentarii k Federal’nomu zakonu "Ob ispolnitel’nom proizvodstve" i k Federal’nomu zakonu "O sudebnikh pristavakh" (Iurist, Moscow, 1999), 72-74.
Thus, the question arises as to the competent court for resolving a dispute on recognition and enforcement in Russia of a notary act rendered, for example, by a notary in Italy or Poland with respect to civil law relations (гражданские правоотношения) among businesspeople. Unfortunately, the APK avoids this issue. In our view, an arbitration court would have jurisdiction on the basis of the provisions of Part 1 of Article 27 of the APK if the notary act meets the criteria determined by that Article. This Article stipulates that arbitration courts have jurisdiction in all cases involving business or other economic activity. Moreover, the first part of Article 27 refers both to disputes and other matters if they are connected with the performance of business or other economic activity.

2.5. Filing a Petition for the Recognition and Enforcement of Foreign Court Judgments or Foreign Arbitral Awards

Under Article 242 of the APK, a petition for recognition and enforcement of a foreign court judgment or arbitral award is filed by the party to a dispute in whose favor the judgment has been rendered (the claimant) with an arbitration court in the subject of the Russian Federation where the debtor has her domicile or residence; if it is unclear as to where the debtor has her domicile or residence, a petition may be filed with a court where the debtor’s property is located.

This article details the jurisdiction over petitions seeking recognition and enforcement of a foreign court judgment or arbitral award (Part 1), the requisites of such petitions (Part 2) and the documents to be appended thereto (Parts 3-5). In addition, it is important to keep in mind that this article is applied unless otherwise stipulated by Russia’s international agreements. For example, according to Article 8 of the Kiev Agreement, in order for a judgment to be recognized and enforced, the interested party must append a duly certified copy of the judgment for which the petitioner is seeking enforcement, an official document attesting to the fact that the judgment has entered into force (if this is not clear from the text of the judgment itself), proof that the other party has been informed of the proceedings and an enforcement order (исполнительный документ).

It is true that the last provision of Article 8 of the Kiev Agreement has always raised questions, since the enforcement order is issued by the court that has recognized the judgment in question, not by the court that rendered the judgment.46 Currently, a domestic regime of enforcement

46 A number of commentators on the Kiev Agreement have commented on this point. See, for example, A. Tynel’ and V. Kvalei (eds.), Mezhdunarodnyi kommercheskiy arbitrazh. Gosudarstva Tsentral’noi i Vostochnoi Evropy i SNG (Izdatel’stvo Beck, Moscow, 2001), 32-34; L.P. Anufrieva, Mezhdunarodnoe chastnoe pravo, Vol.3 (Izdatel’stvo Beck, Moscow, 2001), 394-398.
and recognition of domestic enforcement orders has been established in full only between Russia and Belarus.

This is also the case with respect to documents attached to a petition for recognition and enforcement of a foreign arbitral award. The list of relevant documents has been established by Article IV of the 1958 New York Convention which, for all intents and purposes, is the same as the rules of Part 4 of Article 8 of the Kiev Agreement. If another international agreement establishes a different list of documents (for example, Art.17, Agreement on the Mutual Provision of Legal Aid between the Soviet Union and Algeria) to be appended to a petition for enforcement of an award, then, in this case, one should be guided by the bilateral agreement. Under Article 242(5) of the APK, the amount of state fees is equal to five minimum monthly wages.

2.6. Procedure for Considering Petitions

Article 243 of the APK describes the procedure for considering petitions for recognition and enforcement that had been established earlier by the 1988 USSR Edict. A petition is considered by an individual judge, who summons the relevant parties. The failure of the parties to appear, however, does not prevent a hearing of the petition. The facts forming the basis of proof are established depending on whether the question concerns recognition and enforcement of a foreign court judgment or a foreign arbitral award.

With respect to foreign court judgments, the list of facts that must be proven is determined on the basis of Article 244(1) of the APK unless otherwise stipulated by an international agreement, while taking into account any objections raised by the judgment debtor.

With respect to foreign arbitral awards, the list of such facts is also determined while taking into account the objections of the judgment debtor on the basis of the 1958 Convention or on the basis of bilateral agreements between the Russian Federation and other countries if they establish a procedure for mutual recognition and enforcement of arbitral awards, e.g., with Germany, Algeria, Yemen and Iraq.

In addition, there is also an ongoing discussion as to whether the Kiev Agreement can be considered to be a regional treaty that regulates the procedure of mutual recognition and enforcement of arbitral awards among countries of the CIS or whether it should be governed by the 1958 New York Convention.47

At present, some CIS countries (Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Uzbekistan and Ukraine) are parties to the

47 Tynel’ and Kvalei, op.cit. note 46, 31-35.
1958 Convention, while others have not joined. In addition, not all countries are parties to the Kiev Agreement, in particular, Moldova, Armenia, Azerbaijan, Tajikistan and Turkmenistan.

In the opinion of a number of commentators, the Kiev Agreement provides the legal basis for the recognition of arbitral awards. Another approach to this question suggests that the legal basis for the recognition of arbitral awards is the 1958 New York Convention and, if a bilateral agreement exists, then that agreement forms the basis thereof.

In particular, Article 8 of the Kiev Agreement stipulates that an enforcement order must be attached to the petition for enforcement. However, the said document may not be issued in the country where the arbitral award was rendered. There are special domestic procedures for this. If an arbitral award rendered in Ukraine has to be enforced in Russia, it would contravene legislation for a Ukrainian court to issue a writ of execution. In this context, Letter No.OM-37 of the RF Supreme Arbitration Court of 1 March 1996 is significant. It underscores the fact that the Kiev Agreement provides for the mutual recognition and enforcement of court judgments in civil matters of one state on the territory of another state. Here, the term “courts” is understood to mean state arbitration courts, not arbitration tribunals the former being empowered to render decisions and judgments having the force of law and subject to compulsory enforcement on the territory of a state.

Current judicial practice is not unambiguous, and it is important to consider the direction in which it is now developing. Let us take, as an example, consideration by an arbitration court of a petition for recognition and enforcement of an award of the International Commercial Arbitration Court under the Chamber of Commerce and Industry of Belarus on the


50 According to Art.7(5)(b) of the 1997 RF Federal Law “On Enforcement Proceedings” (as amended), “a writ of execution [ispolitel'nuiy list] issued by [Russian] courts on the basis of […] foreign court judgments and arbitral awards is deemed to be an enforcement document”. Foreign arbitral awards may not have direct force on the territory of another country but must first undergo a procedure of recognition and enforcement.

51 This contradiction in judicial practice can be seen in the fact that courts have been considering petitions for recognition and enforcement of foreign arbitral awards on the basis of a wide variety of international treaties and agreements that establish varying levels of requirements for granting legal force to an arbitral award.
basis of the Kiev Agreement. The practice of the RF Supreme Court on this issue prior to the adoption of the new APK, as studied by the author, has not been marked by a singularity of position; courts of general jurisdiction have used—as the legal basis for a variety of cases—the Kiev Agreement, the 1988 Edict or Articles 5 and 36 of the 1993 RF Law on International Commercial Arbitration. In one ruling of the Presidium of the RF Supreme Arbitration Court, No.9772/01 of 6 August 2002, the Court noted the necessity for courts—when ruling on petitions for recognition and enforcement of awards of the International Commercial Arbitration Court under the Chamber of Commerce and Industry of Ukraine—to use the 1958 Convention and the Kiev Agreement although, as has already been noted, it is very difficult to include the latter among the legal acts that relate to international commercial arbitration.

2.7. Complex Issues in the Consideration of Petitions

Several issues may arise during the consideration of a petition for the recognition and enforcement of foreign court judgments or arbitral awards.

First, can a foreign court judgment or arbitral award be enforced on the territory of the Russian Federation if enforcement has already been denied in another country? In answering this question, it should be noted that a refusal of recognition and enforcement of a foreign court judgment or arbitral award in one country should not be seen as an obstacle to initiating similar proceedings on recognition in another country, if the debtor has property in several countries. There could be various reasons for refusal, and domestic legislation and international agreements could establish a wide variety of grounds for refusing recognition and enforcement. In addition, the judicial authority of one country is limited by its territorial boundaries. Therefore, the legal force of a judicial act denying enforcement of a judgment of Country A in Country B does not extend to other countries, including Russia. Consequently, if a debtor has property in other countries, the claimant can ‘try her luck’ and file a petition for recognition and enforcement of a court judgment in Country A in these countries, while meeting, naturally, all of the legal preconditions for this.

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Second is the question of the possibility of recognizing and enforcing in Russia a judgment of a court of Country A at the same time that a judgment of a court of Country B has already been recognized in Russia in an identical case between the same parties. A number of conventions and agreements shed some light on this issue.

For example, according to Article 55(c) of the Minsk Convention, one of the grounds for refusal of recognition and enforcement of judgments is the existence of a recognized judgment of a court of a third country on the same issue (traditional conditions relating to identical claims and decisions) on the territory of the state where enforcement is being sought. The same grounds can be found in Article 53(5) of the Russian–Polish Agreement on Legal Aid and Legal Relations in Civil and Criminal Matters: i.e., a judgment of a court of a third country on the same cause of action between the same parties shall not be recognized or enforced on the territory of Poland or Russia. In this case, the issue concerns court orders of third countries in cases with the same cause of action between the same parties, which is a basis to refuse recognition and enforcement of a judgment that has been subsequently rendered.

Third is the question of the possibility of filing a petition for recognition and enforcement of a judgment of a court in one country at the same that leave for compulsory enforcement has already been granted in another country. For example, there is a judgment of a Ukrainian court with respect to a respondent located in Belarus. In Belarus, however, the judgment was only partially enforced as a result of the insufficiency of the judgment debtor’s property. Could enforcement be sought in Russia if the debtor had property there? The answer, in our view, should be affirmative, since the court’s judgment was not fully enforced on the territory of one country. In this case, the claimant should, in our view, provide documents that confirm the fact of partial recovery, which, in fact, is stipulated in Article 53(2)(c) of the Minsk Convention. In addition, documents need to be submitted attesting to the completion of enforcement proceedings (Art.27, Federal Law on Enforcement Proceedings or analogous rules and regulations of another jurisdiction).

Article 243(4) of the APK contains an important provision providing that an arbitration court is not entitled to review the merits of a foreign court judgment. The grounds for refusal of recognition and enforcement—as set out in the APK and Russia’s international agreements—are exhaustive. In addition, under a procedure of *exequatur*, an arbitration court may only evaluate a judgment from the point of view of the criteria

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55 This is a hypothetical example that aims to provide answers to questions that could arise in judicial practice.
established in the law and in treaties; it is not entitled to change or correct anything therein because it is final and has entered into legal force.

The rules on the impossibility of reviewing the merits of a judgment also extend to foreign arbitral awards, since they are also final.

2.8. Grounds for Refusing to Recognize and Enforce a Foreign Court Judgment or Foreign Arbitral Award

2.8.1. General Conditions for a Refusal of Recognition and Enforcement

Under Article 244 of the 

(1) The judgment, according to the law of the state on whose territory it was rendered, has not entered into legal force;
(2) The party against whom the judgment has been rendered was not informed on a timely basis or in the proper manner of the time and place of the hearing or was, for other reasons, unable to submit its evidence (testimony) to the court;
(3) The consideration of the case, in accordance with an international treaty of the Russian Federation or a federal law, falls under the exclusive competence of a court in the Russian Federation;
(4) There exists a judgment of a Russian court that has entered into legal force on a dispute between the same parties on the same cause of action;
(5) Proceedings in a Russian court in a dispute between the same parties on the same cause of action was initiated prior to the initiation of proceedings in a similar action in a foreign court or the Russian court was the first to accept a petition in the dispute between the same parties on the same cause of action;
(6) The statute of limitations on enforcement of a foreign court judgment has expired and has not been reinstated by an arbitration court;
(7) The enforcement of a foreign court judgment would contravene public policy in the Russian Federation.

As it has already been noted above (see Section 2.3), there is no single procedure for recognition and enforcement of foreign court judgments. The procedure used is determined depending on the level of legal and economic cooperation between Russia and the relevant country or group of countries, on the degree of similarity between the legal systems of
Foreign Persons and Russia’s New Arbitration Procedure Code (Part I)

said countries, on which conditions were considered by the parties to an agreement to be more advantageous, etc. There are, at times, significant differences to be found in the agreements on legal aid as far as they concern conditions of recognition and enforcement.

Thus, the grounds for refusal of recognition and enforcement of a foreign court judgment—as established in Article 244(1) of the APK—are applicable unless otherwise stipulated by an agreement or treaty of the Russian Federation.

2.8.2. Bilateral Agreements

For example, Article 18 of the Soviet–Spanish Agreement on Legal Aid in Civil Matters provides extensive conditions for recognition and enforcement of judgments. They are recognized and enforced if:

(i) The judgment has entered into legal force and is subject to enforcement according to the laws of the contracting state on the territory of which the judgment was rendered;

(ii) The respondent (or her representative) did not take part in the proceedings but was duly informed on a timely basis in accordance with the laws of the contracting state on the territory of which the judgment has been rendered. (A notice to appear, as the result of filing a claim with a court, is not taken into consideration.);

(iii) On the territory of the contracting state where the judgment is supposed to be recognized and enforced, or on the territory of a third country, no judgment has been rendered that has entered into legal force in a dispute between the same parties on the same cause of action, or if proceedings were not initiated earlier in this country in a dispute between the same parties on the same cause of action;

(iv) The court rendering the judgment is competent to do so in accordance with Articles 19-20 of this Agreement;

(v) According to the legislation of the contracting state on the territory of which the judgment should be recognized and enforced, the case does not belong to the exclusive competence of that state’s institutions;

(vi) The recognition or enforcement of the judgment does not affect the sovereignty, security or fundamental principles of legislation of the contracting state making the request.

In other bilateral agreements and international conventions, the list of these legal-factual conditions may be narrower or they may be elaborated with the aid of another legal technique. For example, the Agreement be-
tween the Soviet Union and Greece on Legal Aid in Civil and Criminal Matters (Art.24) contains four conditions for recognition and enforcement of judgments;\footnote{Agreement between the Soviet Union and the Republic of Greece on Legal Aid in Civil and Criminal Matters of 21 May 1981.} with North Korea (Art.51), there are only two conditions;\footnote{Agreement between the Soviet Union and the Democratic People’s Republic of Korea on the Provision of Legal Aid in Civil, Family and Criminal Matters of 16 December 1957.} and with Cuba (Art.50), there are three conditions,\footnote{Agreement between the Soviet Union and the Republic of Cuba on Legal Aid in Civil, Family and Criminal Matters of 28 November 1984.} etc.

2.8.3. The 1993 Minsk Convention

The Minsk Convention envisions special, although simplified, judicial proceedings on recognition and enforcement. In particular, according to Article 53 of the Minsk Convention, there are two alternatives to filing a petition for leave to compulsorily enforce a judgment: (i) to the competent court of the state where the judgment is subject to enforcement; or (ii) to the court that originally rendered judgment in the case. In the latter case, this court forwards the petition to a court that is competent to render a judgment on the petition.

The following documents must be appended to a petition:

(a) The judgment (or a notarized copy thereof) as well as an official document indicating that the judgment has entered into legal force and is subject to enforcement or that it is subject to enforcement before entering into legal force (if this does not follow from the judgment itself);

(b) A document attesting to the fact that if the party against whom the judgment was rendered and who failed to participate in the proceedings was duly informed and properly served with a court summons on a timely basis or—in case of legal incapacity to take part in the proceedings—that the court was duly informed thereof;

(c) A document confirming the partial enforcement of the judgment at the moment that it has been forwarded;

(d) A document confirming the agreement of the parties in cases of contractual jurisdiction.

A petition for leave to compulsorily enforce and the documents appended thereto must be submitted in the form of a legalized translation in the language of the requesting state or in Russian.

The recognition procedure is as follows: a petition for recognition and leave for compulsory enforcement is heard by the courts of the
state on the territory of which the enforcement should take place. The competence of the court—considering the petition for recognition and leave for enforcement—is limited to a determination that the conditions stipulated by the Convention have been met. If a determination is made that the conditions have been met, the court must render judgment for compulsory enforcement.

A refusal of recognition and enforcement of a judgment is possible in the following cases if:

(a) In accordance with the legislation of the state on the territory of which the judgment was rendered, that judgment has not entered into legal force or is not subject to enforcement, with the exception of cases where a judgment is subject to enforcement prior to entering into legal force;

(b) The respondent did not take part in the proceedings as a result of the fact that she (or her authorized representative) did not receive a court summons on a timely basis or in the proper manner;

(c) In proceedings between the same parties on the same cause of action on the territory of the state where the judgment is supposed to be recognized and enforced, an earlier judgment has already been rendered that has entered into legal force, or if there exists a recognized judgment of a court of a third country, or if proceedings were initiated earlier in this case by an institution of this country;

(d) According to the provisions of the Convention and, in instances not stipulated thereby, according to the legislation of the state on the territory of which the judgment should be recognized and enforced, the case falls under the exclusive competence of the institutions of that state;

(e) If there is no document confirming that there is an agreement between the parties on the matter of contractual jurisdiction;

(f) If the statute of limitations has expired for compulsory enforcement as established by the legislation of the state, the court of which will enforce the request.

2.8.4. The Model of Recognition and Enforcement under the 1992 Kiev Agreement

Here, the paradigm is somewhat different. According to Article 7 of the Kiev Agreement, CIS member states mutually recognize and enforce judgments of competent courts that have entered into force. Judgments rendered by competent courts of one CIS member state are subject to enforcement on the territory of the other member states.
Judgments rendered by a competent court of one CIS member state with respect to levying execution upon a respondent's property are subject to enforcement on the territory of another CIS member state by the bodies appointed by the court (or determined by the legislation of that state).

Enforcement of a judgment may be refused—according to Article 9 of the Agreement—upon the request of the party against whom the judgment was rendered only if that party provides a competent court in the place where the enforcement is sought with evidence of the following:

(a) That a court in the CIS member state where enforcement is being sought rendered an earlier judgment that has entered into legal force in proceedings between the same parties on the same cause of action;
(b) That there exists a recognized judgment of a competent court of a third CIS member state or of a state that is not a member of the CIS in a dispute between the same parties on the same cause of action;
(c) That a dispute, in accordance with this Agreement, was decided by a court that did not have competence to do so;
(d) That the other party was not informed about the proceedings;
(e) That the three-year statute of limitations for seeking enforcement of a judgment has expired.

It is clear that the model contained in the Kiev Agreement does not coincide with the Minsk Convention, first, since it allows the court—that has rendered the judgment—to immediately issue a writ of execution and, second, that this can be submitted directly to the bodies responsible for enforcement proceedings. There is a variety of reasons for these discrepancies. These legal acts were drafted one year apart; it is also possible that the discrepancies can be explained by the different spheres of activity involved. If the Kiev Agreement is aimed at the movement of court judgments in economic disputes, the Minsk Convention is aimed more at the movement of court judgments and sentences in non-business cases.

2.8.5. General Conditions

In the end, the selection of these legal conditions could be very different, depending on the level of legal and economic integration of the states and their degree of trust in one another. This chiefly concerns the following legal conditions.

First, the judgment must be final and must have entered into legal force in accordance with the rules of domestic legislation. As a rule, the
possibility of appealing a judgment expires at the stage of cassation proceedings.

Second, a court must have competence to consider the specific case. This, most often, concerns the exclusive competence of a court to consider a particular dispute (see Art.248, APK).

Third, the respondent must be duly informed of the time and place of court hearings by means of a summons which has been duly served in accordance with domestic legislation and international agreements.

Fourth, the main principles of judicial proceedings must be observed, in particular, the right to legal defense, the opportunity to provide evidence and the right to a hearing.

Fifth, public policy should not be contravened in the country in which enforcement is being sought, from the point of view of the legal consequences of enforcement.

2.8.6. The ECHR as a Ground for Refusing to Recognize and Enforce a Foreign Court Judgment

The analysis set forth above shows that—depending on the nature of relations among different states—there is a variety of ways for regulating the question of recognition and enforcement of judicial acts. One question relates to the possibility of applying the ECHR as grounds for refusing to recognize and enforce a foreign judicial act where evidence is submitted of a violation of the Convention. In this respect, one could look at the case of Krombach v. France (No.29731/96, European Court of Human Rights), in which the Court concluded that recognition of a judicial act of a French court in Germany would violate the procedural guarantees of Article 6 of the ECHR.

We argue that—based on the above precedent—it is possible to conclude that noncompliance in judicial proceedings with the guarantees of Article 6 of the ECHR can also be grounds for a refusal to recognize and enforce a foreign court judgment, regardless of the existence of bilateral or multilateral agreements in the sphere of international enforcement proceedings (including agreements among the countries of the CIS).

In this sense, the European Convention on Human Rights presents a body of unique domestic rules of procedural ordre public. Moreover, the Convention can be applied in a dual manner when resolving issues of recognition and enforcement of a foreign judicial act. First, from the point of view of a violation of its provisions by a court when resolving a

59 The judgment was rendered by the third chamber of the European Court of Human Rights; dated 13 February 2001, final judgment of 13 May 2001; the text of the judgment can be found at <http://cmiskp.echr.coe.int//tkp197/viewhkm.asp?action=open&table=F69A27FD8F86142 BF0C106DEA39B649&key=1732&sessionId=10114098&skin=hr&attachment=true>.
dispute, for example, with respect to the fact that the period of time for considering a petition for recognition and enforcement of a foreign court judgment turned out to be excessive. Second, from the point of view of the consequences that could result from enforcement of a foreign court judgment: namely, a violation of the provisions of the Convention. This follows logically from the priority of its provisions in relation to the rules of the legal systems of the states that have ratified the Convention.

2.8.7. Grounds for a Refusal to Recognize and Enforce a Foreign Arbitral Award

Under Article 244(2) of the APK, the following are grounds for a refusal to recognize and enforce a foreign arbitral award: contravention of public policy (Art.244(7)(1), APK) as well as grounds established by an international agreement of the Russian Federation or by the 1993 RF Law on International Commercial Arbitration (Art.239(4)), unless otherwise stipulated by an international agreement.

Practically all of the above-mentioned provisions are encompassed by Article V of the 1958 New York Convention, by which, obviously, one should be guided unless otherwise established by a specialized bilateral or regional agreement (see Section 2.6).

According to Article III of the 1958 Convention: “[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the reward is relied upon, under the conditions laid down” in the Convention.

The grounds for refusal of recognition and enforcement of an arbitral award are divided into two groups and are contained in Article V of the 1958 New York Convention (as well as in Art.36 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration and Art.36 of the 1993 Russian Federation Law on International Commercial Arbitration). These are, in turn, subdivided into two major groups.

The first group encompasses various factual issues related to procedural rules, the existence (or absence) of which is a ground for refusal of recognition and enforcement of an arbitral award. The second group encompasses the consideration of factual circumstances relating to the substantive side of arbitration proceedings which may also serve, upon a determination thereof, as grounds for refusing to recognize the legal force of an arbitral award.

According to Article V of the 1958 New York Convention

“Recognition and enforcement of an arbitral award may be refused, at the request of the party against whom it is invoked, only if that party furnishes the competent authority where recognition and enforcement is sought, proof that:
Foreign Persons and Russia’s New Arbitration Procedure Code (Part I)

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

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

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

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

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

The second group of grounds is connected with the verification both of legal facts related to procedural rules and the merits of a dispute.

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

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

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

The discrepancies between these grounds for refusing to recognize and enforce an arbitral award are the following. First, points (a), (b), (c), (d), and (e) of Section 1 and point (a) of Section 2 of Article V of the 1958 New York Convention deal with procedural issues. Point (b) of Section 2 deals with substantive issues and relates more to the substantive issues both of the case itself and of the possible consequences of enforcement of the arbitral award. Second, if the first group of grounds (points (a), (b), (c), (d), and (e) of Section 1 and point (a) of Section 2) are more or less defined, the point relating to public policy is (quite) subjective and open to a (wide) variety of interpretations.

Third, there is a significant discrepancy in terms of the burden of proof. When setting forth evidence of the grounds outlined in Section 1, the obligation to prove the existence (or the absence) of the indicated procedural facts falls upon the party against whom the award was ren-
dered. The legal facts indicated in Section 2 may both be proven by the party against whom the award was rendered or be established at the initiative of the state court considering the petition for recognition and enforcement of the arbitral award. In this context, one can argue that a particular feature of proceedings involving the recognition and enforcement of foreign awards is to be seen in how active the court is as well as in the manifestation of a public basis aimed at protecting the domestic legal space from judgments that could adversely affect important features of the public life (publicnyi stroi) of one country or another. Contrary to the traditional rules of civil and arbitration procedure, in this context, the court has an obligation to take the initiative to determine the facts of the evidence that has been offered in such proceedings.

However, a common, unifying principle of all the grounds of Article V of the 1958 New York Convention is the fact that a competent court—considering a petition to recognize and enforce a foreign arbitral award—is not entitled to review it on the merits, i.e., the correctness of applying the rules of substantive law or determining the issues, which are subject to proof or in evaluating the evidence.

Nevertheless, there has been at least one instance in judicial practice that provides an example of imprecise interpretations of the rule on the distribution of the burden of proof: Ruling No.2853/00 of the Presidium of the RF Supreme Arbitration Court of 14 January 2003 upholding a judgment of the Federal Arbitration Court of the West Siberian Okrug of 20 July 1999 in case No.F04/1402-291/A70-99. The Italian company Pressindustria SpA filed a claim with the Commercial Arbitration Court of Tyumen Oblast' seeking the recognition and enforcement of the final award of an ad hoc international commercial arbitration tribunal of 7 July 1997 in Stockholm, Sweden, which was rendered against the open joint-stock company Tobol'skii neftekhimicheskii kombinat. In its judgment, the Stockholm Arbitration Panel head found that the agreement to create a joint enterprise called Sovbunital of 14 October 1988, concluded by the Company and the Plant, was null and void as a result of significant breaches of the provisions of the agreement by the Plant and that the Plant was required to indemnify the Company in the amount of its contri...
bution to the charter capital of the joint enterprise, as well as in the amount of its expenditures related to construction of the production line and the activity of the enterprise: in total, 75,827,365 German Marks. The Company’s petition was satisfied by the judgment of the court of first instance of 20 January 1999. This judgment was overturned by a ruling of the appeals court of 7 May 1999 and the petition for recognition and enforcement of the arbitration award was denied. In its judgment of 20 July 1999, the Federal Arbitration Court of the West-Siberian Okrug upheld the judgment of the appeals court.

The primary argument set forth by the Presidium in its ruling is that which, in particular, catches the eye of the reader: i.e., the arbitral award exceeded the limits of the arbitration clause. However, as was noted in the judgment of the West-Siberian Arbitration Court, the objections of the respondent could be reduced to the fact that the arbitral award contravened public policy and that the Arbitration Panel—in making its ruling—failed to take into account the imperative rules of Russian legislation which, it seems to us, in the end, fall under the category of public policy in terms of grounds for refusing recognition and enforcement of a foreign arbitral award. Thus, arbitration courts of various instances, with the exception of the first instance, have included—at their own initiative—among the issues subject to proof the fact that an Arbitration Panel rendered an award on matters exceeding the limits of the arbitration clause and deemed this to have been proven; however, the judgment debtor had not made this argument nor did he submit any evidence thereof. Regarding the case in question, the courts—contrary to the principle of the adversarial nature of the judicial process—exceeded their authority and included, in the issues to be proven, facts that should have been substantiated by the party against whom the award was rendered. In our view, this approach contravenes both domestic legislation (first and foremost Arts.9, 55, 244(2) and 239(4), APK), where reference is made to the 1993 Law of the Russian Federation on International Commercial Arbitration, Art.36) as well as international agreements of the Russian Federation (e.g., Art.V, New York Convention).

This judgment is noteworthy in that the award was, in fact, reviewed on the merits, which is impermissible according to Article 243(4) of the APK. In the judgments of the West-Siberian Arbitration Court and the Presidium of the RF Supreme Arbitration Court, it was noted that the award of the arbitration panel concerned issues of the reorganization and ongoing economic activities of a joint enterprise, which are regulated by the imperative rules of Russian legislation.

In our view, however, the following circumstances have legal significance in this case.

First, the issue at stake here was that of the applicable law since, according to the court reports, it was precisely the imperative rules of Russian law that should have been applied. However, the issue of the applicable law, on the one hand, and whether the dispute is subject to arbitration, on the other, are entirely different matters. In ruling upon the enforceability of a foreign court judgment or arbitral award, a competent state court is
not entitled to examine whether the substantive law was correctly applied; and whether a dispute is subject to arbitration can be examined only in response to arguments offered by the respondent, since this falls under the category of legal facts relating to procedural issues.

Second, it follows from the arbitral award that the arbitration panel did not resolve the issue of the reorganization of the activities of a joint enterprise but of the payment of moneys in favor of the party that proved its rightness (pravota) in the dispute: the foreign investor. By the same token, the award of the arbitration panel was not interpreted entirely correctly by the state courts with respect to its true spirit and substance. Thus, the judgment of the Presidium of the RF Supreme Arbitration Court indicates that “the appeals and cassation instances thought that the award of the Arbitrator [...] concerned [...] the status of the joint enterprise created by the parties”.

As Karabel’nikov has correctly noted, a decision to dissolve a foundation agreement cannot be equated with a decision to liquidate a company.\textsuperscript{67} The very same position has also been expressed in judicial practice. For example, Ruling No.6759/99 of the Presidium of the RF Supreme Arbitration Court of 16 May 2000 noted that the invalidity of a foundation agreement does not indicate the liquidation of a legal person, since liquidation is carried out in accordance with the applicable legislation.\textsuperscript{68} Moreover, the arbitration court failed to touch upon questions related to the status of the joint enterprise in its judgment.

2.8.8. Article V Circumstances

If an understanding of the circumstances described in the first part of Article V of the 1958 New York Convention can be similarly described and interpreted as those in Article 233(2) of the APK, the circumstances described in the second part of Article V require further explanation.

According to Section 2(a) of Article V: “[r]ecognition and enforcement of an arbitral award may also be refused if [...] (t)he subject matter of the difference is not capable of settlement by arbitration under the law of that country [...]”\textsuperscript{69} i.e., Russia.

The fact of the matter is that—in other jurisdictions—the list of issues that can be covered by an arbitration agreement is longer than it is in the Russian Federation. For example, Article 1 of Sweden’s law on arbitration mentions that arbitrators are entitled to adopt awards with respect to the civil law consequences of competition law insofar as this

\textsuperscript{67} Karabel’nikov, op.cit. note 60, 204.
\textsuperscript{68} VV AS (2000) No.8, 44, 45.
\textsuperscript{69} Emphasis added.
concerns the parties. According to Rule 600 of the Arbitration Tribunal of the New York Stock Exchange, this arbitration body is also entitled to consider suits on illegal discrimination in the work place—including sexual harassment—upon condition that the parties have agreed to transfer consideration of the dispute to arbitration after the suit has been initiated.\textsuperscript{70} In the United States, disputes stemming from antimonopoly legislation, securities legislation, bankruptcy, patents and even civil disputes under RICO (the Racketeer Influenced and Corrupt Organizations Act) may be resolved through arbitration.\textsuperscript{71}

In addition, there are a number of civil law disputes that have also been excluded from the sphere of arbitration in the United States. For example, according to Rule 600 of the NYSE's Arbitration Tribunal, a class action suit should not be considered through arbitration. This approach is completely justified, since a class action suit assumes the consideration of a single claim by a large number of people (or of an undetermined number at the beginning) against one and the same respondent by involving all those parties who have suffered damages.\textsuperscript{72} However, the involvement of other parties on the side of the claimant in arbitration proceedings has limitations connected with the fact that each of them must have an arbitration agreement with respect to the matter to be settled (or else the claimant and the respondent must consent to consideration of the case through arbitration). As a result, arbitration proceedings can 'collapse' beneath the weight of such a large number of claims. An arbitration tribunal may also not consider the claims of holders of corporate securities.

Therefore, the possibility that the subject matter of a dispute can be settled through arbitration proceedings will be determined by a Russian arbitration court from the position of Russian, not foreign, law, which could take different approaches.

2.8.9. Public Policy

The issue of whether or not enforcement of a foreign court judgment or arbitral award will contravene the public policy of the Russian Federation deserves particular attention. The category of public policy as a condition for disallowing the possibility of recognition and enforcement of court orders is contained in many international agreements and the domestic legislation of many countries. When the results of recognition of a foreign court judgment are inadmissible in the legal system of the recognizing

\textsuperscript{70} The text of this rule was taken from Sovremennye mirovye problemy birzhevogo treteiskogo suda. Mezhdunarodnaiia konferentsiia (Moscow, 2000), 6, 7.

\textsuperscript{71} Bruntseva, op.cit. note 43, 36.

\textsuperscript{72} Sovremennye mirovye problemy, op.cit. note 69, 6, 7; for more on class-action suits, see G.O. Abolonin, Gruppovye iski (Norma, Moscow, 2003).
state, they pull the “emergency brake” by applying a reservation on public policy.\textsuperscript{73}

Such a reservation can be found in Article 244 of the APK, Article V(2)(b) of the 1958 New York Convention, Articles 34 and 36 of the 1993 RF Law on International Commercial Arbitration and Article 1193 of the RF Civil Code. A number of international agreements on legal aid contain a reservation clause on public policy in relation to arbitration, e.g., Article 16(c) of the Agreement with Iraq on Mutual Legal Aid and Article 16(c) of the Agreement with Yemen on Legal Aid in Civil and Criminal Matters.

According to Article 18(6) of the Agreement between the Soviet Union and Spain on Legal Aid in Civil Matters, judgments are recognized and enforced if the recognition and enforcement thereof do not affect the sovereignty, security or the fundamental principles (osovnye printsipy) of the legislation of the requesting party to the Agreement. In Article 20 of the Agreement between Russia and China, the following is a ground for refusal: “where recognition or enforcement may inflict damage upon the sovereignty, security, or public policy [publicyi poriadok] of the contracting party in which the petition has been filed”. This same position is reflected in a number of other international legal documents, e.g., Article 34(a) of EU Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters: “[a] judgment shall not be recognised: if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought”. The Brussels Conventions (the predecessor to the 2001 Regulation) as well as the Lugano Convention also contain similar provisions.

In many countries, the category of public policy is not a clearly defined concept. As the basis for understanding the concept of public policy in the Russian Federation in terms of private international law, one could take Article 1193 of the RF Civil Code, which establishes that a rule of foreign law—that is applicable in accordance with the rules of Section VI of the RF Civil Code—will not be applied in exceptional cases if the consequences of the application thereof would clearly (iavno) contravene the foundations of the legal order (public policy) of the Russian Federation. If necessary in such a case, the corresponding rule of Russian law is applied. However, a refusal to apply a rule of foreign law may not be based only on differences between the legal, political or economic systems of the corresponding foreign state and the Russian Federation.

We have set forth here a general framework for this concept, as well as the conditional boundaries and legal consequences of the application of the category of public policy. Indeed, the very legal construct “con-

\textsuperscript{73} See Schack, \textit{op.cit.} note 30, 418.
travention of the public policy (противоречие публичному порядку) of the Russian Federation” requires a subjective evaluation, thereby allowing it to be interpreted in different ways in different situations.

The following characteristics of the concept of public policy deserve attention. First, many countries distinguish between the categories of international and domestic public policy, e.g., the United States and France. Moreover, international public policy is understood much more narrowly than domestic public policy; the former has the aim of protecting and supporting the system of international commercial arbitration and the stability of the awards thereof, as well as the force of international contracts.

Second, distinctions are made between procedural and substantive violations of ordre public. In terms of substantive consequences of the enforcement of a judgment that are incompatible with public policy, examples are usually provided from US court judgments, which can include punitive damages (or treble damages).

Third, public policy should not be confused with public law. Public policy is a general concept for the entire legal system that applies to every branch of both public and private law. These two parts of the legal system are not different from the point of view of level; they are differentiated by their corresponding field of application.74

In our view, we should proceed from that interpretation of public policy that is found in judicial practice, as well as that found in authoritative and widely recognized commentaries. The majority of experts consider “the contravention of the public policy of the Russian Federation” to mean a contravention of the fundamental legal structure of Russia, as defined in the 1993 RF Constitution. Thus, by contravention of the public policy of the Russian Federation is understood a contravention of the foundations of Russia’s constitutional structure, as enshrined in Chapter 1 of the Russian Constitution (Arts.1-15), e.g., the provisions on recognition of private ownership, including of land; on the unity of economic space; the freedom of movement of goods, services, and money; the freedom of economic activity (Arts.8 and 9, RF Constitution). Under such an approach, a refusal of enforcement on the above-mentioned grounds should be an extremely rare event.75

A contravention of Chapter 2 of the 1993 Russian Constitution, “Rights and Freedoms of Man and the Citizen”, and contraventions of the

74 See K. Verbar, “Oпределение понятия публичного порядка в внутреннем праве России через французское право”, Rossiiskii ezhegodnik grazhdanskogo i arbitrazhnogo protsess (Norma, Moscow, 2002), 270.

public legal consciousness (общественное правосознание) and fundamental principles of the law (fundamentальные принципы права) are also considered to be “contraventions of the public policy of the Russian Federation.”

Foreign arbitral awards are seen as contraventions of public policy when arbitrators of dubious honesty and independence have participated in rendering the decision, when there have been violations of the fundamental rights of the respondent that have obstructed her in defending her rights—as are arbitral awards, the enforcement of which may conflict with the imperative rules of the domestic legislation of the country where enforcement is being sought or with the rules of international agreements to which that country is a party.

A number of other experts suggest a broader interpretation of the reservation on public policy, understanding this to include the fundamentals of anti-monopoly legislation; legislation on privatization; the fundamental legal basis of commercial relations; and legislation on competition, bankruptcy, city-forming enterprises, etc. In the case of a suit seeking enforcement of an arbitral award in relation to a city-forming enterprise, for example, a number of experts think that exequatur should be denied since this could result in unemployment and bankruptcy.

In Russia, there is still no trace of the delimitation of the categories of domestic and international public policy in judicial practice, at least not in the practice that has been surveyed by the author. It is possible that the category of the “fundamental principles of Russian law” could be seen as the domestic public policy and “the public policy of the Russian Federation” as the international public policy, keeping in mind the narrower understanding of the latter category.

The practice of the RF Supreme Court is now losing significance as a result of the change of jurisdiction and the transfer of such cases for consideration by arbitration courts. Nonetheless, let us consider certain of the Court’s individual holdings as reference points for interpretation that can be taken into account in the practice of arbitration courts. One of the most frequently cited rulings of the Judicial Collegium of the Supreme Court, of 25 September 1998, which was rendered in a specific case, states the following:

“[By ‘public policy of the Russian Federation’ is understood the basis of the social structure of the Russian state. A reservation on public policy is possible only in those

77 Karabel’nikov, op.cit. note 60, 199, 200.
78 Neshataeva, op.cit. note 21, 166.
individual instances, where the application of a foreign law could lead to a result that is inadmissible from the point of view of Russian legal consciousness”.

In another case, the Judicial Collegium on Civil Matters of the RF Supreme Court (Ruling of 13 April 2001, Case No.5-G01-35) dismissed the arguments of the judgment debtor that an arbitral award failed to comply with public policy in the following manner:

“The substance of the concept of ‘public policy of the Russian Federation’ is not the same as the substance of the rules of the domestic legislation of the Russian Federation. Insofar as the legislation of the Russian Federation permits the application of the rules of a foreign state (Art.28 of the [1993 RF] Law on International Commercial Arbitration), the existence of a fundamental difference between a Russian law [закон] and a law [закон] of a foreign state cannot, in and of itself, be grounds for application of the reservation on public policy. Such an application of this reservation indicates a denial of the possibility of applying the law of a foreign state in the Russian Federation altogether. ‘Public policy of the Russian Federation’ is deemed to mean the basis of the social structure [общественный строй] of the Russian state. A public policy reservation is permissible only in those individual instances where the application of a foreign law could lead to a result that is inadmissible from the point of view of Russian legal consciousness [правосознание].

In this instance, there are no grounds for considering that the enforcement on the territory of the Russian Federation of an arbitral award for payment of a debt, under a time-charter agreement, of a Russian foreign-trade association in favor of a foreign company on the basis of an obligation for payment of shipping services undertaken by the state unitary enterprise foreign-trade association, Tekhnopromeksport, could lead to a result that is inadmissible from the point of view of Russian legal consciousness. The non-enforcement of the arbitral award in this case also means the denial of the possibility of applying the law of a foreign state in the Russian Federation, which contradicts the principles [принципы] of Russian law.”

The Supreme Court also noted that

“[T]he assignment of an obligation for indemnifying damages in the absence of fault could be seen as a contravention Russia’s public policy if such circumstances were proven by the debtor although he was unable to prove this.”

A fundamental holding is also to be seen in the following case from the practice of the Supreme Court:

“The arbitral award was based on the rules of Russian civil legislation, as a result of which it is not possible to cite a violation of public policy since the application of the rules of Russian domestic legislation cannot be interpreted as a violation of the public policy of the Russian Federation. This is a significant ruling, according to

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81 This and other rulings of the RF Supreme Court were reviewed by the author using the texts available from the Supreme Court. Complete texts of the above-mentioned rulings can be found at the Supreme Court’s website by reference to the date and number of the ruling at <www.supcourt.ru>.
82 Ruling of the RF Supreme Court in Case No.5-G00-122 of 1 December 2000.
83 Nonetheless, the practice here is not entirely unequivocal. B. Seglin has provided a number of
which the rules of private law enshrined in various articles of the Civil Code that are cited in a private-law complaint cannot be treated as the basis of legal order.\textsuperscript{84}

One of the general principles of Russian legislation on civil law liability is the culpability of the respondent:

“Despite indicating in its award that the respondent was not culpable in breaching its contractual obligations, the arbitrator granted the claim of the company for indemnification of expenses and damages of the contractor caused by the necessity of suspending construction for reasons independent of the parties. Under such circumstances, the court concluded that enforcement of the arbitral award would contravene the fundamental principles of the legal order established by the legislation of the Russian Federation, including the Constitution of the Russian Federation. To what extent does such a conclusion comply with Article 401 of the Civil Code, which does not, in general, make culpability a precondition for the liability of entrepreneurs?\textsuperscript{85}

In another case, the Supreme Court found that:

“[A]ccording to the general rules for payment for labor, a premium is paid for quality work that is completed on time. However, the arbitrator awarded the payment of a premium in favor of the respondent, though he did not even complete the required amount of work. Under such circumstances, the court concluded that enforcement of the arbitral award would contravene the fundamental principles of the legal order established by the legislation of the Russian Federation.”\textsuperscript{86}

In one of these cases, the grounds for refusal of enforcement on the basis of public policy were to be seen in the fact that a Russian court had invalidated the agreements forming the basis for the dispute that had been resolved by arbitration. The following was noted as grounds for refusal of recognition and enforcement of the award:

“In refusing to enforce an award of the London International Court of Arbitration, the court proceeded from the fact that, according to Article 11 of the Constitution of the Russian Federation, courts of the Russian Federation exercise state authority. With respect to bodies of judicial authority, state authority is exercised through enforcement of the legal order (Art.118 of the Constitution of the Russian Federation). One of the fundamental principles of legal procedure is the fact that court orders that have entered into legal force are obligatory for all state bodies, organizations, officials, and citizens on the entire territory of the Russian Federation. The Court established that the judgments of the Presnia Intermunicipal Court of Moscow of 14 February 2001 and the Kirov Raion Court of Ekaterinburg of 7 March 2001, in response to the petitions of the shareholders of the AKB Zoloto-Platina-Bank, invalidated the surety agreement of 24 September 1998, which served as the grounds

examples where courts—in applying Russian law—have still refused to recognize or enforce a judgment on the basis of a contravention of public policy. See B. Seglin, “Somnitel’nye ukrašeniiia dlia rossiiskoi Femidy”, Biznes-advokat (2000) No.11.

\textsuperscript{84} Ruling of the RF Supreme Court in Case No.5-G00-01 of 8 February 2000.

\textsuperscript{85} Ruling of the RF Supreme Court in Case No.5-G00-59 of 26 May 2000.

\textsuperscript{86} Ruling of the RF Supreme Court in Case No.5-G00-63 of 20 May 2000.
for rendering the judgment, enforcement of which was being sought by the European
Bank for Reconstruction and Development.\(^{87}\)

Thus, the court reached the correct conclusion that enforcement of the
arbitral award of 31 August 2000 would have meant a violation of the
principles of the constitutional structure and the legal order of Russia,
since—in the case of recognition of a foreign judgment—a competent
Russian court would have been forced to ignore the obligatory judgment
of another Russian court. One should also agree with that part of the
conclusion of the court that enforcement of the said arbitral award on
the territory of the Russian Federation—in light of the above-mentioned
judgments of courts of the Russian Federation—would mean a violation
of the rights of citizens who turned to the courts for protection of their
rights to judicial protection, as guaranteed by Article 46 of the RF Con-
stitution, which would also contravene the public policy of the Russian
Federation.

What does not contravene public policy is:
“the rendering of an award by an international commercial arbitration tribunal in
a foreign currency in relation to a Russian company when [the company] does not
have a [foreign-currency] account. The court refused to overturn the arbitral award
indicating that, in the process of enforcing the award, a competent court had the
possibility of modifying the procedure and process of enforcement.”\(^{88}\)

In another case:
The award of the International Court of Commercial Arbitration was upheld, which
provided for the payment by a Russian organization of an amount of money in a foreign
currency in favor of an Afghan firm. The Presidium of the RF Supreme Court noted
that requiring the respondent, as a party to an international economic transaction, to
pay a debt in a freely convertible currency does not contravene the currency legisla-
tion or the public policy of the Russian Federation.\(^{89}\) The same approach is reflected
in Ruling No.9772/01 of the Presidium of the RF Supreme Arbitration Court of 6
August 2002, which noted that there were no grounds for ruling that payment of a
debt—stipulated in the award of the International Court of Commercial Arbitration
of the Chamber of Commerce and Industry of Ukraine, in a foreign currency, not in
rubles—did not comply with Russian legislation or public policy.\(^{90}\)

Thus, we believe the above shows that contravention of public policy of the
Russian Federation is understood, first and foremost, as contravention of
the fundamental constitutional principles of the legal structure of Rus-

\(^{87}\) Ruling of the RF Supreme Court in Case No.45-G01-18 of 28 May 2001.
\(^{88}\) See, for example, Bruntseva, \textit{ibid.} note 43, 236.
This enables us to formulate several more general rules regarding the interpretation and application of the category of public policy.

First, it is impossible to invoke public policy if the case was considered by a foreign court or arbitrator on the basis of Russian legislation and enforcement is being sought in Russia. Second, a review of the merits of an arbitral award is inadmissible since a court is not entitled to consider issues of the application of rules of substantive law. Third, an arbitral award itself is not subject to evaluation but rather the results of its enforcement, which could be incompatible with the public policy of the Russian Federation or another state where enforcement is being sought. Fourth, a wide variety of spheres may be affected by the negative consequences of the application of a foreign court judgment. With respect to public policy, it is quite unlikely that all cases will entail only violations of the general principles of the Russian Constitution. For example, the judgments of US courts dealing with punitive damages (this is exactly the type of judgment that is usually cited as an example of a contravention of public policy) contravene public policy from the point of view of the field of application not of the Constitution but of civil legislation; in particular, of one of the principles thereof on the commensurability (proportionality) of damages and the indemnification thereof. Without a doubt, this issue will require further study.

These types of complicated issues dealing with enforcing and recognizing foreign court judgments and arbitral awards have been examined in a survey (obzor) of the practice of arbitration courts that involve enforcement and recognition, the appeal of (ad hoc) arbitration tribunals (treteikoie sudy) and the issuance of documents for the compulsory enforcement (prinuditel’noe ispolnenie) of the awards of arbitration tribunals.

2.8.10. Insolvency Proceedings and the Recognition and Enforcement of Foreign Court Judgments and Foreign Arbitral Awards

The following question used to come up in judicial practice prior to the adoption of the new APK: are the initiation of bankruptcy proceedings, the hearing of bankruptcy proceedings or the conclusion of an amicable agreement—including one made in accordance with the 1999 RF Federal

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91 There are also other recommendations from experts. See, for example, Karabel’nikov, op.cit. note 25, 209-213; and E. Stepanenko, "Kak primeniat’ ogovorku o publichnom poriadke pri ispolnenii inostrannykh arbitrazhnykh reshenii", Khoziaistvo i pravo (2001) No.3, 106.

92 See, for example, D.V. Litvinskii, Priznanie inostrannykh sudebnikh reshenii po grazhdanskim delam (Izdatel’stvo luridicheskogo Fakulteta SPbGU, St. Petersburg, 2005); and S.V. Krokhalev, Kategorii publichnogo poriadka v mezhdunarodnom grazhdanskom protsesse (Izdatel’stvo luridicheskogo Fakulteta SPbGU, St. Petersburg, 2006).

Law on the Restructuring of Credit Organizations—grounds for refusal of exequatur? Indeed, in this instance enforcement proceedings are impossible insofar as, in the course of bankruptcy proceedings, for example, the claims of all creditors against the debtor are established and they are subsequently satisfied by the bankruptcy manager in the procedure established by the 2002 RF Federal Law on Insolvency (Bankruptcy).

Neither the Law on the Restructuring of Credit Organizations—which provides the basis for the conclusion of amicable agreements—nor the Law on Insolvency (Bankruptcy) expressly governs issues related to the enforcement of foreign court judgments or arbitral awards insofar as they do not contain any grounds for refusal of enforcement of arbitral awards. Therefore, when analyzing issues related to enforcement, said federal laws cannot be taken into account. The grounds for refusal of enforcement contained in Article 244 of the APK, international agreements and in the 1993 RF Law on International Commercial Arbitration deal with rules of procedure or substantive aspects of the rules of procedure; however, nowhere therein can a link with bankruptcy proceedings be found. Therefore, the fact that an amicable agreement has been concluded has no influence on the process of considering a petition for enforcement of an arbitral award and cannot be considered grounds for refusal of enforcement. However, a moratorium on the enforcement of foreign court judgments and arbitral awards remains in force until that stage of bankruptcy proceedings when the bankruptcy manager actually begins distribution of the bankruptcy estate among claimants in accordance with the established order of priority.

2.9. Rulings of Commercial Arbitration Courts in Proceedings on Recognizing and Enforcing Foreign Court Judgments or Foreign Arbitral Awards

Under Article 245 of the APK, as a result of consideration of a petition for recognition and enforcement of a foreign court judgment or arbitral award, an arbitration court renders a ruling according to the provisions of Chapter 20 of the APK. An arbitration court is entitled either to satisfy the petition in question or to deny it insofar as it is not entitled to review the merits thereof.

A ruling of an arbitration court—rendered as a result of hearing a petition for recognition and enforcement—may be appealed only through a cassation procedure. In case of satisfaction of a petition following the issuance of a ruling to this effect, the same arbitration court issues the claimant a writ of execution in accordance with Article 246(i) of the APK.

With respect to the issue of enforcement of a foreign court judgment or arbitral award, Article 246 of the APK makes references to the RF
Federal Law on Enforcement Proceedings. Receiving the sanction of an arbitration court for recognition and enforcement is only the first stage of protecting the rights of a foreign claimant in Russia. During the second stage, the claimant has to initiate enforcement proceedings, thereby protecting her interests with the aid of the legal mechanisms established by the APK (Section VII) and the Law on Enforcement Proceedings.

Article 246(2) of the APK provides for a three-year statute of limitations period for filing a claim to enforce foreign court judgments and arbitral awards. Under the spirit of this rule, this period covers both the time necessary for applying for a writ of execution and for consideration by an arbitration court of a petition for recognition and enforcement, as well as the time for the claimant—having received a writ of execution—to take recourse to the Court Bailiffs’ Service to commence enforcement proceedings.

The time periods established in Article 246(2) of the APK correspond to the periods established in Article 437 of the RSFSR Code of Civil Procedure, which establish a similar period for foreign court judgments and arbitral awards, and in Article 80(2) of the Law on Enforcement Proceedings, where the same three-year period is established for foreign court judgments. The commencement date for calculating the periods in all of these federal laws is the date of the entry into legal force of the relevant judicial act.

3. The Competence of RF Commercial Arbitration Courts in Cases Involving Foreign Persons

(Chapter 32, APK)


In cases involving foreign persons, the general rules governing the competence of arbitration courts can be found in Article 247 of the APK. According to the rules set forth in the first part of this article, arbitration courts hear cases in economic disputes and other cases that are related to the performance of business or other economic activity, with the participation of foreign persons, where:

(i) The respondent has her domicile or residence on the territory of the Russian Federation or has property on the territory of the Russian Federation;

(ii) A management organ, branch office or representative office of the foreign person is located on the territory of the Russian Federation;
(3) The dispute arose in relation to a contract that was supposed to be performed (or was performed) on the territory of the Russian Federation;

(4) The claim arose in relation to damage caused to property by an action or other circumstance that occurred on the territory of the Russian Federation or whereupon the damage has occurred on the territory of the Russian Federation;

(5) The dispute arose as a result of unjust financial gain that took place on the territory of the Russian Federation;

(6) In proceedings concerning the protection of its business reputation, the claimant is located within the Russian Federation;

(7) The dispute arose from relations connected with the circulation of securities that were issued on the territory of the Russian Federation;

(8) In proceedings to establish a legally significant fact, the claimant contends that this fact exists on the territory of the Russian Federation;

(9) The dispute arose with respect to relations connected with the state registration of names and other objects and with the provision of Internet services on the territory of the Russian Federation; or

(10) In other instances, if there is a close connection (тесная связь) between the disputed legal relations and the territory of the Russian Federation.

As it can be seen, in comparison with Article 212 of the 1995 APK, the rules provided in the new APK—on the competence of RF arbitration courts in cases involving foreign persons—are much broader. Article 212 of the 1995 APK simultaneously regulated both the general and exclusive competence of arbitration courts in cases involving foreign persons, which was inadequate (see, also, Section 3.6 of this article).

3.2. Terminology

When establishing the competence of one body or another, a wide variety of terms are used in the Russian context: e.g., podvedomstvennost’, podsudnost’ and iurisdiktsiia (all meaning ‘jurisdiction’), as well as kompetensiia (‘competence’). Which term is the most appropriate to use in relation to international civil procedure? The answer is a function of the level of clarity of the understanding of the parties in legal relations with foreign elements of procedural institutions or, more precisely, by judicial practice.

International agreements most often use the term kompetensiia, which encompasses the synonymous terms podvedomstvennost’ and podsudnost’. Therefore, following the tradition of distinguishing between the con-
cepts of podvedomstvennost’ and podсудnost’ when characterizing the various boundaries of judicial competence (see Chapter 4, APK), in addition to this, the area of international civil procedure uses the term kompetentsiia more, which encompasses both of the legal categories in question. Indeed, for a foreign person, what is important in the end is the correct choice of court for which the case will be simultaneously podvedomstvenno and podсудno, as a result of which usage of the term kompetentsiia in international civil procedure is more justified.

The vast majority of international agreements and treaties of the Russian Federation on legal aid almost exclusively use the term kompetentsiia and concepts derived thereof: competent court (kompetentnyi sud), competent institution (kompetentnoe uchrezhdenie), etc. For example, this terminology is used in Articles 4 and 5 of the Kiev Agreement, Articles 20 and 29 of the Minsk Convention, Article 19 of the Agreement between the Soviet Union and Spain on Legal Aid in Civil Matters and Article 24 of the Convention between the Soviet Union and Italy on Legal Aid in Civil Matters.

International competence is one of a number of complex issues in the area of international civil procedure since it is very closely tied to the rules governing the organization of domestic legal systems and reflects the complexity of the judicial structure of one country or another. By international jurisdiction (podсудnost’) is understood the competing competence of the court of one country with the courts of another country.94 However, this should not be confused with domestic jurisdiction (podсудnost’), which delimits competence in various cases only among the courts of one country. Many international agreements and conventions—in particular, Minsk, Kiev, Lugano, EU Regulation 44/2001 and others—provide detailed provisions on questions of jurisdiction, including a large number of articles that are dedicated to the resolution of these issues.

The problem of choosing a competent court has both formal legal and tactical aspects.95 This type of interrelation between procedural, conflicts of law and substantive law leads to the problem of forum shopping or—in other words—the problem of choosing the best court. The claimant will take recourse to a court in the country where she will receive optimal legal and factual conditions for the protection of her interests. This is where the problem of international competence appears on the legal

95 See N.G. Eliseev, Grazhdanskoе processual’noе pravo zarubezhnykh stran. Istochniki, sudoustroistvo, podсудnost’ (Statut, Moscow, 2000), 66.
landscape. The means of defending the claim also depend on the choice of a competent court.

3.3. Types of International Jurisdiction of Arbitration Courts

Proceeding from our analysis of the article in question, as well as from Articles 248-250 of the APK, it is clear that both international jurisdiction and domestic jurisdiction are characterized by the same types of jurisdiction (podsudnost') since, from the formal legal point of view, they are—in terms of substance—identical legal constructs. They are: general territorial jurisdiction (based on domicile), alternative jurisdiction, contractual jurisdiction, exclusive jurisdiction and jurisdiction stemming from the relationship between cases.

All of the indicated rules of domestic jurisdiction are also applicable in a like fashion to cases with a foreign element. All of this illustrates the sufficiently conditional nature of the term “international competence” (kompetentsiia) insofar as it is closely related to domestic rules of jurisdiction. In all of the above-mentioned cases, regardless of the subject matter—unless otherwise stipulated by an international agreement of the Russian Federation—foreign persons take recourse to Russian arbitration courts; this stems from the principle of the domestic regime. Therefore, another narrower understanding of international jurisdiction is also possible: namely, the aggregate of rules for resolving conflicts over the competence of courts of various states. There is a clearer distinction here between domestic and international jurisdiction which, in this case, is found in specific articles of codes of procedure and international agreements.

Article 247(1) of the APK contains general rules on the international competence of arbitration courts, indicating the possibility of taking recourse thereto for judicial protection in accordance with a wide variety of criteria: depending on the domicile of one of the parties, on the existence of property and rights on the territory of Russia, on the nature of the claim or a close connection of the disputed legal relations with the territory of the Russian Federation. Therefore, much depends on the interpretation in judicial practice of these subjective categories.

3.4. Judicial Practice

There are numerous examples from judicial practice of the application of individual provisions of Article 212 of the 1995 APK that are similar to the rules of the article in question. For example, Point 1 of Informational Letter No.10 of the Presidium of the RF Supreme Arbitration Court of 25 December 1996, “Review of the Practice of Consideration of Disputes in Cases Involving the Participation of Foreign Persons by Commercial Arbitration Courts After 1 July 1995”, concludes that an arbitration court
of a subject of the Russian Federation is entitled to consider cases with the participation of a foreign respondent if a representative of the foreign person is located on the territory of the Russian Federation.

A Russian limited-liability company filed suit with a municipal arbitration court in which its claims stemmed from a contract of purchase and sale against the owners of a commercial vessel belonging to a foreign state that had a representative on the territory of the Russian Federation. In its response to the complaint, the owners of the foreign vessel raised objections regarding the merits of the claim and cited the fact that it did not have an agreement with the claimant for the resolution of disputes in an arbitration court of the Russian Federation. In refusing to accept the claimant’s statement of claim, the arbitration court said that the dispute was not subject to consideration in an arbitration court since the parties had not concluded a written agreement on the transfer of disputes involving the participation of a foreign person to an arbitration court in the Russian Federation.

Under Article 22(6) of the \textit{APK}, an arbitration court shall consider cases that fall under its jurisdiction involving the participation of organizations and citizens of the Russian Federation, as well as foreign organizations, organizations with foreign investment, international organizations, foreign citizens and stateless persons, that are conducting business activity unless otherwise stipulated by an international agreement of the Russian Federation. The competence of arbitration courts of the Russian Federation in cases involving foreign persons is established in Article 212 of the \textit{APK}.

Arbitration courts in the Russian Federation are entitled to consider cases involving foreign persons “if a branch or representative office of the foreign person is located on the territory of the Russian Federation”. Based on the circumstances that: (a) the foreign vessel had a representative office on the territory of the Russian Federation; and (b) the bilateral agreements between the Russian Federation and the state where the vessel was registered did not contain rules disallowing domestic courts from assuming jurisdiction over disputes among commercial enterprises of the contracting parties, the dispute in question is subject to consideration in an arbitration court in the Russian Federation without a written agreement between the disputing parties. The dispute should be subject to consideration in an arbitration court of the subject of the Russian Federation on whose territory the representative office of the foreign commercial enterprise is located.

Another example can be seen in Point 22 of Informational Letter No.58 of the Presidium of the RF Supreme Arbitration Court of 18 January 2001, “Review of the Practice of the Resolution by Commercial Arbitration Courts of Disputes Related to the Protection of Foreign Investors”, which takes the position that an arbitration court should accept a complaint involving the participation of a foreign person where there is an international agreement of the Russian Federation providing rules on its jurisdiction in such disputes.

\footnote{Art.212(6), \textit{APK}.}
\footnote{IRRAS (1997) No.3.}
An open joint-stock company filed suit with an arbitration court, seeking compensation of damages from a foreign company. In its judgment, the court refused to accept the claimant’s statement of claim, citing the lack of jurisdiction of arbitration courts in the dispute. In its judgment, the appeals court upheld the Ruling on the grounds of Article 107(1)(1) of the 1995 APK. The Presidium of the RF Supreme Arbitration Court annulled these judgments and remanded the case for a new hearing.

As is clear from the materials of the case, the claims were based on the respondent’s improper performance of shipping obligations under a transport agreement, under which the foreign company was required to provide transport services to the Russian joint-stock company. Since the basis of the dispute involves the international transport of cargo, the Geneva Convention on the Contract for the International Carriage of Goods by Road (hereinafter referred to as the “Convention”) of 19 May 1956 should be applied to the relations between the parties. Article 31 of the Convention stipulates that:

“In legal proceedings arising out of carriage under this Convention, the claimant may bring an action in any court or tribunal of a contracting country designated by agreement between the parties and, in addition, in the courts or tribunals of a country within whose territory: [...] The place where the goods were taken over by the carrier or the place designated for delivery is situated.”

The transport agreement, accounts and receipts, bills of lading and other documents that are among the materials of the case provide evidence that transport was conducted on the territories of several states (Russia, Scandinavian countries, Germany). All of the above-mentioned countries are member states of the 1956 Geneva Convention. The places where the cargo was to be loaded and where it was to be delivered—in all instances indicated in the agreement—were located on the territory of two different states. The territory of the Russian Federation was either the place where the cargo was to be accepted or the place where it was to be delivered.

Therefore, on the basis of Article 31(b) of the Convention, the dispute falls under the jurisdiction of a competent court of the Russian Federation. Since this is an economic dispute (its subjects are legal persons), the competent court is an arbitration court of the Russian Federation. Article 212 of the 1995 APK provides for the possibility of consideration of disputes involving foreign persons. In accordance with Part 4 of this article, however, cases involving complaints against shipping companies stemming from a transport agreement—including when the shipper is one of the respondents—are considered in the place where the shipping company is located. Thus, in this aspect, the rules of the APK—on determination of the competence of commercial courts of the Russian Federation in cases involving foreign persons—diverge from the rules of the 1956 Geneva Convention. On the grounds of Article 15(4) of the RF Constitution, Article 5(2) of the Federal Law of 16 June 1995 on International Agreements of the Russian Federation and in accordance with Article 5(3) of the 1995 APK, where different rules are established by an international agreement of the Russian Federation than those provided by the legislation of the Russian Federation, the rules of the international agreement shall apply.98

3.5. Competence under the Kiev Agreement

As we have seen, when there is a divergence between the rules of domestic legislation and an international agreement, the latter should be applied. *Inter alia*, rules regarding international competence are established in Article 4 of the Kiev Agreement. A competent court of a member state of the CIS is entitled to consider disputes enumerated in Article 1 of the Agreement if the respondent had a permanent residence or domicile on the territory of the said CIS member state on the day upon which the complaint was filed. If, however, the case has several respondents who are located on the territories of various CIS member states, the dispute can be considered in the place of domicile of any one of the respondents, at the choice of the claimant.

In addition, a competent court is entitled to consider a complaint if an enterprise or branch of the respondent is conducting commercial, industrial or other economic activity on the territory of a given state; if the contractual obligation that is the subject matter of the dispute was performed (or should have been completely or partially performed) on the territory of a given state; if an action or other circumstance that is the basis for a claim for damages occurred on the territory of a given state; if the claimant in a suit for protection of business reputation has her permanent residence (or domicile) on the territory of a given state; if the counterparty, contractor or party providing services or completing works is located on the territory of a given state and the dispute concerns the conclusion, amendment or termination of a contract. It has been established that exclusive jurisdiction in complaints regarding the right of ownership of immovable property belongs to the courts on the territory of which the property is located. It is clear from these provisions that a sufficiently broad framework has been established for tying a specific case to a particular court, which provides a claimant with numerous possibilities in choosing a competent court.

Cases involving the complete or partial invalidation of non-normative acts of state and other bodies—as well as those involving indemnification of damages caused to economic subjects by such acts or damages resulting from the improper performance by said bodies of their duties in relation to economic subjects—are considered exclusively by courts in the place where the relevant body is located. Counterclaims and set-off claims stemming from the same legal relations as those of the primary suit are subject to consideration in the court that is considering the primary suit.
3.6. Exclusive Competence of RF Arbitration Courts in Matters Involving Foreign Persons

One of the innovations of the new APK can be found in Article 248, which establishes rules for the exclusive competence of arbitration courts in cases involving foreign persons. Previously, some of the rules on exclusive competence were included in Article 212(3-4) of the 1995 APK. The exclusive competence of arbitration courts may be limited only by international agreements of the Russian Federation.

In accordance with the rules of exclusive competence, the courts of other states are not entitled to accept for consideration the cases listed here. In such a case, the rule contained in Article 244(1)(3) of the APK is applicable, which states that an arbitration court shall refuse recognition and enforcement of a foreign court judgment if consideration of the case falls under the exclusive competence of a court in the Russian Federation. If an identical cause of action that falls under the exclusive competence of Russian arbitration courts is accepted for consideration by a court of a foreign state, the Russian court shall not stay proceedings in the case (see Art.252(2), APK).

The following fall under the exclusive competence of arbitration courts in the Russian Federation in matters involving foreign persons. Disputes related to:

1. Property under state ownership of the Russian Federation, including disputes related to the privatization of state property and forced nationalization of property;
2. Immovable property or rights thereto, if said property is located on the territory of the Russian Federation;
3. The registration or issuance of patents, or of licenses for trademarks, industrial designs, useful models or the registration of other rights to the results of intellectual activity that require registration or the issuance of a patent or a license in the Russian Federation;
4. The invalidation of entries in state records (registries, cadastres) made by the competent body of the Russian Federation responsible for the administration of such records (registries, cadastres);
5. The founding, liquidation or registration on the territory of the Russian Federation of legal persons and individual entrepreneurs, as well as disputes related to challenges to the decisions of the management organs of these legal persons.
Cases described in Section III of the APK involving foreign persons and arising from administrative or other public law relations also fall under the exclusive competence of arbitration courts of the Russian Federation.

3.7. Agreements on Determining the Competence of RF Arbitration Courts

Under Article 249 of the APK, if two parties—at least one of whom is a foreign person—have concluded an agreement stipulating that an arbitration court in the Russian Federation has competence for consideration of disputes arising from (or that could arise in relation to) their conduct of business or other economic activity, a RF arbitration court will have exclusive competence for considering such disputes upon condition that said agreement does not alter the exclusive competence of a foreign court.

This is also a new article, since there were no provisions on prorogation and derogation agreements in the 1995 APK. Such agreements—which stem from the dispositive nature of procedural and substantive civil law—allow parties to an agreement to change the legally established competence of a court and to determine it in another manner. Under a prorogation agreement, a specific arbitration court is granted jurisdiction over proceedings that would not ordinarily fall within its jurisdiction; under a derogation agreement, an arbitration court loses jurisdiction in proceedings over which it would ordinarily have jurisdiction in accordance with the law. However, such agreements on contractual jurisdiction cannot be used to alter exclusive or generic jurisdiction, as determined by law.

In addition to the APK, a number of conventions and agreements provide for the possibility of concluding prorogation agreements. For example, according to Article 21 of the Minsk Convention, courts of contracting states can also consider cases in other instances if the parties have a written agreement on the transfer of the dispute to the said courts. Where there is an agreement on the transfer of proceedings, the court shall stay proceedings in the case upon receipt of a petition to that effect from the respondent. The same rule can be found in Article 4(2) of the Kiev Agreement: competent courts of CIS member states shall also consider cases in other instances if the parties have a written agreement on the transfer of the dispute to such a court. Upon the existence of such an agreement, the court of the other member state of the Commonwealth shall stay proceedings in the case upon receipt of a petition to that effect from the respondent if the said petition is filed prior to the court’s rendering of its judgment.

It is important to keep in mind Point 7 of Ruling No.8 of the Plenum of the RF Supreme Arbitration Court of 11 June 1999 on the Applicability of International Agreements of the Russian Federation in Relation to Issues of Arbitration Procedure,
which states that arbitration courts of the Russian Federation may also consider cases in instances stipulated by international agreements upon the existence of a written (prorogation) agreement between the parties to a transaction from other foreign countries on the transfer of an economic dispute to a Russian arbitration court (Art. 21, Minsk Convention; Art. 4(2), Kiev Agreement, and other international agreements on legal aid).

The requirements established by Russian legislation for the form of international economic transactions are applicable to the form of a prorogation agreement. The exclusive competence of arbitration courts of the Russian Federation—as established by a Russian law or by an international agreement of the Russian Federation—may not be altered by a prorogation agreement. A prorogation agreement may envision the transfer of a dispute to a court of a foreign state. When a prorogation agreement on the transfer of a dispute to a competent court of a foreign state exists, an arbitration court shall stay proceedings where it has received a petition to that effect from the respondent, between the same parties on the same cause of action that has been accepted for proceedings in accordance with the rules of general jurisdiction. In the case that proceedings are initiated in several states between the same parties on the same cause of action, an arbitration court shall stay proceedings in the case if it turns out not to be the court in which proceedings were initiated first. In our view, in certain cases it is even possible not to consider a suit at all. 99

### 3.8. Competence of Arbitration Courts With Respect to the Use of Security Measures in Cases Involving Foreign Persons

Under Article 250 of the APK—in cases involving foreign persons that fall under the competence of arbitration courts—a court may demand the imposition of a security measure in accordance with the rules of Chapter 8 of the APK. With respect to the article in question, this deals with the extension of the security measures stipulated in Chapter 8 of the APK to cases involving foreign persons. Moreover, measures for guaranteeing a claim (a bond) can be used, as can preliminary security measures. Russian respondents may be requested to deposit a security upon a petition by a foreign person without any restrictions upon the claimant.

Security measures may be imposed as regards the property or financial assets of foreign persons that are located on the territory of the Russian Federation. However, Russian arbitration courts may only impose security measures upon foreign persons on the territory of foreign states on the basis of international agreements of the Russian Federation.

### 3.9. Judicial Immunity

Under Article 251 of the APK, a foreign state—acting as the bearer of state power—has judicial immunity in relation to suits filed against it in arbitration courts in the Russian Federation, as well as from being called to participate as a third party in proceedings, from the arrest of

property belonging to a foreign state and located on the territory of the Russian Federation, and from paying a security in court to ensure a claim or property interests. Making a claim against such property is permitted through a procedure for enforcement of a judicial act of an arbitration court only with the consent of the competent bodies of the state in question unless otherwise established by an international agreement of the Russian Federation or a federal law. The judicial immunity of international organizations is determined by an international agreement of the Russian Federation or a federal law.

Judicial immunity can be refused only through the procedure established by a law of the relevant foreign state or by the rules of the relevant international organization. In such an instance, an arbitration court shall consider the case in the procedure established by the APK.

3.9.1. The Concept of Immunity

In comparison with Article 213 of the 1995 APK, the rules of judicial immunity are set out in greater detail in Article 251 of the new APK. This article stresses, for the first time, that a foreign state has judicial immunity only in those cases when it is acting as the bearer of state power. Consequently, a state does not enjoy judicial immunity in cases where it takes part in commercial relations.

The term “immunity” in relation to states means that one state is not subject to the jurisdiction of another.100 This concept finds its origins in the principle of international law of the sovereignty of states and their equality in international relations. Therefore, one state is not subject to the jurisdiction of another on the strength of the principle of *par in parem non habet jurisdictionem*, i.e., an equal does not have jurisdiction over an equal. It is no accident that judicial immunity is seen as an institute of public international law, the applicability of which is reflected in the civil and criminal procedures of states,101 which was historically justified on the basis of the concept of absolute immunity that held sway in the past.

Traditionally, a distinction has been made between three types of immunity: immunity from being sued; immunity from the application of measures for preliminary protection of rights and for ensuring a claim; and immunity from enforcement of a court judgment. Each of them has one and the same general legal and doctrinal basis. The article in question deals with the necessity of receiving consent for waiving immunity where a suit has been brought against a foreign state in an arbitration court, if a


Foreign Persons and Russia’s New Arbitration Procedure Code (Part I)

175

foreign state is subpoenaed in a suit as a third party, if property—belonging to a foreign state that is located on the territory of the Russian Federation—is arrested or if measures are applied to a foreign state to secure a claim or property interests, and for enforcing a claim against this property through the procedure for enforcing judgments of arbitration courts. All of these acts are possible only with the consent of the competent bodies of the state in question, unless otherwise established by federal laws or by international agreements of the Russian Federation.

This does not suggest, however, that states are completely immune to being sued. The rule on judicial immunity refers to the lack of jurisdiction over claims against a state in courts of another state. It does not, however, extend to the possibility of filing a suit against a state in its own domestic courts, as no such limitations exist.

3.9.2. Absolute and Limited Immunity

In doctrine and in legislation, there is a distinction between absolute and limited immunity of states. For a long time, Russia maintained the position of absolute immunity adhering to the principle of the unconditional absence of jurisdiction over a state in relation to any claims regardless of their basis. For example, in the (in)famous case involving the claims of Shchukina and Konovalov against the Russian Federation, the State Hermitage, the Pushkin State Museum of Graphic Arts, and the Pompidou Center, the Paris High Court decided to reject the claims, citing the principle of judicial immunity of the state and its property.

The doctrine of limited or functional immunity is connected with the greater involvement of states in commercial matters, the attraction by many states of foreign investments under state guarantees, the receipt of credit and financial aid from international organizations and banks, and with a number of other causes. Therefore, many states have ceased to rely on the concept of absolute immunity in relation to certain categories of cases and relations.

When a state acts as a subject of commercial

102 See, for example, the interpretation of L.A. Lunts, “Voproso pravovogo polozhenia inostrantsev i primenienia inostrannykh zakonov v Osnovakh grazhdanskogo zakonodatel’stva i Osnovakh grazhdanskogo sudopriyazhovstva Soiuz SSR i soiuznykh respublik”, in Novoe v grazhdanskom i grazhdanskom protsessual’nom zakonodatel’stve Soiuz SSR i soiuznykh respublik. Trudy nauchnoi sessii VIIuN (Moscow, 1962), 66.

103 The case was taken from M.M. Boguslavskii, “Isk Iriny Shchukina”, Moskovskii zhurnal mezhdunarodnogo prava (1994) No.2, 41-60.


relations, this inevitably leads to another understanding of the concept of immunity. *Inter alia*, this approach can be seen in the judgment of the Federal Constitutional Court of the Federal Republic of Germany of 30 April 1963 in response to a request from a court in Cologne on consideration of proceedings involving a claim for payment for renovations in the Iranian Embassy in the Federal Republic of Germany.\(^{106}\)

According to the concept of limited immunity, a foreign state, its institutions and the property thereof enjoy immunity only when the state is carrying out sovereign functions, *i.e.*, is acting *jure imperii*. If, however, a state is engaging in acts of a commercial nature (completion of international commercial transactions, concession and other agreements, etc.), *i.e.*, is acting *jure gestionis*, it does not enjoy immunity.\(^{107}\) There is no reason to offer foreign states—that are acting within the framework of private law—privileges in comparison with other participants in commercial relations.\(^{108}\)

The concept of limited immunity has begun to be reflected both in legislation and in judicial practice. For example, the Convention on State Immunity, drafted by the Council of Europe, was adopted on 16 May 1972, although only a few states have ratified it.\(^{109}\) This can most likely be explained by the gradual substitution of the law of the Council of Europe by that of the European Union. Although Russia is not a member of this Convention, contemporary judicial practice in the Russian Federation is leaning in the direction of limited immunity of foreign states on the basis of the principle of the goal of a transaction: deriving profit or performing a public function.\(^{110}\)

3.9.3. Rules for the Interpretation of Judicial Immunity

When applying the rules on judicial immunity, attention should be paid to a number of them. *First*, judicial immunity is not unconditional or absolute from the point of view of applicable Russian legislation. In particular, Article 251 of the *APK* states that immunity is recognized unless otherwise stipulated by federal laws or international agreements of the

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\(^{107}\) Boguslavskii, “Praktika”, *op.cit.* note 34, 216.

\(^{108}\) Schack, *op.cit.* note 30, 70.

\(^{109}\) Ibid., 69.

\(^{110}\) Neshataeva, *op.cit.* note 21, 91.
Russian Federation. In this context, mentioned can be made of Article 23 of the 1995 Federal Law on Production-Sharing Agreements (as amended); this provides that agreements concluded with foreign citizens or foreign legal persons may envisage, in accordance with the legislation of the Russian Federation, the denial of judicial immunity to a state, immunity from paying a security for ensuring a claim and immunity from enforcing a court judgment or arbitral award. In addition, according to Professor Boguslavskii, fundamental changes have been made in the legal rules and regulations contained in the new RF Merchant Shipping Code that depart from the doctrine of absolute immunity.111

In this context, Boguslavskii’s analysis of errors that were permitted on the part of Russian state institutions in the Noga case—and the recommendations made in relation thereto in defense of the property interests of the Russian state—is both of theoretical importance as well as of practical significance.112

Second, judicial immunity does not extend to the filing of counterclaims if a suit has been filed on behalf of a foreign country in a court of another state in a private-law dispute. Thus, Point 6 of the 2001 Informational Letter (No.58) of the Presidium of the RF Supreme Arbitration Court, mentioned above, provides the following case as an example.

An embassy of a foreign country filed a suit in an arbitration court against a Russian legal person. The claims stemmed from a construction contract. A Russian construction company (the contractor) filed a counterclaim against the embassy of the foreign country (the client) aimed at offsetting the initial claim in accordance with Article 110 of the APK. Since the embassy cited international immunity from legal proceedings in the host country, the arbitration court refused to accept the counterclaim. The cassation instance overturned the judgment of the court of first instance and remanded the case for a new hearing because the fact that the embassy filed a claim with an arbitration court in relation to a dispute over a commercial contract was evidence of its waiver of judicial immunity with respect to the contract in question. After filing a claim with an arbitration court, the embassy had waived its right to claim immunity from the Russian courts in this particular dispute.

Third, a distinction should be made between the role of a state as a sovereign entity and its participation in commercial relations on general grounds with other subjects of civil law. Therefore, in every individual case, the legal basis of the participation of the state in one capacity or another should be clarified. There is an interesting example in this context from judicial practice, provided in Point 5 of the 2001 Informational Letter (No.58), mentioned above, according to which an arbitration court

111 Boguslavskii, “Praktika”, op.cit. note 54, 232. The case of the Swiss company Noga is an example hereof, where Russia was denied immunity in a contract with Noga.

stayed proceedings in an investment dispute in which the respondent was a foreign state acting as a sovereign entity.

A Russian construction company filed a suit in an arbitration court against the embassy of a foreign country for the payment of money owed for the completion of construction works. The claim was granted by a judgment of the arbitration court. The embassy of the foreign country filed a claim with the RF Supreme Arbitration Court requesting that a protest be lodged against the judgment of the lower arbitration court. The petition cited international agreements between the Russian Federation and the foreign country, according to which a guesthouse for guests of the Russian ambassador was to be built next to the Russian Embassy in the capital of the foreign country at the expense of the federal RF budget and a guesthouse for guests of the ambassador of the foreign country was to be built in Moscow next to the embassy of the foreign country using funds from that country's budget.

The international agreement stipulated that all disputes related to construction would be resolved through negotiations between the ambassadors or, with their consent, in a judicial body selected by them. The foreign embassy concluded a construction contract with the Russian construction company. This agreement did not envision a waiver of the foreign country's judicial immunity. After the construction company filed a claim with an arbitration court, the foreign embassy—citing the judicial immunity of a foreign state—requested that the court stay proceedings in the case and suggested to the construction company that they find a resolution to the conflict outside the courts through the mediation of the Russian Foreign Ministry in accordance with the interstate agreement. Attached to the embassy's petition was a letter from the prime minister of the foreign country stating that the construction of guesthouses in the contracting states was being conducted with the aim of carrying out the public sovereign functions of the states and did not involve deriving profit on the territory of a foreign state. The prime minister ruled out the possibility of consideration of the dispute in a judicial body without the consent of the disputing parties. In addition, indemnification for expenses from the state budget of the foreign country involves a specific procedure of accounting with the contractor, which was stipulated in the construction agreement and was not evaluated in any judicial acts.

Having considered the petition of the official bodies of the foreign country, the RF Supreme Arbitration Court overturned the court orders and remanded the case for a new hearing, suggesting that it be determined whether the body of the foreign state (the embassy)—that had concluded the construction agreement—enjoyed immunity, as well as the possibility of a waiver of judicial immunity on the part of the foreign state represented by its embassy in the Russian Federation. In the absence of evidence suggesting that judicial immunity had been waived and taking into account that the embassy was carrying out construction with the aim of conducting activities of a public, not commercial, nature of a foreign country in the Russian Federation, it was recommended that the arbitration court consider the question of applying Article 213(1) of the 1995 APK (staying proceedings as a result of the judicial immunity of a foreign country).

Another example is to be seen in the practice of a federal arbitration court where:113

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A St. Petersburg state unitary enterprise for servicing foreign representative offices, Inpredservice, filed a complaint with the Commercial Arbitration Court of St. Petersburg and the Leningrad Oblast against the Consulate-General of the United States in St. Petersburg to modify the terms and conditions of a lease agreement of 30 January 1984 through the adoption of a new redaction. Under a Ruling of 20 November 2000, the government of the United States was joinded as a co-respondent and, in a Ruling of 21 February 2001, proceedings in the case were stayed as a result of the lack of jurisdiction of the arbitration court over a dispute involving the participation of a foreign country. The ruling of the appeals court of 16 May 2001 upheld the ruling without change.

The cassation court overturned the rulings and remanded the case for a new hearing. The cassation instance noted that, in the Ruling of 21 February 2001, the court indicated that the respondent did not have legal status independent of the government of the United States and could not be a respondent in court. However, the court of first instance did not cite any law or normative act. The case is void of any official documents on the status of the respondent. Upon reconsidering the case, the court should establish the status of the respondent and evaluate the arguments of the claimant and the fact that the lease agreement was concluded by the Consulate-General, not by the government of the United States.114

In our view, the most important point in this case was not that the Consulate-General is a part of the system of executive power of the United States but, rather, the nature of the dispute, which led to the need to amend the conditions of the lease agreement, and whether this was related to the Consulate’s performance of its diplomatic functions or the resolution of issues related to ensuring the performance of its activities from an economic point of view.

Such an approach certainly falls under the contemporary understanding of immunity and the application thereof in practice. As Professor Boguslavskii correctly notes, the enshrinement of the absolute immunity of foreign states in the legislation of any CIS state does not lead to the automatic recognition thereof in the courts of foreign states.115 A number of countries have adopted legislative acts that point to the limited judicial immunity of states, e.g., Australia, Canada, Great Britain, Pakistan, Singapore, South Africa, the United States, etc.

For example:

“[T]he Russian Embassy in Buenos Aires, Argentina, owed the company Obras Sanitarias de la Nacion (OSN), which provided communal services, around $160,000. This debt was created at the beginning of the 1990s. An Argentine court rendered a judgment in favor of the claimant, but the embassy refused to pay, stating that the court did not have competence. OSN requested that the building housing the Russian Embassy be sold at auction and that the proceeds be used to pay off the debt. The Supreme Court of Argentina, which intervened in the case, considered that—on the basis of immunity—the building housing the Russian Embassy could

114 Taken from <www.kadis.ru>.
not be arrested or sold at auction. The Supreme Court of Argentina decided that—on the basis of Argentine Law 24.488, limiting immunity in the case of disputes over immovable property—Russia had to pay OSN the entire amount of the debt and penalties for delays in payment.116

Fourth, a waiver of immunity must be sufficiently clear and expressed in documents issued by competent persons. As it has been expressed in Point 8 of Ruling No.8 of the Plenum of the RF Supreme Arbitration Court (of 11 June 1999 on the Applicability of International Agreements of the Russian Federation in Relation to Issues of Arbitration Procedure), an arbitration court must accept a suit in a commercial dispute in which the respondent is a foreign state acting as a sovereign entity or an international organization with immunities according to an international agreement only upon the clearly expressed consent of the respondent to consider the dispute in an arbitration court of the Russian Federation. Such consent should be seen as a waiver of judicial immunity of the relevant foreign state or international organization. Consent to consideration of a dispute in an arbitration court of the Russian Federation must be signed by individuals authorized by legislation of the foreign state or by the internal rules of the international organization to waive judicial immunity.

In this context, Article 251(3) of the APK stresses that a waiver of judicial immunity must be made in the procedure stipulated by a law of the relevant foreign state.

Fifth, the rules on immunity of states also apply to the immunity of their representatives. In this context, one could look at such basic international agreements as the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. We will consider immunity in terms of the first Convention.

According to the Preamble of the 1961 Vienna Convention on Diplomatic Relations, the privileges and immunities of diplomatic agents are not for the benefit of individuals “but to ensure the efficient performance of the functions of diplomatic missions as representing states”. Therefore, according to Article 31:

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

2. A diplomatic agent is not obliged to give evidence as a witness.

3. No measures of enforcement may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a diplomatic agent from the jurisdiction of the State does not exempt him from the jurisdiction of the sending State.

In accordance with Article 32 of the Convention:

"1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under article 37 may be waived by the sending State.

2. Waiver must always be express.

3. The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the enforcement of the judgement, for which a separate waiver shall be necessary."

3.9.4. Immunity of International Organizations

This is a derivative of the immunity of the states that enter into international organizations. The foundation documents of organizations and, first and foremost, their charters enshrine the principle of immunity, at the same time that the substance of the immunity is revealed in agreements with the country where the headquarters of the relevant organization is located. According to Part 2 of the article in question, the judicial immunity of international organizations is determined by an international agreement of the Russian Federation or by a federal law.


117 M.M. Boguslavskii, Mezhdunarodnoe chastnoe pravo (Iurist, Moscow, 4th ed. 2001), 416.
118 Anufrieva, op.cit. note 46, 342.
It is also important to distinguish between immunity when an international organization is performing the functional duties for which it was created and when it is participating in commercial relations. An example of this can be taken from Point 7 of the 2001 Informational Letter RF Supreme Arbitration Court (No.58, cited above), which states that immunity does not extend to the commercial activities of an international organization that are not envisioned by international agreements (its charter or an agreement on its headquarters).

An international intergovernmental organization filed a suit against the State Tax Inspectorate for a declaration recognizing as improper the performance of the respondent’s collection instructions for the ex parte deduction from the organization's current bank account of arrears for the payment of value-added tax.

In its judgment, an arbitration court granted the claim since, on the basis of Article 7 of the Convention on Legal Status, Privileges and Immunities of Intergovernmental Economic Organizations Operating in Designated Areas of Co-operation (Budapest, 5 December 1980, hereinafter referred to as the “Convention”), the claimant shall be granted exemption from direct taxes as well as other mandatory fees and charges with the exception of charges for public utilities and similar services. According to Article 6 of the Convention, the claimant's property and assets shall be immune from any manner of administrative or legal interference with the exception of cases when the claimant itself abandons the immunity. When considering the case in a review procedure, the RF Supreme Arbitration Court overturned the judgment of the court of first instance and remanded the case for a new hearing because—according to Article 4 of the charter of the international organization—it was created for academic activities with the goal of studying the fundamental properties of matter and applying the results of academic research in industrial manufacturing. In order to carry out these functions, it was endowed with immunity from domestic jurisdiction (functional immunity). The latter is also confirmed by the agreement on the headquarters of this organization in Russia that was concluded by the organization and the RF government.

As is clear from the case materials, in addition to the above-mentioned functions, the international organization also engaged in other activities, including the leasing of premises, the provision of communal services, etc. Taking these circumstances into account, the arbitration court should have established the amount of money received by the international organization from its charter activities and from performing works and services that had no relation to the competence of the international organization, ascertained the amount of profit to which the immunities and privileges of the international entity did not extend and calculated the amount of tax owing to the budget of the country hosting the international organization.119

3.9.5. Immunity and Joinder in Arbitration Proceedings

Complicated procedural issues have arisen during consideration of the question of whether judicial immunity extends to situations where proceedings have been joined and where one of the parties has immunity while

the other does not. Could such a case be considered in full or would the fact that one of the parties has immunity make it impossible to consider the case at all?

In particular, in 1999 in the practice of the Arbitration Court of Sverdlov Oblast, the question arose of whether a claim for invalidation of a bilateral transaction filed against both parties to said transaction could be considered in an arbitration court if one of the parties to the transaction, the European Bank for Reconstruction and Development, was an international organization that enjoyed judicial immunity. In the end, the arbitration court—on the basis of Articles 85(3), 140 and 213 of the 1995 APK—stayed proceedings in the case, citing the fact that the case in question could not be considered by a state arbitration court.\footnote{For a summary of the case, see V.V. Yarkov, “Ob immunitete mezhdunarodnykh organizatsii v praktike rossiiskikh sudov”, in Boguslavskii and Svetlanov, op.cit. note 54, 193-197.}

This approach was based on the following circumstances, which were examined in the court session.

1. In this instance, it is necessary to take into account and at the same time apply both general and specialized rules of legislation on arbitration procedure.

   According to the rules of arbitration procedure, for any dispute to be considered, proceedings must have two parties: a claimant and a respondent. This provision of legislation on arbitration procedure is expressed in a whole range of articles of the APK. If a suit is filed seeking invalidation of a two-party transaction by an entity that is not a party to the transaction, both parties to said transaction must be respondents insofar as their rights and interests will be directly affected by the consideration of the case.

2. If one of the parties to the transaction is an international organization that has the right to judicial immunity, then its involvement in arbitration proceedings is governed by specialized rules established in Article 213 of the APK and, congruently, by the interpretation provided in Point 8 of Ruling No.8 of the Plenum of the RF Supreme Arbitration Court of 11 June 1999 on the Applicability of International Agreements of the Russian Federation in Relation to Issues of Arbitration Procedure.

   Thus, legislation on arbitration procedure and existing judicial practice have established that a suit against an international organization that has judicial immunity in accordance with the provisions of international agreements can be accepted by an arbitration court for consideration only with the organization’s consent. Moreover, among the conditions in legislation on consideration of a cause of action by an arbitration court involving the participation of an international organization, there is no provision stating whether an international organization has to be the only respondent or whether it can be a respondent alongside other respondents that do not have judicial immunity. Therefore, the fact that an international organization is among the respondents in a suit obliges the arbitration court, in accordance with Article 213 of the APK, to clarify the issue of the organization’s consent to consideration of the case.

3. In order to determine whether the European Bank for Reconstruction and Development has judicial immunity, it is necessary to look at:
a) The relevant founding documents of the organization in question (to determine its legal status); and

b) The rules established by international agreements (to determine the limits of judicial immunity).

According to the Agreement establishing the European Bank for Reconstruction and Development (in particular the Preamble and Arts. 1-3, 32, 60-63 and others) signed on 29 May 1990, the EBRD is an international nongovernmental organization, created on the basis of an international agreement. The Russian Federation is also a party to this Agreement, insofar as the Agreement was originally ratified by the Supreme Soviet of the Soviet Union on 26 March 1991, and participation of the Russian Federation was confirmed by Letter No.04329P-P9 of the government of the Russian Federation of 8 April 1992.

Recognition by the Russian Federation of the judicial immunity of the EBRD is expressly provided for in Article IV(6) of the Agreement between the government of the Russian Federation and the EBRD on the Permanent Representation of the EBRD. This establishes that the EBRD and property belonging thereto, regardless of the location thereof and who had disposition thereover, enjoy immunity from any form of judicial prosecution, with the exception of cases where the EBRD declares that it is waiving such immunity.

Thus, for proceedings involving the participation of the EBRD as a respondent or for involving it in proceedings as a third party that is not making any independent claims with respect to the subject matter of the dispute, the consent of the EBRD to waive its judicial immunity is required. According to Article 55 of the Agreement establishing the European Bank for Reconstruction and Development, a waiver of any of the EBRD’s immunities, including judicial, is permitted only upon the consent of the EBRD’s board of directors.

4. Consequently, a claim for invalidation of a bilateral transaction filed against two parties to the transaction is not subject to consideration if one of the parties to the transaction is an international organization that enjoys judicial immunity insofar as, in such proceedings, one of the parties leaves the arbitration process.

5. Another question also arose in the court session: what should an arbitration court do when it first agrees to undertake proceedings in a suit and then establishes during the proceedings that an international organization has judicial immunity?

In such a case, upon establishing that one of the parties in arbitration proceedings has judicial immunity and that it has not waived this immunity, an arbitration court must stay proceedings on the basis of Articles 85(1) and 213 of the APK, since such a dispute is not subject to consideration in an arbitration court. The determination of any of a wide variety of factual circumstances would make consideration of a cause of action in an arbitration court impossible: lack of jurisdiction (nepodvedomstvenost’) of an arbitration court in the case; lack of legal capacity on the part of one of the parties; withdrawal of one of the parties that is also one of the co-respondents because it has judicial immunity on the basis of Article 213 of the APK.

Moreover, if proceedings have been stayed, they may not be resumed by an arbitration court.
6. Another question was also discussed: whether, in such a suit, an arbitration court is entitled to stay proceedings only in the part relating to the international organization with judicial immunity and to continue consideration of the merits of the case in relation to that party of the bilateral transaction that does not enjoy judicial immunity?

The APK does not provide a simple solution to this question. Therefore, in order to provide a proper response, a number of provisions of legislation on arbitration procedure should be analyzed. According to the rules of arbitration procedure, in order for a case to be considered, there must be two parties: a claimant and a respondent. The departure of one of the parties, e.g., through the liquidation of an organization, results unequivocally in the staying of the proceedings in the case. In the case in question, however, only one of the co-respondents departs, while the second is completely capable of participating in arbitration proceedings.

Does this lead us to suppose that an arbitration court is entitled to continue its consideration of the case in relation to the remaining respondent? We suggest that, in such a situation, the answer can only be negative. The point is that the respondent that is an international organization withdraws from the proceedings not because of liquidation but on the strength of the rules of judicial immunity, which do not permit consideration of a cause of action without its participation. If, nonetheless, the arbitration court considers the case with the involvement of the remaining party, an organization that does not enjoy judicial immunity, then it will be considering the cause of action and making a judgment on the rights and obligations of a party—the international organization—that is not involved in the case, which provides unconditional grounds for overturning the judgment of the arbitration court (Art.158(3)(4), APK).

An international organization enjoys judicial immunity which, in this case, prevents judicial consideration of cases that involve its participation as one of the parties without its consent. As has already been noted, Article 213 of the APK does not tie the possibility of consideration of the cause of action involving the participation of an international organization to whether it (the international organization) is the only respondent or whether it is one of a number of co-respondents along with other respondents that do not have judicial immunity.

Therefore, an arbitration court is not entitled to consider the cause of action without the participation of one of the co-respondents—an international organization declaring its judicial immunity—insofar as, if the court renders any other judgment, it will, first, violate the rules on judicial immunity and, second, in any case, it will decide a question of the rights and obligations of a party that is not participating in the case.

The question of how to resolve this issue when a property suit is filed against such co-respondents, one of which has immunity, remains open since, in the case examined above, the claim was not related to the payment of money or the transfer of property. Should proceedings in such a case be stayed in their entirety or only in relation to the respondent that has immunity? There is clearly no simple solution to such a situation; the nature of the dispute also has to be considered, taking into account the
concept of limited immunity, to the extent that a dispute that relates, for example, to the indemnification of damages by the co-respondents concerns the nature of the activities of the international organization. The resolution of this question depends on a number of factors: e.g., whether the international organization was acting as an ordinary subject of commercial relations; whether its activities were in furtherance of the tasks described in its charter; and court practice as regards international organizations.

3.9.6. The Waiver of Immunity of an International Organization
This is carried out under the same procedure as for foreign states, in accordance with Article 251(3) of the APK.

3.10. Procedural Consequences of Consideration by a Foreign Court of a Dispute between the Same Parties on the Same Cause of Action

3.10.1. General Rules
Under Article 252 of the APK, an arbitration court shall not accept a claim for consideration in accordance with the rules of Chapter 17 of the APK if a dispute between the same parties on the same cause of action is being heard in a foreign court upon condition that consideration of said case does not fall under the exclusive competence of an arbitration court in accordance with Article 248 of the APK.

In addition, an arbitration court shall stay proceedings in accordance with the rules of Chapter 18 of the APK if there is a foreign court judgment that has entered into legal force that was rendered in a dispute between the same parties on the same cause of action upon condition that consideration of the said case does not fall under the exclusive competence of an arbitration court and the above-mentioned judgment is not subject to recognition and enforcement in accordance with Article 244 of the APK.

Although Article 252 of the APK resembles, on the whole, Article 214 of the 1995 APK, there are a number of important questions which Article 252 resolves more precisely in terms of the procedural consequences that result when a foreign court considers a dispute between the same parties on the same cause of action. According to Article 214 of the 1995 APK, an arbitration court shall not accept a suit or shall stay proceedings where a competent court of a foreign country—that was seized of the case prior to the filing of the suit with the arbitration court in the Russian Federation—is considering a case in a dispute between the same parties on the same cause of action or if it has rendered a judgment in such a case that has entered into judicial force. There would not be such consequences if
the existing or future judgment of the foreign court were not subject to recognition and enforcement on the territory of the Russian Federation or if the corresponding case fell under the exclusive competence of an arbitration court in the Russian Federation.

Article 252 of the *APK* provides a clearer breakdown of the consequences of the consideration of an identical case by a foreign court, depending on whether the case has already been considered by a foreign court or whether the proceedings are ongoing, as well as on whether or not the case falls under the exclusive competence of Russian arbitration courts or whether it can be recognized and enforced in the Russian Federation. Thus, application of the rules contained in this article should take into account the rules on identical suits, on the exclusive competence of arbitration courts of the Russian Federation (Art.248) and on the grounds for recognition and enforcement of foreign court judgments in Russia (Art.241).

3.10.2. The Consequences of Consideration by a Foreign Court of an Identical Claim

These are distinguished in the following manner. If an identical claim is being considered in a foreign court, a suit is best left unconsidered. Indeed, proceedings in another state could—for a number of reasons—be concluded without any result, including if the suit may not be considered there, for example, as a consequence of the rules on providing a court security, etc. If there is a judgment of a foreign court that may be enforced in the Russian Federation, proceedings in the case should be stayed.

The procedural consequences related to rejecting a suit or staying proceedings arise only upon condition of the possibility of attaching to a court judgment—which may be, or has been, rendered abroad—equal legal force as a Russian court judgment on the basis of a bilateral or international agreement on mutual recognition and enforcement of court judgments.

Although, according to Article 252(2) of the *APK*, staying arbitration proceedings in a case in Russia is connected with the existence of the grounds set forth in Article 244 of the *APK*, the rules of Article 241(1) of the *APK* should be taken into account, which provide that recognition and enforcement of foreign court judgments are possible only if this is envisaged by an international agreement of the Russian Federation or a federal law. The latter provision is of fundamental importance since Russia only has a few agreements on the mutual recognition and enforcement of judgments of state courts. Therefore, the rule contained in Article 252(2)

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121 Such agreements include, *inter alia*, the 1993 Minsk Convention, the 1992 Kiev Agreement, and the 1958 New York Convention. A list of states and related agreements can be found in
of the APK on the staying of proceedings should be applied in relation to the relevant international agreement of the Russian Federation on the enforcement of court orders allowing for the enforcement of court orders of another state in Russia.

3.10.3. Procedural Consequences of Consideration by a Foreign Court of an Identical Claim under International Agreements

There are a number of international agreements and instruments containing rules and regulations on the consequences of the consideration of identical cases by courts of different states. For example, Article 22 of the Minsk Convention establishes a single legal consequence: In the case of initiation of proceedings between the same parties on the same cause of action in courts of two member states that are competent in accordance with the Convention, the court seized of the case later shall stay its proceedings.

This issue was resolved more successfully in Article 27 of European Council Regulation 44/2001 of 22 December 2000, according to which:

“1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.

2. Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favour of that court.”

3.10.4. Judicial Practice

Ruling No.3234/98 of the Presidium of the RF Supreme Arbitration Court of 29 December 1998 illustrates the procedural consequences of consideration by a foreign court of a case that falls under the exclusive competence of Russian arbitration courts.

The Russian limited-liability company Avia-Cargo filed a complaint with the Arbitration Court of Novosibirsk Oblast against the limited-liability company Ukraïnskaia vneshekonomskaia assotsiatsiia Kontakt for the recognition of the invalidity of a contract of 20 June 1996 on the purchase and sale of an Il-86 aircraft (aircraft No.RA86125, serial No.51483210093) through the payment of monies. In a judgment of 18 December 1997, the claims were denied. In its holding, the appeals court upheld the original judgment without change. The Federal Arbitration Court of the West Siberian Okrug upheld the judgment and the holding of the appeals court without change.

In a protest, the first deputy chairperson of the RF Supreme Arbitration Court argued for the overturning of the above-mentioned court orders and the return of the case to the appendix to this article, accompanying Part II which can be found in a subsequent issue of the Review of Central and East European Law.

122 The Ukrainian foreign-trade association Kontakt (hereinafter referred to as “Kontakt”).
for a new hearing. This protest was satisfied on a number of grounds, including the application of Article 214 of the 1995 APK (currently Art.252 of the 2002 APK).

In deciding to deny the claims of the Russian company, the courts proceeded from a judgment of the RF Supreme Arbitration Court of Ukraine of 27 March 1997, which stated that that Kontakt was the owner of the IL-86 aircraft and that the agreements concluded in relation to this aircraft—including the agreement of 20 June 1996 on the sale thereof to Avia-Cargo—were invalid. Meanwhile, according to Article 214 of the 1995 APK, judgments of a foreign court are prejudicial for an arbitration court of the Russian Federation only if the relevant judgment was adopted within the limits of the competence of the foreign court.

The IL-86 aircraft was always located on the territory of the Russian Federation and had been entered into the State Registry of Civil Aircraft of the Russian Federation. Since, on the basis of Article 131 of the Civil Code, civil aircraft that are subject to state registration are immovable property, to resolve dispute in terms of its substance, establishment of the fact of the state registration of the IL-86 aircraft No.RA 86125 is important. This issue was not reflected in the judicial acts, however: the fact of the registration of the aircraft in the Russian Federation was not verified and registration documents were not requested.123