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## ENFORCEMENT OF FOREIGN COURT JUDGMENTS IN RUSSIA A RECENT CASE STUDY

In considering applications for recognition and enforcement of a foreign court judgment, the commercial courts of the Russian Federation traditionally rely on Article 241(1) of the Arbitrazh Procedural Code (the “APC”), which states that foreign judgments can be recognized and enforced in Russia **“if recognition and enforcement of such judgments is provided for by an international treaty of the Russian Federation or federal law.”**

The Russian Federation is a signatory to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the “*New York Convention*”), thus making the foreign arbitral award enforcement process in Russia relatively straightforward. However, **there is no such applicable “global” treaty for enforcing foreign court judgments in Russia.** On the recognition and enforcement of foreign court judgments, the Russian Federation is party to multilateral treaties with nine other CIS countries and has also entered into bilateral treaties with nearly 40 other countries\*.

Traditionally, Russian courts have interpreted the APC Article 241(1) provision rather formally and considered that recognition and enforcement of a foreign judgment is only possible where there exists a treaty between the Russian Federation and the relevant state that expressly provides for mutual recognition and enforcement of judgments. However, several decisions have recently emerged in which the Russian courts have taken a less strict approach in their recognition and enforcement analysis and have held that **a judgment, executed in a state that itself enforces Russian judgments, should be enforceable in Russia,** subject only to the limited defenses set out in Article 244 of the APC.

The below discussion of two enforcement cases from foreign jurisdictions, with regard to the same subject matter, illustrates some of the central factors the Russian courts consider in their enforceability analysis in the absence of a treaty on foreign judgment recognition and enforcement as well as the courts’ divergent approach to the conflicting judgments.

In the English Judgment case (see below), the Russian courts **reinforce the “pro-enforcement” stance towards foreign court judgments,** favoring enforcement not only on the basis of **international treaties** but also in recognition of the international law principles of **reciprocity and comity.** This “pro-enforcement” stance is a positive sign for entities seeking enforcement of foreign judgments in Russia, and it also provides further support to those seeking enforcement of Russian judgments abroad on the basis of reciprocity.

However, uncertainty remains. In the Initial French Judgment case (see below), it is clear that the courts **do not categorically apply the principle of reciprocity and comity in the absence of international treaties on foreign judgment enforcement.**

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NEWSLETTER



## 1. The English Judgment

Boegli-Gravures SA v. Darsail-ASP Ltd & Andrei Ivanovich Pyzhov [2009] EWHC 2690 (Pat).

Boegli-Gravures S.A. (“Boegli-Gravures”), a Swiss patent owner for a new type of embossing rollers for satinizing and embossing packaging foils, sued Darsail-ASP (“Darsail”), a Russian company, as well as its principal, Mr. Andrei Ivanovich Pyzhov, for patent infringement in the **High Court of England & Wales** (the “English Court”). In its [decision](#) dated October 29, 2009 (the “English Judgment”), the English Court found that **Darsail infringed the patent** by offering to supply into the UK rollers made to the patent, and supplying into the UK foil samples made by working the patent. It found Mr Pyzhov jointly liable with his company for the supply of the foil samples. The court also **found Mr. Pyzhov liable with the company as a joint tortfeasor**, “since he was personally involved in committing the infringing act.” (para. 137)

## 2. Procedural History in Russian Courts

On October 24, 2010, Boegli-Gravures S.A. applied to the Arbitrazh Court of the City of Moscow (the “Moscow Commercial Court”) for recognition of the English Judgment as well as recognition and enforcement of several orders of the same court as well as from the Court of Appeal regarding costs. On February 10, 2012, the Moscow Commercial Court in case no. [A40-119397/2011](#) granted the application to enforce the English Judgment. Shortly thereafter, on February 27, 2012, Mr. Pyzhov and Darsail filed for appeal of the lower court decision, invalidation of the English Judgment, and for a fresh review of the case on the merits before the Federal Arbitrazh Court of Moskovsky Okrug (the “Moscow Circuit Court”), i.e., the court of cassation. Enforcement of the lower court order was suspended pending such appeal, as the applicant was a Swiss company without known assets in the Russian Federation and, therefore, the cassation court decided this would have made reversal of enforcement extremely burdensome for the respondents. However, on April 12, 2012, in decision no. [F05-3243/2012](#) the Moscow Circuit Court dismissed the respondents’ appeal and affirmed the lower court’s judgment. The respondents thereafter again appealed to the Supreme Arbitrazh Court of the Russian Federation (the “Supreme Commercial Court”). On July 26, 2012, in decision no. [VAS-6580/2012](#), the **Supreme Commercial Court refused the respondent’s petition to have these decisions reconsidered and affirmed the holdings of the lower courts to recognize and enforce the English Judgment against Darsail and Mr. Pyzhov.**

## 3. The Russian Courts’ Analytical Framework in The English Judgment Recognition Proceedings

The lower courts’ basis of recognition of the English Judgment was underscored by **two central principles of recognition and enforcement in the Russian Federation**,\*\* both of which were also referred to and affirmed by the Supreme Commercial Court:

- **International Treaties.** The Russian Federation is a party to a number of international treaties stipulating a person’s **right to a fair and public hearing before an independent and impartial court**. The provisions of Article 11 of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Russian Federation on Economic Cooperation dated November 9, 1992 (the “1992 Partnership Agreement”) as well as Article 98.1 of the Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part (the “1994 Partnership Agreement”) dated June 24, 1994, both of which require each contracting state **to ensure non-discriminatory access of individuals and legal entities of other contracting states to the competent court**. Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms dated November 4, 1950 (the “European Convention”) recognizes **enforcement of court judgments by contracting states as part of the right to fair trial and of access to court**. The Moscow Circuit Court reasons that these international treaties **implicitly provide for recognition and enforcement of foreign judgments.**



- **The Principles of Reciprocity & Comity.** Recognition and enforcement of foreign court judgments is mandated by the general international law principle of reciprocity **even where there are no treaties**. According to Article 15.4 of the Russian Constitution, generally recognized principles and rules of international law and international treaties constitute an integral part of the Russian legal system. One of the generally recognized principles of international law is that of international comity (*comitas gentium*), which prescribes that states treat foreign executive, legislative and executive acts with comity. The principle of reciprocity, originating from the principle of international comity, is widely interpreted as a rule stipulating that foreign law is subject to mutual application for the purpose of developing cooperation between the countries and, therefore, one jurisdiction shall extend certain courtesies to other jurisdictions or nations by recognizing the validity and effect of the latter's executive, legislative, and judicial acts. **Part of the presumption of comity is that other jurisdictions will reciprocate the courtesy shown to them. However, if one country refuses to apply the law of the other in respective cases, the other country will likely also refuse to apply the law of the former country in its territory.** This principle can be applied to recognition and/or enforcement proceedings of foreign court judgments in Russia. Notably the **court was further persuaded by "evidence of reciprocity," demonstrating that the laws and courts of England and Wales do permit enforcement of Russian judgments**, filed by Boegli-Gravures in support of their application for enforcement.

### PRACTICE TIP/POINTER

**APPLICANTS:** In the absence of an applicable treaty on foreign judgment recognition and enforcement, it is advisable for applicants in Russian courts to **file "evidence of reciprocity,"** in the form of experts' opinions on foreign law and/or **proof that courts in the foreign jurisdiction**, where the judgment to be enforced in Russia was originally rendered, **also enforce Russian court judgments.**

**RESPONDENTS:** Likewise, when **opposing such applications for recognition and enforcement** in Russian court, in order to rebut the presumption of reciprocity codified in Article 1189 of the Russian Civil Code, a defendant ought to **prove the absence of reciprocity** i.e., submit evidence that the **courts of the relevant jurisdiction**, in which the foreign judgment was issued, **do not recognize or enforce Russian judgments.**

## 4. The Supreme Commercial Court's Reasoning

The Supreme Commercial Court's ruling affirms the lower court's position that the principle of reciprocity and international comity can serve as an autonomous basis for the recognition and enforcement of foreign court judgments. However, the panel also repeatedly stressed that the **respondents, having appeared and submitted its counter claims, had unequivocally agreed to the jurisdiction of the English Court and never contested it.** Furthermore, the court reasoned that the **respondent availed itself** of the risks and associated costs of litigation in English courts **by doing business in that jurisdiction.** This may be an important reservation for future cases dealing with the enforcement of foreign judgments in Russia.

The panel also extensively dealt with the respondents' argument that the enforcement of a RUR 23,000,000 costs order against it would be excessive and thus contrary to Russian public policy. The panel dismissed this argument on the grounds that (1) the respondents **never contested the jurisdiction of the English Court** and thus are deemed to have accepted the rules of the English court system including the possible costs associated therewith; (2) **by engaging in business abroad** the respondents undertook the risk of being sued in foreign states and the possible costs associated therewith; (3) in deciding whether these costs were excessive, one **should consider legal costs common in English litigation** rather than costs normally awarded by Russian courts. More importantly, it concluded that, **in order to consider the respondents' argument, it would need to engage in a substantive review of the foreign judgments, which is not permitted at the enforcement stage.**





## 5. Russian Enforcement Proceedings of The Contradictory Initial French Judgment

There has been one truly interesting development in Russian enforcement proceedings between these parties with regard to this subject matter. Apparently, Boegli-Gravures had applied not only to English court but also to French court in late 2007 with its patent infringement claim against Darsail. Interestingly, the French courts (the French Court of First Instance in Paris issued its [judgment](#) on May 20, 2009, the Paris Court of Appeal [affirmed](#) the judgment on March 23, 2011) took the **opposite stand** of the English Court, finding Boegli-Gravures's **patent to be invalid, cancelling and dismissing the patent infringement claims against Darsail, and further ordering damages and costs of approximately EUR 50,0000 against Boegli-Gravures** (collectively the "*Initial French Judgment*").

In the Russian enforcement proceedings (case no. [A40-130760/2011](#)), the Moscow Commercial Court on March 20, 2012 **refused to recognize the Initial French Judgment**, holding that it **would contradict the English Judgment, which was recognized earlier** and, if the Initial French Judgment was to be recognized, the existence of two mutually exclusive court decisions in the Russian Federation would violate public policy. However, this decision was quashed on appeal in decision no. [F05-5307/2012](#) by the Moscow Circuit Court, which instructed the lower court to consider not only **whether there is a contradiction between the judgments** but also **whether a French judgment may be recognized in the absence of a treaty**.

The Moscow Circuit Court also observed that the lower court failed to consider Boegli-Gravures' objection to enforcement of the Initial French Judgment on the basis of **Article 244(1)(1) of the APC**, which states that one of the **grounds for refusal in the recognition and enforcement** of a foreign court judgment is the fact that the same **has not entered legal force in the territory of that judgment**, and, moreover, failed to adequately articulate the appropriate grounds for refusal according to Article 244 of the APC.

Notably, the Moscow Circuit Court **failed to mention the principle of reciprocity as an independent ground for recognition and enforcement of foreign court judgments** as it did in the earlier decision with respect to the English High Court judgment. Besides rejecting this application on public policy grounds, the Moscow Circuit Court went even further by referring to the default rule, Article 241(1) of the APC, which states that foreign court judgments may be recognized in the Russian Federation where so provided by a treaty or federal law. It observed that the **Moscow Commercial Court failed to establish whether there was such an applicable treaty**.

Although there is no bilateral treaty between France and the Russian Federation providing for recognition and enforcement of foreign court judgments, France and the Russian Federation are parties to the 1994 Partnership Agreement and the European Convention, both of which were previously cited as implicitly requiring recognition of foreign court judgments rendered by EU states' courts. However, after fresh review and in the resulting decision dated February 28, 2013, the Moscow Commercial Court did not venture to establish whether those treaties apply to the French Judgment in the same manner as to the English Judgment.

Instead, a significant shift in the procedural disposition of the Initial French Judgment easily determined the outcome of the Russian enforcement proceedings, and made the Moscow Commercial Court's task of evaluating Boegli-Gravures' previously expressed objection to recognition of the Initial French Judgment—arguing that the Initial French Judgment had still not entered legal force—much more straightforward. On November 20, 2012, the Commercial Division of the French Court of Cassation allowed Boegli-Gravures' appeal and overruled the Paris Court of Appeal's affirmation of the First Instance Court decision, thus **ruling against Darsail and bringing the final French decision in line with the English Judgment** (the "*Final French Judgment*"). Therefore, as the original subject of the enforcement proceedings—the Initial French Judgment in Darsail's favor—had clearly not entered legal force, by its decision dated February 28, 2013 the **Moscow Commercial Court denied enforcement** thereof according to Article 244(1)(1) of the APC, which, again, states that one of the grounds for



refusal in the recognition and execution of a foreign court decision is the fact that the **foreign court judgment has not entered legal force in the territory of the judgment.**

## 6. CONCLUSION

**Timing** can be also seen as a crucial factor to apply in determining which of the conflicting English and French judgments should be given precedence in Russian court. While the French first instance court **issued its judgment earlier than the English Court**, the English appellate court confirmed the judgment earlier than its French counterpart. Furthermore, even after being upheld by the second instance court, the Initial French Judgment was still subject to further appeals in French courts and, thus, had not yet entered legal force for recognition in Russia. **Boegli-Gravures applied for recognition of the English Judgment about one month earlier than Darsail applied for recognition of the Initial French Judgment**, and, accordingly, the Moscow Commercial Court recognized the English Judgment first. Since the Moscow Commercial Court did not consolidate or coordinate the proceedings involving the conflicting foreign judgments, it did not offer clear guidance as to **which date should be given preference in determining enforceability of the respective foreign judgments**: the date of commencement of the foreign proceedings, the date of issuance and/or confirmation of the foreign judgment in its respective jurisdiction, or the date of commencement of the enforcement proceedings in Russia.

However, the conclusion with regard to the Moscow Commercial Court's consideration of the Final French Judgment implies that the operative date in the Russian courts' analysis is, per Article 244(1)(1) of the APC, **when the judgment entered legal force in the jurisdiction of issuance**, i.e., all potential appeals have been exhausted and there is no chance for that judgment to be quashed on appeal by the higher instance courts of that jurisdiction. Therefore, while parties which have engaged in forum shopping among multiple jurisdictions may race to Russian courts with their respective favorable foreign judgments in hand, it is crucial that the **foreign judgment to be enforced in Russia has entered legal force in the jurisdiction of issuance** in order to overcome any potential defense against enforcement under Article 244(1)(1).

Furthermore, as a practical matter, parties applying for enforcement of a foreign court judgment in Russia—in the absence of a mutual recognition and enforcement treaty between the Russian Federation and the country in which the judgment was issued—**should submit evidence of the foreign jurisdiction's enforcement and recognition of Russian court judgments in order to establish the applicable principles of comity and reciprocity** in such a case. The corollary also applies: **parties defending against enforcement** in Russia should submit evidence of the foreign jurisdiction not recognizing Russian judgments in order to **definitively disprove the existence of comity and reciprocity between Russia and the issuing jurisdiction.**

### Notes:

\*States which have mutual judgment recognition and enforcement treaties with the Russian Federation include the CIS signatories to the Kiev Agreement on Settling Disputes Related to Commercial Activity of 1992 (ratified by Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, Ukraine, Uzbekistan) and the Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters of 1993 (ratified by Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, Ukraine, Uzbekistan) as well as the following states, which have concluded separate bilateral treaties on mutual judgment recognition and enforcement with the Russian Federation: Azerbaijan, Belarus, Estonia, Kyrgyzstan, Latvia, Lithuania, Moldova, Albania, Algeria, Bulgaria, Hungary, Poland, Romania, Finland (family and inheritance matters), the Czech Republic, Slovakia, Serbia, Macedonia, Montenegro, Croatia, Slovenia, Bosnia and Herzegovina, Italy, Cyprus, Greece, Spain, Egypt, Tunis, Iraq, Iran, Yemen, China, the Democratic People's Republic of Korea, Mongolia, Vietnam, Argentina, Cuba.

\*\*Notably, very similar reasoning can be found in the 1999 "pro-enforcement" decision of the Supreme Commercial Court, *Rentpool BV v. Podiemye Tekhnologii LLC*, wherein the Supreme Commercial Court held that a Dutch judgment should be enforceable in Russia based on the international law principles of "reciprocity and comity" even where there does not exist a relevant bilateral treaty on foreign judgment enforcement.



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