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ENFORCEMENT OF FOREIGN COURT JUDGMENTS IN RUSSIA A RECENT CASE STUDY

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 as well as the courts' divergent approach to the conflicting judgments.

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

However, uncertainty remains. In the 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**. In the case of contradictory and conflicting foreign judgments, it appears that **timing** of enforcement applications and proceedings may also be a consideration in the courts' analysis and decision.

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).

PROCEDURAL HISTORY IN RUSSIAN COURTS

Boegli-Gravures S.A. applied to the Arbitrazh Court of the City of Moscow (the “*Moscow Commercial Court*”) on October 24, 2010 for recognition of the English Judgment as well as 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. On April 12, 2012, in decision no. F05-3243/2012 the Federal Arbitrazh Court of Moskovsky Okrug (the “*Moscow Circuit Court*”) dismissed the respondents’ appeal and affirmed the lower court’s ruling. 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.**

THE RUSSIAN COURTS’ ANALYTICAL FRAMEWORK IN THE ENGLISH JUDGMENT RECOGNITION PROCEEDINGS

The lower courts’ basis was generally underscored by the following **principles of recognition and enforcement in the Russian Federation** arising out of Art. 241 the Arbitral Procedural Code (the “*APC*”) (setting out that foreign judgments are recognized and enforced in Russia if it is prescribed by the international treaty and the Federal law) and out of international law principles. Almost all of them were also referred to and affirmed by the Supreme Commercial Court:

- **1988 DECREE.** Foreign judgments may be recognized in Russia without their enforcement on the basis of the **Decree of the Presidium of the Supreme Soviet of the USSR No. 9131-XI on the Recognition and Execution in the USSR of Decisions of Foreign Courts of Law and Arbitration** dated June 21, 1998 (the “*1988 Decree*”), which is still applicable in the Russian Federation as the legal successor of the Soviet Union, to the extent that the Decree does not contradict the “*APC*” (See Federal Law No. 96-FZ of July 24, 2002).
- **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 court refers to 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 is frequently applied to recognition and/or enforcement proceedings of foreign court judgments in Russia. Notably the **court was further persuaded by the observation that the laws and courts of England and Wales do permit enforcement of Russian judgments**, which reinforced the principle of reciprocity in this case.

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.

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.** This may be an important reservation for future cases dealing with the enforcement of foreign judgments in Russia.

ENFORCEMENT PROCEEDINGS OF THE CONTRADICTION 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, and 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 "*French Judgment*"). While the French Judgment was rendered earlier, the English Judgment was the first to be submitted for recognition and accordingly recognized in Russian court.

In the Russian enforcement proceedings (case no. A40-130760/2011), the Moscow Commercial Court on March 20, 2012 **refused to recognize the French Judgment**, holding that it **would contradict the English Judgment, which was recognized earlier.** 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 next hearing in this case is scheduled for October 31, 2012.

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. 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. It is now arguably for the Moscow Commercial Court to establish whether those treaties apply to the French Judgment in the same manner as to the English Judgment.

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 months earlier than its French counterpart. **Boegli-Gravures applied for recognition of the English Judgment about one month earlier than Darsail applied for recognition of the 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 is not clear **what 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 entry into legal force of the foreign judgment in its respective jurisdiction, the date of commencement of the enforcement proceedings in Russia or the date when the Russian court decision on recognition and enforcement of one of the contradictory foreign judgments becomes final.

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