RUSSIAN LAW IN FOREIGN COURTS: PIERCING CORPORATE VEILS

I. SUING OUTSIDE RUSSIA

The Russian law of shareholder and officer liability has often been the subject of litigation in foreign courts, particularly English courts. Today I will talk about some of the problems and some of the opportunities that claimants face when trying to use foreign courts to impose liability in cases in cases involving piercing corporate veils in which I have been an expert witness or consultant.

The first problem is finding the person to sue and the property to attach. Often of course, both are hidden behind numerous layers of companies and trusts. A great advantage of the English courts is their ability and willingness to force disclosure and order a worldwide freeze. But before that can be done the defendant or defendants must be served with process. Russian citizens can be hard to find and hard to serve. Boris Berezovsky lucked out in serving Roman Abramovich in London.[1]

Even if there is success in service of process, a defendant may argue that the court has no jurisdiction because of insufficient connection of the defendant with the country. Mr. Abramovich made a forceful argument to this effect in the Yugraneft case, pointing out that he had only spent a few days in England during the relevant time period and that his 30 million pound pied-à-terre in London was just one of the many houses where he lived.[2]

If the defendant cannot be served in the country where he is being sued, then, in English-speaking countries, the claimant must request permission from the court for "service out of jurisdiction." In the Kyrgyz Mobil Tel case, defendants, when they sought to bring a counterclaim, had to fight all the way up to Her Majesty's Privy Council to obtain permission for out-of-jurisdiction service of a counterclaim.[3]

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Courts in common law countries, unlike courts in Russia and other countries in the civil law tradition, may refuse a case even if there is jurisdiction and venue, if the court finds that it is not the appropriate forum ("forum non conveniens"). In the recent case of Erste Bank v. Red October,[5] the plaintiff had hoped to pierce several corporate veils to reach

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[1] http://www.dailymail.co.uk/news/article-486164/Battle-oligarchs--amazing-showdown-Roman-Abramovich-arch-rival.html

[2] OJSC Oil Company Yugraneft v Abramovich & Ors (Rev 1) [2008] EWHC 2613 (Comm) (29 October 2008); http://www.bailii.org/ew/cases/EWHC/Comm/2008/2613.html

[3] AK Investment CJSC v Kyrgyz Mobil Tel Ltd & Ors (Isle of Man) (Rev 2) [2011] UKPC 7 (10 March 2011); http://www.bailii.org/uk/cases/UKPC/2011/7.html

[4] AK Investment CJSC v Kyrgyz Mobil Tel Ltd & Ors (Isle of Man) (Rev 2) [2011] UKPC 7 (10 March 2011); http://www.bailii.org/uk/cases/UKPC/2011/7.html

[5] Erste Group Bank AG London Branch v J 'VMZ Red October' & Ors [2015] EWCA Civ 379 (17 April 2015) http://www.bailii.org/ew/cases/EWCA/Civ/2015/379.html

Rostekhnologii. However, Rostekhnologii and the other defendants succeeded in having the case dismissed on the basis of inconvenient forum.

When a debtor is bankrupt creditors often look to the possibility of suing shareholders or even ultimate beneficial owners. If the debtor is in ongoing Russian bankruptcy proceedings, a claimant in those proceedings will be told by the English court that it is too soon to sue as long as he could recover something in those proceedings. This happened in VTB Bank v. Parline Ltd. [6] A claimant who participates in Russian proceedings and loses may be barred by *res judicata*. A claimant who refrains from participating in Russian bankruptcy proceedings may be told that he has failed to mitigate damages. Another reason the Erste Bank lost in the Red October case was that it had participated actively in the related Russian bankruptcy proceedings.

Once the case begins, it may turn out that the parties have concluded a contract with a choice-of-law clause choosing Russian law and a choice-of-court clause choosing Russian courts. This was argued by the defendant in TNK-BP v. Lazurenko,[7] in which the English courts dismissed the claim as seeking a remedy unavailable in Russian courts under Russian law.

Often there are complex questions concerning applicable law. In 2013 a law added Paragraph 4 to Article 1202 of the Civil Code of the Russian Federation.[8] This paragraph allowed a plaintiff to choose either Russian law or the law of the place of incorporation of a foreign company primarily doing business in Russia. However, foreign courts have regularly applied the conflict of law rules of their own country and have ignored Russian conflicts rules. Thus I doubt that Paragraph 4 will have any effect in cases decided abroad.

Unfortunately, when it is uncertain if a claim is governed by the law of the forum or Russian law, both parties will need to pay lawyers and experts to prepare their case under both legal systems. This was the situation in the Otkrytie case,[9] in which a great deal of money was spent preparing arguments on Russian law, but in which the court eventually applied only English law.

Unlike a decision on the content of foreign law, which generally binds only the parties to the particular case, in England a decision on English principles of choice of law becomes a

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[6] OJSC VTB Bank v Parline Ltd & Ors [2015] EWHC 1135 (Comm) (29 April 2015) http://www.bailii.org/ew/cases/EWHC/Comm/2015/1135.html

[7] Ojsc Tnk-BP Holding & Anor v Lazurenko [2012] EWHC 2781 (Ch) (16 October 2012) http://www.bailii.org/ew/cases/EWHC/Ch/2012/2781.html

[8] 4. If a legal person founded abroad conducts its entrepreneurial activity primarily on the territory of the Russian Federation, Russian law or, at the option of the creditor, the personal law of such legal person shall be applied to claims for liability for obligations of the legal person of the founders of (or participants in) a legal person or of other persons that have the right to give instructions obligatory for it or in another manner have the possibility of determining its actions.

4. Если учрежденное за границей юридическое лицо осуществляет свою предпринимательскую деятельность преимущественно на территории Российской Федерации, к требованиям об ответственности по обязательствам юридического лица его учредителей (участников), других лиц, которые имеют право давать обязательные для него указания или иным образом имеют возможность определять его действия, применяется российское право либо по выбору кредитора личный закон такого юридического лица.

[9] Otkritie International Investment Management Ltd & Ors v Urumov & Ors (Rev 1 - amended charts) [2014] EWHC 191 (Comm) (10 February 2014) http://www.bailii.org/ew/cases/EWHC/Comm/2014/191.html

precedent. For instance, principles of determining applicable tort law in the Fiona Trust[10] case were applied in the case of VTB Capital Plc v Nutritek.[11]

II. ENFORCEMENT OF A RUSSIAN JUDGMENT ABROAD

If a claimant is unable to sue outside Russia or decides for some reason to sue in Russia, then, the claimant, after winning a judgment in Russia, may try to sue to enforce the judgment abroad, either on the basis of a treaty or of comity. English courts generally will enforce such judgments on the basis of comity. They usually will not review a foreign judgment on substantive grounds, but always will review it for procedural fairness.

A Russian judgment in favor of Aeroflot against Mr. Berezovsky was attacked in English court on the ground that service on Mr. Berezovsky at his registered address in Moscow (where of course he did not live) was inadequate under Russian law. It was further attacked on the ground that the suit was an attempt to impose additional liability for the same wrong, and thus to violate the principle of finality of litigation, and so contrary to the Convention on Human Rights and Fundamental Freedoms, as interpreted in the case law of the European Court of Human Rights. The case was recently remanded to the trial court for a hearing on the merits of these claims.[12]

III. MULTIPLE CORPORATE VEILS

Even if a final judgment is reached, for instance against an off-shore holding company or trustee on some island, further complex attempts may be needed to penetrate the corporate veil (or the multiple corporate veils) shielding the ultimate beneficial owner. These attempts will of course most likely involve law other than Russian law in removing the veils, which will be a lot harder to remove than Salome's reputed 7 veils.[13]

IV. COUNTERCLAIMS

A great advantage of many foreign courts is the high quality of justice that they administer. But recall another Biblical passage, "He that is without sin among you, let him first cast a stone at her."[14]

The threat of a counterclaim is a serious one. Having instituted the action, the claimant will have great difficulty arguing that a counterclaim is not in the court's jurisdiction.

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[10] Fiona Trust & Holding Corporation Ors v Privalov Ors [2010] EWHC 3199 (Comm) (10 December 2010) http://www.bailii.org/ew/cases/EWHC/Comm/2010/3199.html

[11] VTB Capital Plc v Nutritek International Corp & Ors (Rev 1) [2013] UKSC 5 (6 February 2013) http://www.bailii.org/uk/cases/UKSC/2013/5.html

[12] Joint Stock Company (Aeroflot -Russian Airlines) v Berezovsky & Anor [2014] EWCA Civ 20 (16 January 2014) http://www.bailii.org/ew/cases/EWCA/Civ/2014/20.html

[13] Matthew 14:6-7：

6 But when Herod's birthday was kept, the daughter of Herodias danced before them, and pleased Herod.

7 Whereupon he promised with an oath to give her whatsoever she would ask.

[14] John 8:7:

7 So when they continued asking him, he lifted up himself, and said unto them, He that is without sin among you, let him first cast a stone at her.

Further, this counterclaim will be considered with the same expertise and fairness as the main claim.

There are ongoing proceedings in London in which the claimant, Bank St. Petersburg, is attempting to hold the defendant, Mr. Vitaly Arkhangelsky, liable on a personal loan contract and a guarantee of company debts both purportedly signed by Mr. Arkhangelsky. The defendant has counterclaimed, alleging that the bank is engaged in a plot to use forged signatures and corrupt Russian authorities to seize defendant's property.[15]

In the Kyrgyz Mobil Tel case, a Kyrgyz company brought a small claim against its former owners, which were Isle of Man subsidiaries of a Russian company. The claim was for an illegal dividend alleged received by the Isle of Man subsidiaries of the Russian company before another Russian company took over the Kyrgyz company. This suit opened the claimant and the Russian company that had taken it over to a massive counterclaim for illegal takeover. This claim eventually resulted in a settlement worth 320 million dollars in favor of the prior owners.[16]

Success in piercing the corporate veil in Russian proceedings can also have major repercussions under investment protection treaties. The most notable cases of course, are the arbitration awards to YUKOS shareholders totaling over 50 billion dollars for what they lost when the corporate veils of YUKOS-related companies in low-tax regions were pierced.[17] More recently, international investment arbitrations are being brought by a Ukrainian investor claiming to be the victim of unlawful piercing of the veil of the branch of a bank that he owned in Crimea.[18]

Foreign courts are ready to apply Russian law and to recognize Russian judicial decisions. However, before filing suit abroad, one must think seriously about the danger of a counterclaim. If a decision of a Russian court involved piercing the corporate veil, there is a significant risk that foreign shareholders of the losing defendant may bring a claim against the Russian Federation in international investment arbitration in connection with direct or indirect losses.

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[15] Bank St Petersburg Ojsc & Anor v Arkhangelsky & Ors (Rev 1) [2014] EWCA Civ 593 (14 May 2014) http://www.bailii.org/ew/cases/EWCA/Civ/2014/593.html

[16] "MTS, Altimo and Nomihold Reach Settlement Over Bitel" http://www.mtsgsm.com/news/2013-06-25-50768/
Антон Бурсак, «Невиданная щедрость: Altimo компенсирует МТС потерю киргизского «Бителa», http://www.forbes.ru/tehnologii/internet-i-svyaz/241268-nevidannaya-shchedrost-altimo-kompensiruet-mts-poteryu-kirgizskog

[17] http://www.italaw.com/sites/default/files/case-documents/ita0720.pdf
http://www.italaw.com/sites/default/files/case-documents/ita1075.pdf
http://www.gazeta.ru/business/2015/07/08/7630613.shtml

[18] Sarthak Malhotra, "Arbitration Proceedings against Russia to protect the Investment lost in Crimea", https://ilsquare.wordpress.com/2015/07/12/arbitration-proceedings-against-russia-to-protect-investment-in-crimea/
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