Enforcement of Arbitral Awards against Russian Companies outside Russia

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Introduction

Before companies from different countries enter into an arbitration agreement in international business matters, they do not only have to carefully choose the appropriate arbitral tribunal and the applicable set of rules for the arbitration proceedings. The practical value of an arbitration agreement often only turns out when it comes to enforcement. Each party should therefore also consider the chances to enforce an arbitral award against the other party and the risks to be itself exposed to enforcement measures.

However, in order to do so, it is not sufficient to evaluate the risks and chances to seek enforcement in the respective country where a company is domiciled or registered. Each party has to be aware that an arbitral award may just as well be enforced anywhere in the world, provided that the debtor has some assets there, including incorporeal chattels such as a foreign bank account or accounts receivable from foreign debtors. However, information about enforcement of arbitral awards in foreign countries is very often not easily available.

The following article therefore serves the purpose to outline the general rules and conditions of which a Russian company, against which an arbitral award was rendered, should be aware if it faces the risk that the judgment creditor might try to seek enforcement of the award abroad, i.e. outside Russia.

I. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958

The major legal source of international law regarding the enforcement of arbitral awards is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (in the following: "NY Convention"). The NY Convention contains rules on the validity of arbitration clauses - a topic that shall not be examined here - and on the recognition and enforceability (as opposed to the actual enforcement, see below section 3. c) of arbitral awards.

1. General Rules of the NY Convention

The system of recognition and enforcement of arbitral awards under the NY Convention is laid down in articles III - V. According to article III,

> "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure laid down in the following articles …"

Article IV then determines the formal requirements that have to be fulfilled by an application for the enforcement of foreign arbitral awards. Those requirements – the submission of the arbitral award and of the arbitration agreement in the original or in certified copies as well as a certified translation of those documents into the official language of the country where enforcement is sought – usually do not constitute an obstacle for the enforcement of arbitral awards. Of higher practical importance are therefore the grounds for refusal of recognition and enforcement of an arbitral award, which are exclusively enumerated in article V of the NY Convention. Those grounds deal, however, with exceptional circumstances, such as a violation of due process during the arbitration proceedings (cf. article V (1)(b) covering the situations that a party was not given proper notice or did not have a chance to present its arguments to the tribunal), a lack of binding force of the arbitration agreement or of the arbitral award (cf. article V (1)(a) and article V (1)(e) of the NY Convention) or a violation of public policy (article V (2)(b) of the NY Convention).

As a result, the provisions on recognition

[1] See, for a detailed discussion of the grounds for refusal of recognition and enforcement of arbitral awards under article V of the NY Convention, *van den Berg*, The New York Arbitration Convention of 1958 (1981), pages 264 et seq.

and enforcement of the NY Convention can be summarized in the rule that *foreign arbitral awards are generally recognized and enforceable in a member state of the NY Convention, unless exceptional circumstances occur*. In order to evaluate whether a creditor can seek enforcement of an arbitral award outside Russia, a Russian company, against which that award was rendered, should therefore first of all find out whether the creditor could rely on the NY Convention. This depends on the applicability of the rules of the NY Convention to a given case.

2. Geographical Scope of the NY Convention

As of 26 June 2003, the NY Convention has been ratified and entered into force in 133 countries. A constantly updated list of all member states, including the reservations made by some countries, is available in English on the website of UNCITRAL, although not in an authoritative form (www.uncitral.org/en-index.htm). The list of member states covers all major economic centers of the world and is constantly increasing; countries that have not (yet) ratified the NY Convention can mostly be found in Africa and on the Pacific islands[2]. This basically worldwide application of the NY Convention and of its general rules on recognition and enforcement as outlined above under I.1. is certainly one of the major advantages of arbitration as compared to litigation before state courts. From the perspective of a debtor against whom an arbitral award was rendered, this also means that the creditor can seek enforcement of the award almost everywhere in the world.

And even if the debtor has some assets in a non-member state (like, e.g., a bank account in Liechtenstein), he cannot necessarily be sure that those assets are safe from enforcement of the arbitral award. First, an arbitral award might also be enforceable on the basis of the local laws of the non-member state – the fact that a country has not become a member to the NY Convention does not mean that that country does not grant enforcement to foreign arbitral awards. Second, there are situations when enforcement against assets located in a non-member state might be carried out from a member state. If, e.g., a judgment creditor knows that his debtor has a bank account in Liechtenstein at the Liechtenstein branch of a French bank, he is well advised to apply for a garnishment order with the competent French court. The French court has the authority to issue a garnishment order by which all claims of the judgment debtor against the French bank – the third party debtor – are seized. Provided that the Liechtenstein branch is not a legal entity of its own, but forms part of the French bank, such a garnishment order can also attach the debtor's Liechtenstein bank account, which can be qualified as a conditional claim of the debtor against the French bank, payable at the bank's Liechtenstein branch[3].

Finally, the applicability of the NY Convention does, as a rule, not depend on the place where the foreign arbitral award was rendered. However, a considerable number of member states[4] made use of the first reservation under article I (3) of the NY Convention and declared that they will not apply the Convention to awards made in the territory of non-member states. Other countries[5], such as Belarus, the Russian Federation and Ukraine, apply the Convention to awards of non-member states on the basis of reciprocity only, i.e. only to the extent to which the non-member state recognizes and enforces arbitral awards made in those countries.

Due to the constantly decreasing number of non-member states, those reservations have, of course, lost most of their practical importance. What is more, even if a member state does not apply the NY Convention to arbitral awards of non-member states, the member state is free to grant recognition and enforcement to such arbitral awards on the basis of its local laws. The NY Convention does not exclude the application of local laws if those laws are more favorable to enforcement of a foreign arbitral award (article VII (1) of the NY Convention).

3. Subject Matter of the NY Convention

While the geographical scope of the NY Convention is almost worldwide and does therefore not provide for any serious limits to the enforcement of arbitral awards, the restrictions of the NY Convention as to its subject matter are of a far higher practical relevance.

a) First, the NY Convention only applies to *foreign* (as opposed to domestic) arbitral awards. If a creditor of a French arbitral award seeks enforcement against certain assets of the Russian

[2] The most notable non-member states might be Afghanistan, Andorra, Bahamas, Iraq, Liechtenstein, Pakistan, Tajikistan, Taiwan and Turkmenistan.

[3] See the judgment of the French Cour de Cassation (chambre commerciale) of 30 May 1985, published in Revue critique 1986, page 329 et seq.

[4] According to the list of states published on the website of UNCITRAL, 68 out of 133 member states have filed that reservation, inter alia Argentina, China, France, the United Kingdom and USA (as of 26 June 2003).

[5] According to the list of states published on the website of UNCITRAL, those states are (as of 26 June 2003): Belarus, Bulgaria, Cuba, Lithuania, Romania, the Russian Federation, Ukraine and Vietnam.

judgment debtor that are located in France, the creditor can not rely on the NY Convention, but has to refer to local French laws. Of course, it can easily be imagined that the local laws of the country where an arbitral award was rendered usually do not impose higher obstacles to the enforcement of domestic awards than the NY Convention does with regard to foreign arbitral awards. The inapplicability of the NY Convention to domestic arbitral awards does, therefore, not mean that such awards would be less easily enforceable in practice.

b) Second, some member states[6] made use of the second reservation under article I (3) of the NY Convention and declared that they will only apply the Convention to commercial disputes. As a result, those states may refuse enforcement of arbitral awards in matters like matrimonial and other domestic relations or in disputes on the exercise of sovereign state powers (acta iure imperii).

c) The most important restriction to the application of the NY Convention, however, lies in the fact that the NY Convention only deals with the *conditions for enforceability* of an arbitral award.

As a result, the rules of procedure on how an arbitral award becomes an enforceable title in a member state are – except for the formalities of the application laid down in article IV (see above under 1.) – subject to the local laws of that member state. The NY Convention does not specify that a court has to issue a so-called "judgment for enforcement" in order to render a foreign arbitral award enforceable, nor does the NY Convention contain provisions on what court has jurisdiction to decide on the enforceability of a foreign award. The local laws of the country where enforcement is sought can thus set up additional requirements for jurisdiction of the local courts in such cases, e.g. a sufficient connection of the case to the forum, with the result that the courts will completely refuse to deal with enforcement of certain arbitral awards[7].

However, since enforcement of an arbitral award is normally only pursued in a foreign country if the judgment debtor has some assets in that country, a sufficient connection of the application for enforcement against those assets can usually always be established on the basis of the location of those assets. What is more, it is not uncommon that a court assumes jurisdiction to decide on the enforceability of a foreign arbitral award even if the case does not have any current connection to the forum, since the judgment creditor might need the enforceable title later in order to start enforcement immediately after he learns that the debtor has acquired assets in the forum state[8].

While provisions on jurisdiction in local laws, therefore, usually do not impair the possibilities to enforce an arbitral award abroad, another procedural issue not covered by the NY Convention could result in serious practical difficulties for enforcement, namely the requirement of a jury trial. If a judgment creditor had to present the foreign arbitral award to a local jury in order to obtain a judgment for enforcement, the creditor might easily face the situation that the jury does not only review whether the award fulfils the conditions for enforcement under the NY Convention, but looks into the merits of the case. However, at least in the United States, it has been ruled that the judgment debtor has no right to jury trial in enforcement proceedings under the NY Convention, as such proceedings primarily deal with questions of law and not with questions of fact subject to examination by jury[9].

There is, however, another topic where the restrictions of the NY Convention as to its subject matter are of high practical relevance: Since the NY Convention only deals with the *enforceability* of a foreign arbitral award, it does not provide for harmonized law in the subsequent *enforcement* proceedings. As a result, even among the 133 member states of the NY Convention, there are (at least) 133 different legal systems on how to execute an enforceable award against the debtor's assets.

A judgment creditor who wants to know whether he can seek enforcement of an arbitral award against certain assets of his debtor in the foreign country X, should, therefore, not be satisfied with the answer that country X is a member to the NY

[6] According to the list of states published on the website of UNCITRAL, 43 out of 133 member states have filed that reservation, inter alia Argentina, China, India, Poland, Turkey and USA (as of 26 June 2003).

[7] See, e.g., the decision of the US District Court for the Southern District of New York in an action for confirmation of a London arbitral award rendered between a Liberian claimant and a Panamanian respondent with its principal place of business in Greece. The court dismissed claimant's petition for confirmation of the London arbitral award for lack of personal jurisdiction over respondent, since personal jurisdiction would have required "some basis…, whether arising from the respondent's residence, his conduct, his consent, the location of his property or otherwise" (*Transatlantic Bulk Shipping Ltd.* v. *Saudi Chartering*, 622 F. Supp. 25 (S.D.N.Y. 1985)). This decision is further discussed by *Kronenburg*, Vollstreckung ausländischer Schiedssprüche in den USA (2001), page 152 et seq.

[8] Even in the U.S., some State courts – like the New York State courts – assume jurisdiction on a far broader basis than the District Courts, see *Kronenburg*, op.cit., page 153 note 894. In other countries, local law provides for a subsidiary jurisdiction of a certain court to decide on the enforceability of a foreign award that has no closer connection to any other local court of the forum state, see, e.g., sec. 1062 subsection 2, last alternative, of the German Code of Civil Procedure (ZPO) and the annotations on sec. 1062 by *Schlosser* in Stein-Jonas, ZPO, 22nd edition, note 3.

[9] See judgment of the US District Court of the Eastern District of Michigan, Southern Division, in *Audi NSU Auto Union A.G.* v. *Overseas Motors, Inc.*, III Y.B. Com. Arb. 291, 292 (E.D. Mich. 1972).

Convention, because this does, at best, only mean that the award is enforceable in country X. The creditor also has to investigate whether and under what conditions he can actually seize certain assets located in country X, and this depends on the local laws of the country where enforcement is sought. From the perspective of a Russian company against which an arbitral award was rendered, it is thus important to find out whether those local laws provide for additional defenses that can be used in order to prevent enforcement against certain assets located abroad, even though the award is as such enforceable under the NY Convention.

II. Common Features of Local Laws on Enforcement

Due to the fact that the enforcement proceedings as such are ruled by local laws not harmonized by way of an international convention, a full evaluation of the chances and risks to seek enforcement abroad can only be made with regard to the specific rules of certain local enforcement laws. However, there are at least three common features that can be assumed to apply to local enforcement laws in general and that can thus give the parties a first hint to possible complications that might arise in enforcement proceedings.

1. Preclusion of Defenses as to the Merits of the Case

First, proceedings for the enforcement of an arbitral award are supplementary proceedings based on the arbitration proceedings that have resulted in the award. The debtor, against whom an arbitral award was rendered, therefore already had the chance to raise defenses as to the merits of the case in the arbitration proceedings[10]. In order to avoid that the creditor has to litigate the dispute again when it comes to enforcement, the debtor usually is precluded by local laws to raise defenses as to the merits of the case in the enforcement proceedings, unless the defense only came into existence after the award had become final (e.g. the defense that the debtor fulfilled his obligations in the meantime).

2. Rule of Territoriality

Second, it is a recognized principle of international law that a state can only grant enforcement against assets that are located within its territorial reach (rule of territoriality)[11]. E.g., an English bailiff is not entitled to seize assets located in France; any such attachment would be against international law and would not be recognized as valid. In order to start enforcement measures, the judgment creditor therefore has to address the authorities of the state where the assets, against which enforcement shall be carried out, are located.

3. Enforcement Follows Property Law

Third, enforcement can only be validly carried out against the assets of the judgment debtor[12], and the issue whether certain assets belong to the judgment debtor, is determined by the applicable property law. Local enforcement laws only follow the legal allocations of property rights established by the applicable property law.

The three common features of local enforcement laws outlined above can considerably influence the success of enforcement proceedings abroad, depending on the enforcement measures that are at issue. This shall be illustrated in the following general overview of enforcement measures against Russian companies' assets outside Russia.

III. Enforcement Against Russian Companies' Assets outside Russia

1. Attachment on Russian Companies' Assets outside Russia

a) Rule of Territoriality

As a result of the rule of territoriality outlined above under II. 2., it would be against international law – and thus not be recognized by other countries – if a country permitted the attachment of assets located beyond its territorial sovereignty. A Russian company having assets in France can therefore be sure that those assets can only be validly attached, as a rule, by a French bailiff and pursuant to the French law on enforcement.

However, it is not always easy to determine the location of assets. The location of real property in a certain country is, of course, an obvious fact, and the location of chattels – tangible property – can at least be objectively determined for a certain point of time. Yet it is far from clear how the location of shares shall be determined. Should shares in a company,

[10] If the debtor was not given the possibility to defend the case in the arbitration proceedings, the arbitral award would not be enforceable under the NY Convention, see article V (1)(b) of the NY Convention and above under I.1.

[11] See, e.g., *Geimer*, Internationales Zivilprozessrecht, 4th edition, 2001, note 3200; *Gottwald*, IPRax 1991, page 288; *Rogerson*, Cambridge L.J. 49 (1990), page 448.

[12] Including the legal successor to the judgment debtor and - possibly - certain parties who are liable for the judgment debtor's debts; see, for the latter, below under III.4.

at least if they are represented by share certificates which are traded at a stock exchange, be qualified as tangible property that is located at the location of the certificate? Or are shares so closely connected to the company that they are always located at the seat of that company? There is no generally accepted answer to that question, so the location of shares – and thus the determination of the correct enforcement measures and the international reach of such measures – depends on the applicable local laws.

This can even lead to a different result for different types of shares: If, e.g., a Russian company holds shares in a German "Aktiengesellschaft" ("AG") – i.e. in a stock corporation –, the shares can be transferred, according to German corporate law, by transfer of the share certificates, and German law on enforcement therefore considers those shares as being located at the place where the certificates are located. If the Russian company, however, holds shares in a German "GmbH" – i.e. in a limited liability company –, under German law, those shares, which are not represented by certificates, can only be assigned to another party like intangible accounts receivable, with the result that a judgment creditor has to obtain a garnishment order from a German court in order to seize the shares[13]. As a result, the shares in a German stock corporation cannot be attached by a German bailiff, due to the rule of territoriality, if the share certificates are located outside Germany[14], while the shares in a German limited liability company are always subject to the territorial reach of a German garnishment order.

b) Enforcement Follows Property Law

Pursuant to the principle outlined above under II. 3., foreign assets can only be validly attached by way of enforcement if those assets are attributed to the judgment debtor's property on the basis of the applicable property law. As a result, an arbitral award can be executed against the shares in a subsidiary of the debtor, because those shares belong to the debtor pursuant to the applicable corporate and property law. At the same time, the arbitral award can not, as a rule[15], be executed against property owned by that subsidiary, since the subsidiary, provided that it forms a legal entity of its own, is not identical to the judgment debtor and therefore generally has to be treated like a third party not involved in the arbitration proceedings.

In addition, the exposure of a Russian judgment debtor to foreign enforcement measures can depend on the distribution system of the Russian company. If the Russian company sells its products abroad via agents, who sell the company's goods on behalf of the company and do not acquire property to the goods, the goods can, as a rule, be validly attached by the judgment creditor as long as title has not passed from the debtor to its customers. If the distribution system, on the contrary, is based on independent distributors, who acquire title to the goods that they later sell on account of the Russian company, the creditor cannot attach the goods as soon as they become property of the distributor[16].

Similarly, due to the principle that enforcement follows property law, retention of title to goods, which were sold by the Russian judgment debtor and sent abroad, can increase the chances of the creditor to obtain a valid attachment on those goods. If the title to the goods had already passed to the buyer as soon as he took possession of the goods, the judgment creditor would no longer be entitled to seek enforcement against those goods. If, however, due to a valid retention of title, the goods remain the property of the judgment debtor, the creditor can still try to seek enforcement against the goods as long as the buyer has not paid the full purchase price and thus has not acquired property[17].

2. Attachment on Russian Companies' Securities

Similarly to the situation of the enforcement against shares (see above 1.a), there is no generally accepted rule on how the location of securities should be determined. Securities – i.e. instruments evidencing an obligation of the issuer towards the security holder – might be located, according to the enforcement laws of one country, at the place where the security certificate is located, while the laws of another country might refer to the registered office of the issuer in order to determine the location of securities. In addition, local enforcement laws might provide for different rules depend-

[13] Cf., regarding the different legal rules on the attachment of shares of a German stock corporation and of a German limited liability company, the annotations by *Stöber*, Forderungspfändung, 12th edition 1999, notes 1605 and 1612.

[14] The enforcement against such shares would, in such a case, only be possible if the country where the share certificates are located permits the attachment of shares in a foreign company by attachment of shares located in its territory.

[15] See, for a possible exception under the doctrine of "piercing the corporate veil", below under 4. Another exception would be the situation that the judgment debtor transferred property to its subsidiary, thus impairing the chances of the judgment creditor to obtain enforceable property of the debtor. In such a case, the judgment creditor might, according to the applicable local laws, be entitled to challenge that property transfer.

[16] It has to be pointed out, however, that the distinction between distribution via agents and distribution via independent distributors might often not result in relevant practical differences. In both cases, the judgment creditor is free to garnish possible claims of the debtor against the agent/distributor. What is more, local enforcement laws might not allow the bailiff to attach property of the debtor as long as it is in the possession of a third party or as long as the agent does not hand out the property voluntarily to the bailiff.

[17] A valid attachment of the goods would, of course, presuppose that the applicable local enforcement laws permit the attachment on the debtor's property while it is in the possession of a buyer.

ing on the nature of the security and on the conditions for transfer of title. If, e.g., title to the security passes by a simple transfer of the certificate, it makes more sense to determine the location of the security through the location of the certificate, than if a formal notice to the issuer is an essential requirement for the transfer of the security. The nature of the security and the conditions for transfer of title, however, depend on the law applicable to the security as such, and that law is very often chosen by the parties.

As a result, if, e.g., the judgment creditor wants to enforce the arbitral award against certain Eurobonds held by a Russian debtor, the judgment creditor has to find out whether the local enforcement laws provide for different rules depending on the nature of the security and, in this case, what is the nature of the security pursuant to the chosen law. If, according to the chosen law, the Eurobonds can be traded by a simple transfer of the certificate, the creditor can, e.g., try to get hold of the Eurobonds while they are in Germany, because German law on enforcement allows a seizure of such securities by a simple attachment of the certificate by a bailiff[18].

Another type of securities, which illustrates the principle "enforcement follows property law" (see above II. 3.), are the so-called ADRs ("American Depositary Receipts"). Although ADRs, which are issued by US banks (especially New York banks) as "depositary", represent shares in a non-US company, the holder of the ADRs does not acquire title to the shares, which remain in the property of the depositary bank. The judgment creditor of the ADR holder can therefore not attach the shares directly, but can only seek enforcement against the address.

3. Attachment on Accounts Receivable by Russian Companies

The most obvious example for a situation where the rule of territoriality (see above II.2) cannot be properly applied is the attachment on accounts receivable. The location of accounts receivable is, due to their incorporeal nature, a question of law and not of fact. Local enforcement laws can thus provide all different kinds of solutions to locate accounts receivable, e.g., at the creditor's domicile, at the debtor's domicile, or even at the place where payment has to be carried out. There is no generally accepted rule in this regard.

What is more, the local rules on jurisdiction differ broadly with regard to the garnishment[19] of accounts receivable in a transnational case. A local court may assume jurisdiction to issue a garnishment order, by which accounts receivable are attached, in any case with a sufficient connection to the forum; the rule of territoriality does not provide for clear limitations. It is thus not unusual that a creditor has the choice to apply for a garnishment order with different courts, e.g. with the court where the debtor is located or with the court where the debtor's debtor – i.e. the garnishee, upon whom the garnishment order has to be served – is located.

There is, however, a limitation that can arise from practical complications with transnational garnishment orders: If a court assumes jurisdiction to garnish a claim of the debtor against a garnishee located abroad, the garnishment order has to be validly served upon the garnishee in the foreign country. Some countries, like e.g. Germany, consider the service of a garnishment order upon the garnishee as an Act of State, which can, as a rule, only assume validity if it is carried out within the territory of the state where the order was issued[20]. In order to avoid legal discussions on the validity of a garnishment order that has to be served upon a garnishee located abroad, the creditor is, therefore, usually in a better position if he directly applies for a garnishment order with the court having jurisdiction over the garnishee in its country of domicile. In addition, if the creditor chooses the court at the garnishee's domicile for the request for a garnishment order, the creditor might, pursuant to the applicable local enforcement laws, be entitled to directly seek enforcement against the garnishee's assets, if the garnishee does not bring forward proper defenses against the garnished claim.

The garnishment of accounts receivable by court order issued in the country of the garnishee's domicile can, however, result in a serious dilemma for the garnishee: If the debtor is entitled to pursue the garnished claims before the courts of another country, the garnishee can not be sure whether

[18] See, regarding the German rules on enforcement, the annotations by *Stöber*, op.cit., notes 2092 and 2096.

[19] The term "garnishment", which is used here and in the following, describes the attachment of a cleim a judgment debtor has against its debtor (the so-called "garnishee"). In order to attach such a claim of the judgment debtor, the creditor usually has to obtain, according to local laws, a so-called "garnishment order" from the competent court (or other state authority). By that order, which has to be served upon the garnishee, the garnishee is notified of the attachment by the judgment creditor. After service of the garnishment order, the garnishee usually can no longer validly fulfil the garnished claim towards the judgment debtor, but has to disclose the details of the garnished claim to the court and can only validly fulfil the garnished claim as the court shall direct.

[20] See, for Germany, *Gottwald*, IPRax 1991, page 289 and *Stöber*, op.cit., notes 38 et seq. As a result, if the garnishment order has to be formally served abroad by way of judicial assistance of the local authorities, those authorities may deny a request for judicial assistance because they consider service of a foreign garnishment order as an interference with the sovereign power of their country, cf. article 4 of the Hague Convention on Civil Procedure of 1954 and *Gottwald* op.cit., page 289.

those courts will recognize the foreign garnishment order. Since there exists no international convention on the recognition of foreign garnishment orders, the courts of another country might well refuse to recognize the foreign garnishment order and might confirm the garnishee's obligation towards the debtor. As a result, the garnishee could be forced to carry out his obligations twice, once towards the creditor pursuant to the garnishment order and the second time towards the debtor who turned to a court not recognizing the garnishment order[21].

4. Parent Company's Liability for Subsidiaries' Debts

Pursuant to the principle "enforcement follows property law" (see above II. 3.), an arbitral award obtained against a subsidiary – i.e. against a legal entity of its own – can, as a rule, not be enforced against the assets of the parent company, since the parent company was not a party to the arbitral proceedings and could not defend its case[22].

However, there are situations when, under local laws, a parent company can be held liable for its subsidiary's debts, e.g. if the parent company unduly interferes with the subsidiary's business or if the two companies' assets are commingled in a way that they can no longer be attributed to one company or the other. In such a situation, some local laws allow a so-called "piercing of the corporate veil", with the result that the parent company can no longer raise the defense that it is a separate legal entity not responsible for the debts of its subsidiary.[23]

It is doubtful, however, whether this concept can also be applied to enforcement proceedings. A parent company's liability for its subsidiaries' debts allows the creditors of a subsidiary to sue both the parent and the subsidiary; it does not necessary imply that the creditor can enforce a judgment, that was rendered against the subsidiary only, against the parent company without having sued the parent company before. Yet at least in the United States, there is case law allowing such a piercing of the corporate veil in enforcement proceedings[24]. That case law is, however, not yet settled, and the legal situation in the US has to be analyzed separately for each of the 50 States. As a general remark, it can be concluded that a Russian company with a parent company or a subsidiary in the United States should be aware of the risk that a creditor, who obtained an arbitral award in its favor, might be entitled to seek enforcement of the award against the assets of the U.S. parent company/ subsidiary of the Russian debtor, provided that the U.S. company can be considered as "alter ego" of the Russian company under the doctrine of piercing the corporate veil.

IV. Resume

Due to the almost worldwide application of the NY Convention, foreign arbitral awards are generally recognized and enforceable throughout the world, unless exceptional circumstances occur. However, since the NY Convention only deals with the enforceability of a foreign arbitral award, the subsequent enforcement proceedings are subject to the local laws on enforcement. Despite the diversity of those laws, enforcement laws in general have at least three common features: The judgment debtor is basically precluded with defenses as to the merits of the case; a state can only grant enforcement against assets that are located within its territorial reach; enforcement measures have to respect the attribution of property rights according to the applicable property law.

A Russian company that faces enforcement measures against its assets located abroad should be aware of those common features and of their influence in the specific enforcement situations. The Russian company can thus better evaluate its actual exposure to enforcement of arbitral awards abroad.

[21] This dilemma was actually confirmed in a case decided by the German Supreme Court for Labor Disputes (BAG), published in IPRax 1997, pages 335 et seq. The BAG refused to recognize a foreign garnishment order served upon a foreign employer of the debtor and confirmed the debtor's salary claims pursued before the German labor courts, since the salary was earned and payable in Germany.

[22] Due to the preclusion of defenses as to the merits of the case - see above II. 1. -, the possibilities to raise defenses in enforcement proceedings are so limited that a parent company, which was not a party to the arbitration, would basically at no point of time be granted a sufficient chance to defend its case, if an arbitral award rendered against a subsidiary was enforceable against the parent company's assets.

[23] See, for a discussion of this concept and a comparison of the rules under English and Russian law, *Popova*, Khozyaystvo i Pravo 2002, pages 62 et seq.

[24] In *Flip Side Productions, Inc.* v. *Jam Productions, Ltd.* (1990 U.S. Dist. LEXIS 15411 (N.D. Ill. Nov. 8, 1990)), the US District Court for the Northern District of Illinois, Eastern Division, held that even an affiliate company of the judgment debtor can be subject to enforcement proceedings under the doctrine of piercing the corporate veil. Since the affiliate company had treated the debtor's assets as though they were its own, the District Court considered the affiliate company as alter ego of the debtor and therefore did not grant it the right to a full new trial on the merits of the case. However, the judgment of the District Court has not been confirmed by Illinois State Courts later, and since the legal issues at stake are subject to State law, Illinois case law does not give clear guidance so far, cf. the judgment of the US District Court for the Northern District of Illinois, Eastern Division, in *Harris Custom Builders, Inc.* v. *Richard Hoffmeyer*, 2001 U.S. Dist. LEXIS 10032 (N.D. Ill. July 17, 2001).