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Franklin E. Gill

Christopher R. Kelley

Ekaterina Gill

Sergey Budlyn

Dmitri Evseev

See next page for additional authors

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Authors

Franklin E. Gill, Christopher R. Kelley, Ekaterina Gill, Sergey Budlyn, Dmitri Evseev, and Denys Kytsenko

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FRANKLIN E. GILL, CHRISTOPHER R. KELLEY, EKATERINA GILL, SERGEY BUDYLIN,
DMITRI EVSEEV, AND DENYS KYTSENKO

I. Introduction

Dmitri Medvedev was elected president of the Russian Federation on March 2, 2008. On May 8, 2008, the new president appointed Vladimir Putin as Chairman of the Government of the Russian Federation, frequently called the Prime Minister. The Russian Constitution provides for the president to serve a term of four years.¹

While serving as president, Putin had strongly affirmed that there should be no changes in the constitution. But on November 11, 2008, President Medvedev proposed extending the presidential term to six years and the term of members of the State Duma from four to five years to ensure that the members of the Duma “have enough time to put their promises into practice between elections.”² The amendments were adopted by special majorities of both the Duma and the Federation Council less than three weeks after their proposal.³ They were then submitted as required by the Constitution for ratification by “not less than two-thirds of the subjects [political components] of the Russian Federa-

* Franklin E. Gill is a retired Research Professor of Law, University of New Mexico School of Law and Chief Corporate Financial Counsel, Sun Company, Inc. Mr. Gill wrote Section I. He served as editor in consultation with Professor Christopher R. Kelley of the University of Arkansas School of Law and Ekaterina Gill, Staff Counsel, Hyundai Motor Manufacturing Alabama, LLC, and Sergey Budylin, a member of Roche & Duffay consulting firm in Moscow. Dmitri Evseev, an associate in the firm of Arnold & Porter, LLC, Washington, D.C. wrote Section II, and he and Denys M. Kytzenko, Assoc. Professor, National University, Tax Authority of Ukraine, and Senior Lawyer, Arca Capital Ltd., Kiev, Ukraine are joint authors of Section III.

1. “(1) Citizens of the R.F. select the President of the R. F. for four years on the basis of a general, equal and direct electoral law by secret ballot. . . . (3) The same person may not occupy the position of President of the R.F. for more than two terms in succession.” *Konstitutsia Rossiskoi Federatsii* [Konst. R.F.] [Constitution] ch. 4, art. 81 (Russ.).

2. Philip P. Pan, *Putin’s Intentions Debated After Shift on 4-Year Term*, WASH. POST, Nov. 28, 2008, at A12. Konst. R.F. ch. 5, art. 94 provides that “the representative and legislative body of the R.F. shall be the Federal Assembly—the parliament of the R.F.” which, under art. 95(1) “is composed of a Federal Council and State Duma.” Under art. 96(1), “the State Duma shall be elected for a term of five years.” Konst. R.F. ch. 5, art. 94, 95(1), 96(1).

3. Issues covered by the R.F. Constitution are treated separately as “federal constitutional legislation” requiring approval by three-fourths of the members of the Federal Council and by two-thirds of the members of the State Duma. Konst. R.F. ch. 5, art. 108(1) and (2).

tion.⁴ This amendment was accomplished over the opposition of only the Communist members of the Duma and representatives of the remnants of the liberal parties. Speculation followed that these amendments foretold a possible return of Putin to the presidency, either at the end of Medvedev's presidency in 2012, or upon the resignation of Medvedev.

In his campaign for the presidency, Medvedev, a graduate and former member of the St. Petersburg University Faculty of Law, declared that a major goal of his administration would be judicial reform and elimination of corruption in the courts and government administration. While campaigning, he called Russia "a country of legal nihilism" with a "disregard for the law."⁵

After election in July, Medvedev established a council that issued a national plan against corruption. The plan outlined proposals: (1) to impose personal responsibility on state officers for corruption-related crimes of subservient officers; (2) regulatory measures for state contracts and removal of government officials from boards of directors of state corporations; and (3) education of citizens in the legal regulation of corrupt activities, presumably meaning bribery. A report of Transparency International found Russia to be number 147 among 180 countries relating to the degree of corruption.⁶

On October 3, Medvedev submitted to the Duma a proposed law "On the Counteraction to Corruption" accompanied by three bills amending existing legislation regulating activities of government agencies, the police, and the courts. The State Duma adopted this package of legislation at its second reading on December 17 after the President succeeded in blocking efforts of some members and civil servants to postpone the effective date until January 1, 2010.⁷

On December 22, 2008, the Russian Federation Council approved this legislation amending more than twenty federal laws including the civil, criminal, and labor codes.⁸ The legislation also implemented the United Nations Convention against Corruption of October 31, 2003, which Russia had ratified on May 6, 2006. The new anti-corruption laws require state officials to declare their income and property and the income and property of their spouse and minor children. The laws also expand the definition of corruption to include active and passive bribery as well as trading in "influence." Article 575 of the

4. Konst. R.F. ch. 9 regulates amendments of the Constitution. Amendments of Chapters 1, 2 and 9 concerning basic constitutional structure and rights of citizens require approval by three-fifths of the Federal Assembly and a special Constitutional Assembly or national referendum. Amendment of other chapters such as those regulating the terms of office follow the format described in the text above. See Konst. R.F. ch. 9.

5. Natalya Krainova, *Medvedev Orders Cleanup of Courts*, MOSCOW TIMES, May 21, 2008, available at www.cdi.org/Russia/Johnson/2008-100-cfm.

6. TRANSPARENCY INTERNATIONAL BANGLADESH, CORRUPTIONS PERCEPTIONS INDEX (CPI) 2008, (2008), http://www.ti-bangladesh.org/CPI/CPI2008/CPI2008_Results-FAQ.pdf.

7. Lyudmila Alexandrova, *President Upsets Duma Attempts to Postpone Anti-corruption Laws*, ITAR-TASS, Dec. 17, 2008.

8. Federal Law No 273-FZ, On Counteraction to Corruption; Federal Law No. 274-FZ, On Amendments to Certain Legislative Acts of the Russian Federation in Connection with the Adoption of the Federal Law on Counteraction to Corruption; Federal Law No. 280-FZ, On Amendments to Certain Legislative Acts of the Russian Federation in Relation to Ratification of the UN Anti-bribery Convention of October 31, 2003 and the Criminal Law Convention on Corruption of January 27, 1999 and Adoption of the Federal Law On Counteraction to Corruption; *Public Anti-Corruption Initiatives, Russia*, BUSINESS ANTI-CORRUPTION PORTAL, available at www.business-anti-corruption.com/country-profiles/europe-central-asia/russia/initiatives; *Federation Council Approves Anti-Corruption Laws*, ITAR-TASS, Moscow, Dec. 22, 2008; J. Vermin, *Disillusion is a Virtue*, Jan. 12 2009, www.russianlawonline.com/content/anti-corruption-legislation-russia.

Civil Code is amended to prohibit any gift to a public official with a value exceeding 3000 rubles (approximately US\$90). This is inconsistent with certain laws prohibiting public officials from accepting any gifts unless they are made at open formal occasions whereupon the gifts become state or municipal property.⁹

On December 2 at the seventh All-Russian Congress of Judges, Medvedev proposed a federal law to reform the judicial system.¹⁰ His legislation provided for a single disciplinary body to supervise judges, simplify procedures to appointment judges, and improve the quality of legal education. One stated purpose of the reform would be to reduce the number of appeals of Russian citizens from decisions of Russian courts to the European Court of Human Rights in Strasbourg, France.¹¹ Russia ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1991. As a result of Protocol No. 11 (which was ratified effective November 1, 1998, when Boris Yeltsin was president), the Convention requires parties to the Protocol to permit persons claiming abuse by courts of certain procedural and substantive rights to appeal to the Strasbourg court. At the end of 2008, the number of cases filed against Russia had risen to twenty-eight percent of the total, far more than any other country and out of proportion to the population.¹²

II. New Law on Foreign Investment in Strategic Enterprises

One of Vladimir Putin's last acts in his capacity as Russia's president was to sign into law, on April 29, 2008, a new federal statute requiring foreign investors wishing to acquire a substantial stake in "strategically significant" enterprises in Russia to seek advance government approval for any such acquisition.¹³ The law has been criticized as likely to have a chilling effect on already-wary foreign investors and further amplify the Russian Government's power to control economic activity for political ends.¹⁴

Defenders of the law point out that many, if not most, countries have adopted some measures to restrict foreign investors' acquisition rights in certain strategically vital spheres of economic activity.¹⁵ The United States, for instance, has maintained, since 1988, its own governmental review procedure for foreign investments affecting national security interests, under the so-called "Exon-Florio" provisions,¹⁶ and has recently en-

9. See Vermin, *Disillusion is a Virtue*, *supra* note 8.

10. *Russia's Medvedev Proposes Transparency for Courts*, RIA NOVOSTI, Dec. 2, 2008, available at <http://www.cdi.org/russia/johnson/2008-218-1.cfm>.

11. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 1955 U.N.T.S. 220 (no. 2889), amended by Protocol No. 11, E.T.S. No. 155, eff. Nov. 1, 1998.

12. Clifford J. Levy, *European Court Seems to Rankle Kremlin*, N.Y. TIMES, Mar. 29, 2009, available at www.nytimes.com/2009/03/29/world/europe/29russia.html?_r=3&hp&adxhnlx=12.

13. On the order of making foreign investments in commercial enterprises having strategic importance for national security of the Russian Federation. Foreign Investment in Companies of Strategic Significance for National Defense and Security No.57-F3, ROS. GAZ. May 7, 2008 [hereinafter FISEL] available at www.rg.ru/2008/05/07/investicii-fz-dok.html.

14. See, e.g., Natalya Alyakrinskaya, *New Bill Bars Foreigners from Strategic Sectors*, MOSCOW NEWS, Aug. 16, 2007, available at www.mnweekly.ru/business/20070816/55268300.html.

15. See, e.g., Jesse Heath, *Strategic Protectionism? National Security and Foreign Investment in the Russian Federation*, GEO. WASH. INT'L L. REV. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1264041.

16. 50 U.S.C. app. § 2170 (2007) (Exon-Florio); 31 C.F.R. § 800.503 (2008).

acted amendments to the procedure designed to expand the scope of this review.¹⁷ Indeed, the official Explanatory Note to Russia's Foreign Investment in Strategic Enterprises Law (FISEL) expressly refers to the "analogous" nature of the U.S. legislation.¹⁸ In assessing the features and likely impact of the new Russian law, it might therefore be instructive, particularly for U.S.-based observers, to compare its provisions and their implementation to those of Exon-Florio.

Both Russia's FISEL and the United States' Exon-Florio provisions permit their respective governments to reject foreign investment transactions deemed to threaten national security interests.¹⁹ There are quite a few significant differences, however, in how the two laws are structured.

Compared to Exon-Florio, the FISEL is relatively explicit and precise regarding its scope of application. In broad terms, it requires all foreign investors acquiring shares and/or control—a concept defined in substantial detail of more than fifty percent of a company operating within the sectors of economic activity listed in the law to obtain advance government approval before proceeding with the investment.²⁰ The threshold is lower if the foreign entity is state-owned (twenty-five percent), or if the entity being acquired is in the business of extraction or exploration of strategic natural resources (ten percent).²¹ Furthermore, would-be acquirers of over five percent of a company within any of the strategic sectors are subject to a notification requirement.²² The law lists forty-two categories of strategic activities, which with a few exceptions fall into the military, nuclear, aerospace, natural resources, and natural monopoly spheres. Some of the other types of companies covered by the law include large mass media companies and telecommunications companies.

Exon-Florio, in contrast, does not define the industries or types of acquisitions that are subject to the law. Rather it authorizes the president to review, suspend, and prohibit any foreign investment transactions that could constitute a threat to "national security."²³ Unlike its Russian counterpart, however, Exon-Florio contains no mandatory pre-approval or notification procedure. Notification under the U.S. law is voluntary, but because the president can also reject transactions where notice was not given, there is a significant incentive to provide timely notice.²⁴

Review under both the United States and Russian legislation is a multi-step procedure designed to collect relevant information to determine whether the transaction should proceed. Under Exon-Florio, ultimate decision-making authority with regard to a given investment rests with the president, who has delegated the task of reviewing and making

17. See COMM. ON FOREIGN INV. IN THE U. S., EXON-FLORIO PROVISION (CFIUS), available at www.ustreas.gov/offices/international-affairs/cfius/ [hereinafter CFIUS].

18. Explanatory Note on Federal Law, On the Order of Making Foreign Investments in Commercial Enterprises Having Strategic Importance for National Security of the Russian Federation, <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=PR;n=53144>.

19. See FISEL, *supra* note 13, at art. 10; CFIUS Note, *supra* note 17.

20. FISEL, *supra* note 13, at arts. 2, 3, 5.

21. *Id.*

22. *Id.* art. 14.

23. CFIUS Note, *supra* note 17.

24. See, e.g., U.S. GOV'T ACCOUNTABILITY OFF., GAO 05-686, ENHANCEMENTS TO THE IMPLEMENTATION OF EXON-FLORIO COULD STRENGTHEN THE LAW'S ENFORCEMENT (2005) available at www.gao.gov/new.items/d05686.pdf.

preliminary recommendations to the Committee on Foreign Investment in the United States (CFIUS), which is composed of senior government officials including the U.S. Secretaries of Treasury, Homeland Security, Commerce, Defense, State, Energy, and the Attorney General.²⁵ CFIUS has thirty days to review a transaction to determine whether it warrants a further forty-five day intensive review, and must thereafter make a recommendation to the president regarding approval or rejection. The president then has fifteen days to decide whether to prohibit a transaction and must report to congress regarding his decision.²⁶

The review procedure spelled out under FISEL is substantially more detailed but, in broad terms, is similar to the procedures of Exon-Florio. As a first step, the foreign investor must submit extensive documentation relating to the intended acquisition to the Federal Anti-Monopoly Service (FAS), which then conducts an investigation of the facts in conjunction with the Federal Security Service (FSB).²⁷ The FAS must then file its report and preliminary recommendation with a special commission, composed of deputy Prime Ministers and heads of various state agencies with competence in security and economic matters.²⁸ The commission is chaired by the Prime Minister and decides whether to approve the investment by a majority vote.²⁹ The entire review process is supposed to take three, or, in some cases, six months, which is roughly comparable to the length of review under Exon-Florio.

With regard to the substantive standard used to approve or reject a transaction, both the FISEL and Exon-Florio use "threat to national security" as the operative inquiry. The U.S. law is substantially more specific, requiring the president to find "credible evidence" that "the foreign entity exercising control might take action that threatens national security" and that other provisions of law do not adequately and appropriately enable him otherwise to protect the national security in the matter.³⁰ While Exon-Florio contains no definition of what constitutes a threat to national security it does contain a list of factors to be considered by the reviewing authority in making the determination. The relevant factors under Exon-Florio involve consideration of national defense requirements, maintenance of U.S. technological leadership in defense-related fields, risk of undesirable weapons proliferation to supporters of terrorism or countries that pose a potential military threat to the United States, and effects on critical technology, infrastructure, and energy security.³¹

Superficially, it appears that FISEL also includes a list of elements to be considered. Thus, under Article 10(1), the FAS is tasked with determining whether the enterprise conducts specially licensed activities, has access to state secrets, deals in transactions involving controlled products and technologies, or has rights to conduct international transactions in the field of military equipment.³² Many elements however appear designed to

25. CFIUS Note, *supra* note 17.

26. *Id.*

27. FISEL, *supra* note 13, arts. 8-9; Heath, *supra* note 15, at 28-30.

28. FISEL, *supra* note 13, at art. 9(1); On the Governmental Commission for Control over the Making of Foreign Investments in the Russian Federation [Russian Federation Collection of Legislation] 2008, No. 510, available at <http://www.fas.gov.ru/law/19644.shtml>.

29. Government Commission No. 510, *supra* note 28, at art. 9.

30. CFIUS Note, *supra* note 17.

31. *See id.*

32. FISEL, *supra* note 13, at art. 10.

establish that the enterprise actually falls into one or more of the forty-two sectors defined in the law as strategic. For instance, one of the thirteen inquiries listed in Article 10(1) is whether an enterprise appears on the FAS list of natural monopolies.³³ Yet, an enterprise's status as a natural monopoly triggers mandatory FISEL review by definition,³⁴ so the inquiry under Article 10(1) does not help to determine whether a prospective acquisition of rights should be approved or rejected. It appears that FISEL contains little guidance in determining when a prospective acquisition should be approved or rejected.

The effect of a law depends on how it is implemented. It is difficult to predict whether FISEL will have a similar effect as Exon-Florio in the United States. Despite thousands of notified transactions, a U.S. president has only once exercised his power to reject a foreign investment transaction under Exon-Florio.³⁵ But it is likely that the possibility of rejection has deterred some acquisitions. It is similarly possible that the added uncertainty regarding the new review procedure would make foreign investors marginally less inclined to proceed with new investments in Russia in the forty-two sectors identified in the FISEL. On the other hand, it could be argued that even absent any investment notification procedure, a foreign investor seeking to acquire a stake in a strategic enterprise in Russia would be well advised to investigate whether the acquisition is likely to meet with the government's approval. Under this view, the approval procedure might actually decrease a foreign investor's uncertainty as to whether its investment is welcomed by the authorities.³⁶

It is too early to tell whether the new law will increase the protection of domestic industries from foreign ownership or merely streamline and centralize decision-making about important foreign investments in Russia's economy. The potential for discriminatory or unjustified application of the vague "threat to national security" standard to screen out undesirable investments is a worrisome possibility. But as the recent unwinding of a Dubai company's deal to operate several U.S. port terminals in the United States powerfully illustrates, sufficient political opposition is usually enough to block an undesirable foreign acquisition, regardless of whether the law is clear in authorizing such an outcome.³⁷

Only two transactions have been reviewed so far by the Russian authorities under FISEL. One involved a share acquisition in the diamond industry by DeBeers and the other a partial acquisition of an aviation enterprise by Alenia Aeronautica.³⁸ The recently constituted FISEL Commission approved both of these transactions within a relatively short timeframe.³⁹ Moreover, one member of the commission, first deputy Prime Minister Igor Shuvalov, publicly stated that the goal of the commission is the approval, rather than the restriction, of investments.⁴⁰ With the recent capital flight from Russia and the

33. *Id.*

34. *Id.* art. 6(36).

35. See Ronald D. Lee & Nancy Perkins, *Securing U.S. Strategic Assets: Does The Exon-Florio Statute Do Its Job?*, CHINA TRADE L. REP., Apr. 2006, at 3, available at www.arnoldporter.com/resources/documents/Securing_US_Strategic.pdf.

36. See Heath, *supra* note 15, at 46.

37. See Lee, *supra* note 35, at 6.

38. See Yevgenia Written & Ulyana Gorbolskaya, *First Deals are Approved*, VEDOMOSTI, October 13, 2008, available at www.vedomosti.ru/newspaper/article.shtml?2008/10/13/164435.

39. *Id.*

40. *Id.*

international financial crisis, Russia can hardly afford to upset the few foreign investors willing to make acquisitions.⁴¹ There is no guarantee that this outlook will always prevail, and so it remains to be seen whether FISEL will be applied in a less benign fashion.

III. Enforcement of Foreign Arbitral Awards in Russia and Ukraine

As Russian and CIS companies expand their reach beyond their countries' respective borders, and as foreign investors continue to undertake projects in the region, the importance of international arbitration in resolving related commercial and investment disputes is on the rise.⁴² Indeed, even contracts between two CIS entities increasingly contain international arbitration clauses, presumably due to continuing distrust of the ability of local court systems to resolve disputes in a speedy, even-handed, and predictable manner.

International arbitration extends the promise of impartial resolution of disputes using procedures of the parties' own choice, which is a tempting proposition for parties seeking to reduce the uncertainties of doing business in an unfamiliar or uncertain legal environment. Bottom-line minded businesspeople, however, often ask whether an international arbitration award could be enforced and executed effectively in the country in which the counter-party's assets are located. For those conducting business with Russian and Ukrainian companies, the issue boils down to whether Russian and Ukrainian courts will enforce arbitral awards rendered outside of their borders against domestic companies.

The deceptively simple answer is that because both Russia and Ukraine are parties to the 1958 U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), Russian and Ukrainian courts must enforce international arbitration awards that do not fall under the list of exceptions to mandatory enforcement under the convention.⁴³

41. Jesse Heath, *Alenia Aeronautica and Archangel Diamond Corporation's Applications Approved with No Drama*, RUSSIA MONITOR, Oct. 10, 2008, <http://www.therussiamonitor.blogspot.com/2008/10/alenia-and-beers-applications.html>.

42. See, e.g., Richard Chlup, *Particularities of Russia-Related International Arbitration*, 3 GLOBAL ARB. REV. 24 (2008).

43. Foreign arbitral awards are in a somewhat privileged position because there is no similar agreement to enforce foreign court decisions, at least as between CIS and Western nations. See, e.g., Sergey Budylin, *Judging the Arbiters: The Enforcement of International Arbitration Decisions in Russia*, REV. CENTRAL & EAST EUROPEAN L. (Forthcoming 2009). Given that this article uses the New York Convention as a reference point, it is important to provide a brief overview of the relevant provisions of that treaty. Under Article V(1), the Convention states that enforcement may be refused only if the party resisting enforcement establishes one of five specified flaws with the underlying arbitration. Essentially the requesting party must demonstrate that (1) the arbitration agreement was invalid under the relevant law, (2) the party was not given an opportunity to present its case, (3) the award goes beyond the scope of the arbitration agreement, (4) there was a flaw in the composition of the arbitral tribunal or the procedure followed by the tribunal, or (5) that the award has not become binding or has been properly set aside at the seat of the arbitration or in the country under the law of which the award had been rendered. In addition, under Article V(2), refusal to enforce an award may be proper where (1) the subject of the dispute cannot be settled by arbitration as a matter of domestic law, and (2) recognition or enforcement of the award would be contrary to the public policy of the country. Although disagreements as to the scope of these provisions exist, there are certain core principles that enjoy broad-based, if not universal, support among arbitration scholars and practitioners. First, review of an award under the New York Convention is not an avenue for reviewing the merits of the dispute, including the factual and legal conclusions of the tribunal. Second, awards are presumptively valid and the burden is on the party resisting enforcement to establish its invalidity. Third, exceptions to enforcement, including the public

The applicability of the New York Convention as a theoretical matter does not fully address the question of whether Russian or Ukrainian courts will necessarily enforce the award in accordance with the convention. In both countries, a number of other treaties and domestic statutes potentially apply to the issue of enforcement of arbitral awards. Alternatively, courts might simply apply the exceptions to enforcement under the convention in a broader manner than standard interpretations of the convention would warrant.

Both Russia and Ukraine are parties to other multilateral international agreements on the subject of enforcement of arbitral awards. All of these agreements post-date the New York Convention. As a matter of traditional treaty interpretation, these later treaties may supersede the New York Convention if both are applicable and inconsistent.⁴⁴ It is therefore crucial to understand how these treaties might affect arbitral awards sought to be enforced under the New York Convention.

One such treaty is the European Convention on International Commercial Arbitration of 1961 (1961 Geneva Convention),⁴⁵ an agreement ratified by the Soviet Union and a number of states in Eastern and Western Europe. As with the New York Convention, Russia and Ukraine have agreed to be bound by the treaty as successors to the Soviet Union. While the 1961 Geneva Convention does not deal with the enforcement of arbitral awards, it does deal with the closely related issue of when an award can be set aside, either at the seat of the arbitration, *i.e.* in the courts of the country in which the arbitration took place, or in the country under the law of which the award had been rendered.

Under Article IX(1) of the 1961 Geneva Convention, an award may be set aside only on one of the following grounds: (1) invalidity of the agreement to arbitrate, (2) lack of an opportunity to be heard, (3) exercise of jurisdiction in excess of the arbitration agreement, and (4) the lack of compliance of the arbitration procedure or the selection of arbitrators with the parties' agreement (or the default rules established in Article IV of the Convention). These grounds are almost a verbatim repetition of the grounds upon which enforcement can be refused under Article V(1)(a)-(d) of the New York Convention and are therefore consistent with it. Article IX(2) of the 1961 Geneva Convention expressly "limits the application of Article V(1)(e) of the New York Convention," which allows a party to refuse enforcement of an award that has been set aside at the seat of arbitration (or in the country whose procedural law applied to the arbitration), to cases where it was set aside in accordance with one of the four grounds stated above.⁴⁶ Essentially this provision means that even an award set aside at the seat of the arbitration may be enforceable in other states that are parties to the 1961 Geneva Convention, so long as it was not set aside in accordance with the limits set forth in Article IX(1).

policy exception under Article V(2), should not be interpreted so broadly as to defeat the treaty's objective of widespread and consistent enforcement of arbitral awards. Fourth, the grounds for refusing recognition or enforcement of an award listed in the Convention are the *only* grounds upon which refusal to enforce an award may be based.

44. *See, e.g.*, Vienna Convention on the Law of Treaties, art. 30, May 23, 1969, 1155 U.N.T.S. 331.

45. European Convention on International Commercial Arbitration of 1961, Apr. 21, 1961, 484 U.N.T.S. 349 [hereinafter 1961 Geneva Convention].

46. European Convention on International Commercial Arbitration, art. IX, Apr. 21, 1961, 484 U.N.T.S. 364.

Russia and Ukraine are also parties to the CIS-level 1992 Agreement on the Resolution of Economic Disputes (1992 Kiev Agreement).⁴⁷ The 1992 Kiev Agreement provides for recognition and enforcement of judicial and arbitral awards as between the signatories.⁴⁸ Articles 4.3 and 4.4 of the agreement, however, carve out areas in which the jurisdiction of domestic judicial bodies is exclusive. These exclusions concern disputes related to title to real property located in the territory of one of the signatories⁴⁹ and disputes regarding the legality of official acts or seeking monetary compensation for the consequences of such acts.⁵⁰ Although not especially significant exclusions with respect to typical commercial disputes, these provisions may raise substantial difficulties in the context of investor-state arbitration, in which the lawfulness of property expropriations or other governmental acts is usually central to the dispute.

One final point regarding the 1992 Kiev Agreement is that, according to Articles 3 and 7 of the agreement, it applies to the enforcement of decisions of *arbitrazh* and *treteyski* courts. In the CIS context, the term “arbitrazh courts” often refers not to arbitration but rather to the domestic courts with jurisdiction over commercial disputes. The term “treteyski” court is a clear reference to arbitration, but is predominantly used for arbitration before domestic arbitral institutions. It might therefore appear that the 1992 Kiev Agreement does not expressly reference international arbitration. Any gap in applicability is largely illusory, at least with regard to Russia and Ukraine.⁵¹ Arbitrations that occur at a CIS international arbitration body, such as the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (MKAS RF) or the parallel institution in Ukraine, are enforced under the 1992 Kiev Agreement as a matter of course. Thus, a Russian court has recently applied the Agreement in enforcing an international arbitration award rendered in Ukraine.⁵² Notably, the court made no reference whatsoever to the New York Convention.

The importance of the 1992 Kiev Agreement should not be underestimated even though it is not applicable to the recognition and enforcement of arbitral proceedings with a geographical seat outside the CIS, such as most proceedings under the auspices of non-CIS institutions such as the Stockholm Chamber of Commerce (SCC) or the London Court of International Arbitration (LCIA). After all, it is thought that a substantial majority of international arbitrations involving CIS parties take place within the CIS at institutions such as MKAS RF.⁵³

One more international agreement sometimes applied to enforcement issues in CIS countries is the 1993 Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (1993 Minsk Convention).⁵⁴ This convention, however, makes reference to arbitration, and only provides for legal assistance by courts of one country to

47. Convention on the Procedure of Settling Disputes Connected with Economic Activity (1992 Kiev Agreement), Russ.-Ukr., Mar. 20, 1992.

48. 1992 Kiev Agreement, *supra* note 47, at art. 7.

49. *Id.* art. 4.3.

50. *Id.* art. 4.4.

51. Russia's and Ukraine's respective laws on International Commercial Arbitration do not limit the term “treteyski” to domestic arbitration.

52. Arbitrazh Court of Krasnodar Region, Case No. ?-32-5202/2007-17/103 (July 2, 2007).

53. *Russians Think Old Duopoly Is Eroding*, 3 GLOBAL ARB. REV. 9 (2008).

54. 1993 Convention on Legal Assistance and Legal Relations in Civil, Family, and Criminal Matters, Commonwealth of Independent States, Jan. 22, 1993 [hereinafter 1993 Minsk Convention].

another. The reference to courts in the convention is phrased in such a manner that makes clear that only the courts as an organ of the state (rather than international arbitral tribunals) are covered by the definition. Moreover, the provisions related to enforcement of decisions are limited to decisions of official judicial organs in criminal, civil, and family matters.⁵⁵ These agreements should therefore in principle, have no relevance to the enforcement of foreign arbitral awards.

In sum, none of the international treaties to which the Russian Federation and Ukraine are a party appear to impose any requirements that contradict, or even appreciably modify, the terms of the New York Convention. It would therefore appear that, from the perspective of international law, there exists no substantial issue with respect to the application of the convention in either country.

A. RUSSIAN DOMESTIC LAW AND PRACTICE

Russian law has several provisions relating to enforcement of international arbitral awards. Some provisions are found in the Civil Procedure Code of the Russian Federation (GPK RF) that governs the procedure applicable in the civil courts. Russia, however, has a dual court system, with *arbitrazh* (i.e. commercial) courts existing in parallel with the civil courts. These courts are governed by a different code, namely the Arbitrazh Procedure Code of the Russian Federation (APK RF).⁵⁶ Because the vast majority of international arbitral awards are commercial in nature, it is the APK RF, rather than the GPK RF, that governs the procedure of enforcement of such awards in the Russian Federation.⁵⁷

Under Article 239 of the APK RF, enforcement of an arbitration award may be denied on seven specified grounds, which largely mirror the seven grounds of the New York Convention.⁵⁸ In addition to these standard grounds, Article 239(4) of the APK RF contains a general provision allowing courts to deny enforcement where authorized by “an international treaty of the Russian Federation and the federal law on international commercial arbitration.”⁵⁹ The latter federal law is discussed further below.

With regard to foreign arbitral awards, the APK RF provides a parallel, but distinct, framework for enforcement. Some of the requirements for enforcement are procedural: for instance, the party seeking enforcement must present the court with certain specified documents and information,⁶⁰ and must make the request for execution within three years of the effective date of the arbitral award.⁶¹ Assuming compliance with these requirements, under Article 241, foreign arbitral awards can be recognized and enforced to the extent permitted by “an international treaty of the Russian Federation and federal law.”⁶² Commentators have suggested that the “and” in this context should be read as an “or,” meaning that either a treaty or a federal law may provide the basis for enforcing a foreign

55. See 1993 Minsk Convention, *supra* note 54, at art. 51.

56. Budylin, *supra* note 43, at 1.

57. *Id.*

58. Arbitrazhno-Protessualnyi Kodeks [APK] [Code of Arbitration Procedure] art. 239 (Russ.) available at www.consultant.ru/popular/apkrf/9_38 (last visited Apr. 15, 2009).

59. *Id.* art. 239(4).

60. *Id.* art. 242.

61. *Id.* art. 242(2).

62. *Id.* art. 241.

arbitral award in Russia.⁶³ Furthermore, Article 244(2) specifies that enforcement of a foreign arbitral award may be denied if the award is contrary to the public order of the Russian Federation or if denial is authorized by the general provision contained in APK RF Article 239(4), cited above.⁶⁴

Because Article 239(4) expressly refers to enforcement in accordance with the “federal law on international commercial arbitration,” it is important to examine the provisions of the Russian Federation Law on International Commercial Arbitration, which dates from 1993 and is based on the U.N. Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration.⁶⁵ Under Article 35 of the law, foreign arbitral awards are generally enforceable in the Russian Federation except to the extent enforcement may be denied under Article 36.⁶⁶ Article 36, in turn, provides a list of exceptions to enforcement that are identical to those of the New York Convention.⁶⁷ Thus, ultimately it appears that Russian legislation is entirely consistent with New York Convention, even though this conclusion is by no means apparent from a facial review of the APK RF.

The fact that Russian law, both domestic and treaty-based, is consistent with the New York Convention, however, does not guarantee that a foreign arbitral award will necessarily be enforced by the Russian courts in accordance with the convention. Unfortunately, no comprehensive review of Russian court decisions to assess their compliance with the New York Convention is possible, because most decisions are not publicly available. At least one review of available cases, however, has suggested that Russian courts refuse enforcement of foreign arbitral awards in approximately one third of these cases, which is substantially higher than the 10 percent rate considered to be the international average under the New York Convention.⁶⁸

In reviewing Russian case law, it is important to keep in mind that Russia has a civil-law legal system in which judicial decisions do not have the force of binding precedent. Decisions of the higher *arbitrazh* courts, particularly the *Visshiy Arbitrazhnyi Sud* (VAS), however, do carry substantial persuasive force with the lower *arbitrazh* courts.⁶⁹ The VAS is the highest court in the federal *arbitrazh* court system. The lower *arbitrazh* courts are divided into three tiers: first instance, appeal, and “cassation.” In addition to decisions, the VAS occasionally issues non-binding “information letters,” in which the court seeks to summarize and clarify case law in a particular area for the benefit of the lower courts.⁷⁰

VAS issued a decision on January 22, 2008, in a long-running enforcement dispute between Joy-Lud Distributors International, Inc. and a Russian oil processing plant. The court permitted enforcement of an arbitration award despite the existence of a typographical error in the name of the enforcing party, Joy Lud was spelled without a hyphen, in its

63. See Budylin, *supra* note 43, at 2.

64. APK, *supra* note 58, at art. 239(4).

65. *Id.*

66. United Nations Commission on International Trade Law, Model Law on International Commercial Arbitration, art. 35 (1985).

67. *Id.* art. 36.

68. William R. Spiegelberger, *The Enforcement of Foreign Arbitral Awards in Russia: An Analysis of the Relevant Treaties, Laws and Cases*, 16 AM. REV. OF INT'L ARB. 261, 262 (2005).

69. Budylin, *supra* note 43, at 4.

70. *Id.*

corporate documents.⁷¹ That such an issue was seriously considered by the court may strike a foreign reader as odd, but there have been cases in the past where such minor technical discrepancies resulted in denial of enforcement.⁷² This VAS decision therefore might represent a welcome move towards a more pragmatic view of such discrepancies.

Also in January of 2008, the Federal Arbitration Court of the West Siberian Division ruled in an enforcement of an arbitration award rendered in Ukraine.⁷³ The court determined that there was an unresolved issue of fact as to whether the party against which the award was rendered was adequately informed of the arbitral proceedings.⁷⁴ The court remanded to the lower court to determine whether adequate notice had been given.⁷⁵ The court's reasoning does not mention the New York Convention, but relies on parallel provisions of Article 9 of the 1992 Kiev Agreement, that lists the lack of adequate notice as a proper ground for refusing to enforce an arbitral award.⁷⁶ The court's decision to remand for evidentiary findings on the issue does not therefore appear problematic. Unfortunately, however, the court made no statement as to which party would bear the burden of proof on remand, even though the New York Convention places the burden of proof on the party resisting enforcement.⁷⁷

Finally, in one of the most recent available cases, published on September 18, 2008, the Federal Arbitration Court of the Moscow Division issued a ruling in favor of OAO Gazprom against OAO Moldovagas, denying the latter's request to enforce an MKAS RF arbitration award on the ground that the arbitral procedure had not been conducted in accordance with the parties' agreement.⁷⁸ In its decision, the court relied on Article V(1)(d) of the New York Convention that allows a court to resist enforcement where the arbitration procedure was fundamentally flawed.⁷⁹ The flaws identified by the court were that (1) the tribunal issued an award instead of suspending the arbitral proceedings and (2) the decision did not contain conclusions about the acceptance or rejection of the presented complaints.⁸⁰ The first of these alleged flaws appears to be a fundamental challenge to the substantive correctness of the award, rather than the procedure followed by the tribunal.⁸¹ The second flaw is arguably procedural, given the requirement under Article 31(2) of Russia's International Arbitration Law that reasons for the award be provided.⁸² It is not clear from the court's description whether the award suffered from a failure to provide reasons or whether it simply failed to address particular arguments raised by one of the parties. In the latter case, the decision to deny enforcement under the New York Convention would be far more questionable.

71. Vestnik Vysshego Arbitrazhnogo Suda RF [Vestn. VAS] [The Highest Arbitration Court of the RF Reporter], Decision No. 5243/06 (Jan. 22, 2008) (unpublished).

72. See generally Spiegelberger, *supra* note 68 (summarizing publicly available enforcement decisions).

73. Federal Arbitrazh Court of the West Siberian Division, Decision in Case No. F04-338/2008(848-A45-12) (Jan. 31, 2008) available at www.arbitr.ru/bras/.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. Federal Arbitrazh Court of the Moscow Division, Decision in Case No. KG-A40/8586-08 (Sept. 18, 2008) available at www.arbitr.ru/bras/.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

Recent enforcement-related decisions of the Russian courts generally recognize the applicable provisions of the New York Convention and other international enforcement agreements such as the 1992 Kiev Agreement, but do not apply these principles in a very consistent or transparent manner. Because Russian court decisions are typically much shorter and less detailed than those of common law countries (or, for that matter, than a typical international arbitration award), it is difficult to determine whether the facts of a particular case fall under one of the exceptions to enforcement under the New York Convention. Nevertheless, some commentators have noted a positive trend towards a greater degree of enforcement of international arbitral decisions in Russia. It remains to be seen whether the trend becomes more pronounced and whether the VAS will provide more effective guidance in its decisions.

B. UKRAINIAN DOMESTIC LAW AND COURT PRACTICE

Unlike in Russia, where the enforcement of commercial arbitration awards is the province of specialized commercial (*arbitrazh*) courts, in Ukraine recognition and enforcement is within the province of the courts of general jurisdiction, whose procedure is governed by Ukraine's Civil Procedure Code (CPK). Although the CPK speaks only refers to enforcing decisions of foreign courts, the term can be understood to include foreign arbitral awards, in accordance with definitions in other domestic legislation, such as Ukraine's statute on Private International Law.⁸³ This understanding is also confirmed by the Resolution of the Plenum of the Supreme Court of Ukraine issued on December 24, 1999 (SCU Resolution) that clarifies some aspects of Ukrainian court practice with respect to the enforcement of both foreign court decisions and arbitral awards.⁸⁴

The lack of distinction between the treatment of foreign arbitral awards and court decisions in the domestic legislation, although not necessarily problematic in the CPK, has resulted in substantial confusion with regard to the application of international treaties. Thus, courts in Ukraine have not infrequently applied the Minsk Convention (that applies only to foreign court judgments) to the issue of enforcing foreign arbitral awards, resulting in refusals of enforcement on grounds not listed in the New York Convention.⁸⁵

According to Article 390 of the CPK, a foreign award may be enforced only on the basis of grounds provided by an applicable international agreement ratified by Ukraine, such as the New York Convention or a bilateral international agreement.⁸⁶ Furthermore, the CPK imposes a three-year statute of limitations on the enforcement of foreign awards in Ukraine, counting from the date of the award.⁸⁷

In accordance with Paragraph 1 of Article 396 of the CPK, enforcement may be refused in those cases only to the extent permitted by the applicable international agreement. Paragraph 2 of Article 396 also provides a list of other grounds for refusing enforcement,

83. Serghii Sviriba et al., *Recognition and Enforcement of Foreign Arbitral Awards in Ukraine*, TRANSNAT'L DISP. MGMT., Vol. 5, No. 3 (2006) at 1.

84. *See id.*

85. Oleh Beketov & Dmytro Marchukov, *Refusing Recognition and Enforcement of Foreign Arbitral Awards in Ukraine (Procedural Issues and Application of Non-Arbitrability and Public Policy Grounds)*, TRANSNAT'L DISP. MGMT. (Feb. 2008).

86. Civil Procedure Code of Ukraine, Law No. 1618-IV (2004) at Art. 396 [hereinafter CPK] available at <http://zakon.rada.gov.ua/cgi-bin/laws/annot.cgi?nreg=1618-15>.

87. *Id.* art. 391.

but the list only applies when the international agreement does not identify the permissible grounds for refusing enforcement.⁸⁸ Because the New York Convention and the other international agreements do provide an exhaustive list of grounds for refusing enforcement, the relevance of the grounds stipulated in Paragraph 2 of Article 396 might appear to be minimal. Efforts to obtain copies and translations of decisions by Ukrainian courts which appear to be in conflict with the New York Convention, the 1992 Kiev Convention and the CPK itself have not been successful. Ukraine's domestic legislation on Private International Law appears to impose some additional requirements for enforcement of arbitral awards.⁸⁹ While Article 81.1 of the law explicitly affirms the recognition and enforcement of international commercial arbitral awards that have entered into force, Article 77 lists a number of subjects involving a "foreign component" with respect to which Ukraine's courts have exclusive jurisdiction.⁹⁰ This legislation implies that an arbitration award concerning any of the matters listed in Article 77 is outside the permissible scope of international arbitration as a matter of Ukraine's domestic law⁹¹. Consistent with Article V(2)(a) of the New York Convention, enforcement of an arbitral award involving such matters could be refused by Ukraine's courts.

The nine types of disputes specifically listed in Article 77 are: (1) disputes over real property located in Ukraine, (2) family relations between Ukrainian residents; (3) matters involving inheritance from a resident of Ukraine; (4) disputes over intellectual property subject to registration in Ukraine; (5) disputes related to the dissolution or liquidation of foreign legal entities in the territory of Ukraine; (6) disputes related to the validity of entries in the government register; (7) disputes related to the bankruptcy of a Ukrainian debtor; (8) cases concerning the issuance of or destruction of commercial paper issued in Ukraine; and (9) matters related to adoption in Ukrainian territory.⁹² As indicated in Article 77(10), this list of matters is not exhaustive, in that Ukrainian law may prescribe other matters that are within the exclusive jurisdiction of the Ukrainian courts.⁹³

The formulations above are capable of a variety of interpretations and, unfortunately, there has been virtually no guidance from the Supreme Court of Ukraine regarding their application. Consequently, commentators have expressed concern that Ukrainian courts may take an unduly broad interpretation of the exclusive jurisdiction of Ukrainian courts.⁹⁴ For instance, with respect to real property disputes, it would be logical for Ukrainian courts to have exclusive jurisdiction over issues of title, registration, liens, and enforcement of property rights. On the other hand, it might be improper for a Ukrainian court to deny enforcement of an award of monetary damages to a claimant merely because the arbitration proceeding was connected to immovable property located in Ukraine.⁹⁵

88. Beketov & Marchukov, *supra* note 85, at 4.

89. Law of Ukraine on Private International Law, No. 2709-IV (June 23, 2005), available at www.cisg.ru/content/download/ipr_ua_rus.pdf.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. Beketov & Marchukov, *supra* note 85, at 1.

95. *See id.*

Ukraine has also adopted a Law on International Commercial Arbitration (ICA Law),⁹⁶ which, like the Russian Federation's counterpart, is based the UNCITRAL Model Law of 1985. As such, the grounds for refusing enforcement of foreign arbitral awards in Article 36.1 coincide almost exactly with those of the New York Convention.

Article 36.1.2 of the ICA Law provides for refusal to enforce decisions of foreign arbitral tribunals if they violate the public policy of Ukraine.⁹⁷ This provision deserves particular attention because it has provided the basis for several recent decisions of Ukrainian courts. According to Article 228 of the CPK, a private agreement contradicts public policy if it (1) violates constitutional and human rights or freedoms or (2) destroys, causes harm to, or unlawfully takes control of the property of an individual, legal entity or the state.⁹⁸ Furthermore, the SCU Resolution mentioned above states that, for purposes of enforcement of foreign judgments and awards, public policy is to be understood as the legal order of Ukraine and its governing principles such as sovereignty, integrity, and independence of the State as well as respect for basic human rights and freedoms.⁹⁹

Although only a few Ukrainian court decisions on the subject are available for public review, it appears that Ukrainian courts have relied particularly on the public policy exception to refuse enforcement of arbitral awards that are inconsistent with decisions of Ukrainian courts.¹⁰⁰ This trend has continued recently with a well-publicized decision of a Kiev district court on October 5, 2007, to refuse enforcement of an arbitral award rendered in New York in the wide-ranging dispute between Telenor Mobile Communications AS and Storm LLC (a subsidiary of Altimo, part of Russia's Alfa Group), the principal shareholders of Ukrainian cellular carrier Kyivstar.¹⁰¹

According to publicly available materials, the two shareholders sought to pursue their claims in different fora.¹⁰² Telenor brought claims against Storm on the basis of a shareholders' agreement providing for international arbitration with a seat in New York as the means of resolving the parties' dispute. Storm, on the other hand, sought and succeeded to have the shareholders' agreement and the arbitration clause declared null and void by a Ukrainian court and obtained an injunction, also from a Ukrainian court, prohibiting the parties from participating in the international arbitration proceeding. When the arbitration tribunal, undeterred by the rulings of the Ukrainian courts, whose impartiality it questioned, proceeded to issue a ruling requiring Storm to divest its shares in Kyivstar to entities unrelated to Altimo or the affiliated Alfa Group, Ukrainian courts, perhaps unsurprisingly, refused to enforce it.¹⁰³

Interestingly enough, however, in refusing enforcement, the Ukrainian court apparently did not rely on New York Convention Article V(1)(a), which allows a court to refuse enforcement based on an invalidity of the arbitration clause, or Article V(1)(d), which permits a denial of enforcement in case of procedural irregularities. Instead, the court

96. Law of Ukraine on International Commercial Arbitration, No. 4002-XII (Feb. 24, 1994) available at <http://www.ucci.org.ua/en/legalbase/zua944002.html>.

97. *Id.* art. 36.1.2.

98. CPK, *supra* note 86, at art. 228.

99. See Sviriba, *Recognition and Enforcement*, *supra* note 83.

100. Beketov & Marchukov, *supra* note 85, at 14-16.

101. Aleksandr Ivanov, *Ukrainian Court Defeated New York Arbitration*, ZERKALO NEDELI, No. 40 (669) (Oct. 27 - Nov. 2, 2007), available at www.zn.ua/2000/2675/60895.

102. See *e.g.*, Telenor v. Altimo, 587 F. Supp. 2d 594 (S.D.N.Y. 2008).

103. Ivanov, *supra* note 101.

seized on the public policy exception to enforcement corresponding to the New York Convention Article V(2).¹⁰⁴ The court found at least two distinct reasons why enforcing the award would violate Ukrainian public policy. First, it held that enforcing a decision requiring alienation of shares in an enterprise violates fundamental norms of property ownership.¹⁰⁵ Second, it found that the decision was contrary to existing decisions of Ukrainian courts and that it was therefore contrary to Ukrainian law to enforce it.¹⁰⁶

Both of the court's reasons are at least questionable under the narrow reading of the public policy exception under the New York Convention commonly accepted in the United States and other Western nations. Indeed, a New York court had little difficulty in recognizing and enforcing the very same arbitral award less than a month after the above-mentioned decision.¹⁰⁷ Moreover, in the latest development in the Telenor-Altimo dispute, on November 18, 2008, the U.S. Federal District Court for the Southern District of New York imposed sanctions against Altimo for failing to comply with the award and declared several related opinions by Ukrainian courts to be "nothing more than a sham, a pseudo-legal excuse for Storm and the Altimo Entities to refuse to do what they have all along refused to do."¹⁰⁸

As it happens, the particular decision to invalidate Telenor's arbitral award appears consistent with the trend in Ukrainian court decisions that tend to read the public policy exception in a fairly broad manner, particularly where the award is thought to conflict with Ukrainian court decisions or proceedings.¹⁰⁹ To be fair, changing court practice to be more consistent with international norms is probably not a task for the lower courts. Rather, leadership must come from the Supreme Court of Ukraine and the political, business, and academic establishments, which have an interest in enhancing the image of Ukraine as an arbitration-friendly jurisdiction.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Telenor v. Storm*, 524 F. Supp. 2d 332 (S.D.N.Y. 2007).

108. *See, e.g., Telenor*, 587 F. Supp. at 608.

109. *See, e.g., Beketov & Marchukov*, *supra* note 85, at 11-15.