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Resolution Of Disputes In U.S. Federal Courts Involving Russian And CIS Litigants

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Introduction

Russian and Commonwealth of Independent States ("CIS") citizens and corporations are taking an ever more active role in the global economy. Sometimes this places them squarely in the U.S. federal courts, litigating business disputes and other issues as plaintiffs or defendants.

This article illustrates the importance of understanding the U.S. federal legal system for Russian and CIS litigants and the absolute necessity of taking the proper steps to ensure preservation of rights when filing a lawsuit or when sued in the U.S. federal courts. This ar-

ticle also highlights additional concerns and unique challenges present in U.S. and Russian/CIS litigation: significant differences between the Russian/CIS and U.S. legal systems, cultural and language barriers, differences between expected and available remedies, and discovery.

To accomplish these goals, the article explores several cases decided in U.S. courts to dispel some myths about U.S. and Russian/CIS litigation, including the case of a notable Russian physicist, Dr. Muradin A. Kumakhov, recently handled by McDermott Will & Emery LLP.

The most important lesson for Russian and CIS litigants who are considering filing a lawsuit or who are sued in U.S. courts is to take action and consult with competent U.S. counsel. U.S. attorneys almost never bill potential clients for the first visit or two, nor can they without an agreement by the client to pay (which usually follows the signing of an engagement letter). The confidentiality of information disclosed during the meeting is protected by ethics rules binding all attorneys, even if the potential client walks away and the attorney-client relationship is never established. Hence, Russian and CIS litigants have nothing to lose by calling U.S. attorneys or by visiting their offices for an introductory meeting, during which they can disclose their issues in confidence and hear the attorneys' proposed course of action, provided they are willing and able to take the case.

Would-be plaintiffs from Russia or other parts of the CIS should be aware that they have limited time to act, and defendants should not assume that they are immune from the U.S. courts because they are in Russia or elsewhere and just ignore claims brought against them, allowing a default judgment. A default judgment without any opposition is bound to be draconian be-

cause pleadings and relief demands are always written broadly. A judgment such as this may foreclose valuable U.S. market opportunities or any chance of entering the U.S. market in the modern globalized economy.

There are at least two factors that influence the attitude of Russian and CIS litigants towards the U.S. federal legal system in addition to the language barrier and the prohibitive costs of litigation and discovery in the United States for those who are aware of them. These are: 1) the belief that a Russian or CIS litigant would not be given a fair hearing, and 2) a misunderstanding of the U.S. legal system due to lack information about it, its laws and its procedures.

The authors wish to disclose that McDermott Will & Emery LLP currently acts for the Russian Federation and several of its corporations in U.S. courts.

Litigation In U.S. Federal Courts

Russian and CIS individuals and companies frequently find themselves in U.S. federal courts, sometimes not sure what to do. A survey of federal cases in the United States for just the past five years turned up dozens of cases where Russian and CIS litigants were involved. The survey included business/commercial and intellectual property litigation, and it did not include criminal, immigration or asylum proceedings. These disputes, some of which were tested in U.S. federal appeals courts, cover a broad range of complex issues: production and importation of energy, metals, and goods (*Norex Petroleum, Ltd. v. Access Indus.*, 416 F.3d 146 (2d Cir. 2005), *cert. denied*, 547 U.S. 1175 (2006)); intellectual property (*Kuklachev v. Gelfman*, 2009 U.S. Dist. LEXIS 15632 (E.D.N.Y. 2009)); and business and employment disputes (*MGM Prods. Group v. Aeroflot Russian Airlines*, 91 Fed. Appx. 716 (2d Cir. 2004), *cert. denied*, 543 U.S. 956 (2004)). Additional representative cases for all citations in this article are available from the authors.

Not surprisingly, key issues in many of these disputes were whether the U.S. courts were the proper forum to hear the case, whether the courts had subject matter and personal jurisdiction over all parties, and the issue of choice of law (*BFI Group Divino Corp. v. JSC Russian Aluminum*, 298 Fed. Appx. 87 (2d Cir. 2008)).

Numerous names well known to Russian and CIS households have been parties to litigation in U.S. federal courts: Aeroflot Russian Airlines, OAO Gazprom, and the beloved Russian clown and entertainer Yuri Kuklachev. Even the government of the Russian Federation often finds itself or its wholly owned companies litigating in U.S. federal courts (*Globe Nuclear Servs. & Supply, Ltd. v. AO Techsnabexport*, 376 F.3d 282 (4th Cir. 2004)). The price of doing business internationally and taking advantage of economic opportunities in the United States means a corresponding rise in litigation. Understanding the system, planning and retaining counsel early on in the process can help protect Russian and CIS interests.

No statistics are readily available to gauge the success of Russian and CIS plaintiffs and defendants in U.S. federal courts, but a quick overview of the cases for the past five years shows that U.S. federal courts frequently rule

for Russian and CIS litigants, both on procedural grounds and on the merits. There is no bias *per se* against litigants from Russia and the CIS. The judges' opinions are just as thoughtful and detailed when addressing claims and defenses of Russian and CIS litigants as they are when addressing those of U.S. litigants. The judges are just as thorough analyzing the law and applying the facts as they are in any other case. Hence, the first factor that influences the attitude of Russian and CIS litigants towards the U.S. legal system is unfounded. The cornerstone of the U.S. legal system is that everyone is entitled to their day in court — if they show up or retain counsel to represent them, that is. If the Russian or CIS litigant chose a U.S. federal court to file a claim or was brought in as a defendant, the litigant would be given a fair hearing, and, if the claims or defenses had merit, would prevail.

The U.S. legal system, just like any other, is complicated and multi-faceted. It takes years to learn and even more years to master. However, in all of the cases pending in U.S. federal courts, an intricate understanding of this legal system, its procedural and substantive laws, and its judges is necessary, which is something a Russian or CIS litigant may not immediately possess. It is worth noting then that, in many of the surveyed cases, Russian and CIS citizens and corporations were represented by well-known, established U.S. law firms with exactly this kind of expertise. That addresses the second factor that influences the attitude of Russian and CIS litigants towards the U.S. legal system, which is along the lines of U.S. principles of practicing law: When you need an expert in a particular field of law, ally yourself with such an expert. Allying early with counsel can often help avoid problems before they result in actual litigation.

Consulting with competent U.S. counsel avoids misunderstanding of the U.S. legal system and (hopefully) preserves all of the rights of the Russian and CIS litigants, which may be lost if prompt action is not taken. On plaintiffs' side, the U.S. law typically allows a limited time to file a claim before it expires due to the statute of limitations. On defendants' side, only a short period of time is allowed to respond to a complaint and other legal pleadings and requests. On both sides, the venue (place of litigation and trial) may become a highly contested issue. Failure to promptly follow procedural and substantive laws, rules, and regulations may forfeit the litigants' rights forever, so the most important thing in any case is to take action. In the U.S. legal system, lawyers are just as much consultants that are, and should be, contacted early on.

Here are some lessons learned in representing Russian and CIS litigants and special concerns present in such cases, taking the Russian legal system as the example for comparison.

Discovery In U.S. Litigation

Depositions

Depositions are generally not permitted outside of court in the Russian legal system. Hence, to many Russian litigants, broad, invasive U.S.-style depositions are difficult

to get used to, and depositions in the United States can be taken of individuals in both their personal capacities and in their capacities as representatives of corporations (Fed. R. Civ. P. Rule 30(b)(6)). In addition, when witnesses are located in Russia, it may become necessary to take depositions there or arrange for remote depositions by video- or telephone conferencing. Restrictions on travel can also be an issue. Provided proper procedures are followed, U.S. courts are generally accommodating towards such requests when flying attorneys, a court reporter, and other staff to Russia for a deposition, or flying the witness to the United States, is not practical and adds to the cost of litigation, not to mention delays and issues added by visa requirements.

Furthermore, a translator should be present at depositions, even of individuals who are conversant in English, because it is imperative for the deponent to clearly understand every question and give an accurate answer. This always increases the amount of time it takes for any given deposition (which has bearing on the deposition boundaries set in the U.S. Federal Rules of Civil Procedure), and creates yet additional costs for taking and defending depositions. The details concerning depositions should be discussed by the litigants in advance, in addition to the usual litigation topics. Frequently, a compromise must be agreed upon by the parties before any substantive discovery effort.

Care also has to be given when issues are involved which may be precluded from export from Russia or a CIS country. U.S. litigation does not prevent the application of local law. While this issue is more apparent when dealing with documents, it can also come up in the context of a deposition and the effective “export of knowledge.” Thus, obligations to non-parties (*e.g.*, contractual obligations) and government prohibitions must be considered. U.S. courts will factor in these issues when they are raised in a timely manner.

Document Discovery

During the course of the litigation in the United States, parties usually engage in broad document discovery. The document requests are purposefully crafted to be broad to get the maximum benefit and as much relevant information as possible. Notwithstanding the usual avalanche of documents and electronically stored information that is subject to discovery under U.S. federal rules, this presents several specific issues with documents in Russian and documents in Russia. The documents in Russian obviously have to be translated for the U.S. attorneys and courts to be able to understand and use them. Obtaining a certified translation requires engaging a professional translation service, which can be costly, burdensome and time-consuming. The issue of who pays for the translation may become important in litigation if large numbers of documents have to be translated. It also helps to have an attorney or member of the staff on the litigation team who speaks and reads fluent Russian. This allows faster access to the content of documents and an occasional correction of translations, which are sometimes inaccurate.

Furthermore, laws and regulations in Russia are similar

to those in many countries which limit the types of information and documents that can be exported out of the country. Examples of documents that fall under such laws include documents concerning defense, nuclear technologies, and advanced technological research. U.S. litigation does not preclude the application of Russian and CIS export control laws. If some or all documents fall into this category, U.S. courts and adversarial parties need to be apprised of the situation as soon as reasonably possible. These documents may still be available for inspection in Russia, or they may not be discoverable at all, which would undoubtedly affect the course of the litigation. In addition to laws, the structures of Russian corporations may limit access to documents and render them outside the possession, custody or control of Russian litigants (the test used by U.S. federal courts to determine whether the documents should be produced). This may prevent the documents from being produced and may require the court to review applicable Russian law.

Remedies

It is also the duty of U.S. attorneys to manage the expectations of their Russian and CIS clients with respect to remedies. For example, Russian litigants may have certain outlooks and desires based on their understanding of the Russian legal system (which is mostly a statutory civil law system, based on codes, just like in a number of other CIS and European countries). Criminal and civil legal proceedings and remedies are generally kept separate in the United States. Thus, if a Russian client alleges fraud in a civil proceeding in a U.S. court, the client cannot threaten bringing criminal charges in that proceeding, even though such charges may be warranted in a separate, criminal action. What’s more, for U.S. attorneys to threaten an opposing party with criminal charges could amount to a violation of professional ethics, since it is not permitted to threaten criminal charges to gain a negotiating advantage in a civil case.

Miscellaneous Concerns

Service of process is not allowed in Russia. This can sometimes be an effective tool for attorneys representing Russian defendants to challenge personal service. However, the challenge is not likely to have a permanent effect, except where the defendant is a foreign state or its agencies or instrumentalities, because other ways are available to effectuate service when the personal service route is unavailable.

Also, there is a substantial time difference between Russia and CIS countries and the United States. Even to schedule something as simple as a telephone conference with the court, attorneys must consider not only the availability of the court (*i.e.*, the working hours of the court and a particular judge’s schedule), but also the seven- or eight-hour time difference between the United States and Russia or other CIS countries. The time difference can be even greater depending on the particular time zone in the United States and in Russia or the CIS. Thus, a morning in the United States could already be past the end of the business day in Russia, but morn-

ings generally work well for telephone conferences, provided all parties can work with this limitation. The courts will usually take this issue into consideration and try to accommodate the parties.

For the same reason, reaching attorneys, translators, notaries, mailing or document services in Russia and other CIS countries is challenging, especially if something needs to be done urgently. Email resolves some of the less-urgent communication issues, but more than 24 hours may pass before an email is answered due to the time difference. Special care with respect to the time difference must also be taken by teams of U.S. and Russian or CIS attorneys working together when filing deadlines are at issue, such as the deadline to file an Answer to the Complaint.

Costs

The authors litigate business and intellectual property cases in the United States and the United Kingdom. Both jurisdictions involve litigation fees and costs that are among the highest in the world. The reasons for this are both economic and technical. The technical reasons, which may be less familiar to Russian and CIS litigants, include the heavy emphasis on precedent in the common law tradition in the United States and the United Kingdom. While it is expensive to search for,

analyze, present or distinguish precedents drawn from a large number of national (or federal) and state courts dating back many decades, precedent-based decisions are one of the foundations of the rule of law in these countries. In effect, the clients are paying for the rule of law.

Conclusion

Litigation in U.S. federal courts is always a complicated endeavor, and for a Russian or CIS litigant, the system adds complexity due to the nature of U.S. and Russian/CIS litigation. We anticipate that the number of instances where Russian and CIS corporations and citizens litigate in U.S. federal courts will only increase over time, as these courts become a venue for resolving disputes more accepted by Russian and CIS plaintiffs, and as more Russian and CIS defendants are involved in U.S. litigation due to their increased role in global commerce and the U.S. economy.

This article explored some of the issues Russian and CIS litigants should be aware of in U.S. federal courts. However, the first, and perhaps the most important, step for Russian and CIS litigants to adequately defend their rights in U.S. courts is consulting with competent U.S. counsel who have knowledge of and experience with these issues to fight for their rights.