

FROM RUSSIA WITH RICO:
BROAD JURISDICTION OF THE UNITED STATES COURTS
OVER CIVIL CASES INVOLVING MONEY LAUNDERING

BRIEFING PAPER

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I. EXECUTIVE SUMMARY

United States law, and specifically the Racketeer Influenced Corrupt Organizations (“RICO”) Act provides civil jurisdiction and remedies for persons who have been victimized by money laundering as part of a scheme to defraud. Key facts which support jurisdiction in the United States include:

- United States residents who are harmed
- United States defendants participating in the scheme
- Fraudulent telephone calls or telefaxes made from or into the United States
- Use of dollar denominated wires made through US banks
- Travel to and from the United States in furtherance of the fraud

Many schemes which are familiar in Russian commercial transactions, such as the diversion of profits to offshore companies related to company management through transfer pricing, and asset stripping to other companies related to company management, may fall under US civil jurisdiction if any of the above key factors are present.

II. JURISDICTION

A. PERSONAL JURISDICTION

Under American law, a plaintiff must establish that the Court has personal jurisdiction over the defendants. Generally, there are two types of personal jurisdiction: (a) specific jurisdiction based on the connection between the specific claims asserted in the action and the jurisdiction or (b) general jurisdiction based on the defendants’ general contacts with the jurisdiction, even though the claims in question do not relate to the jurisdiction. To satisfy either test, a plaintiff must show that the defendants had sufficient “minimum contacts” with the jurisdiction and the exercise of jurisdiction would not violate “traditional notions of fair play and substantial justice;” the contacts necessary to establish general jurisdiction are obviously greater than those necessary to establish specific jurisdiction.¹

Satisfying personal jurisdiction standards is often not difficult because the persons involved in the transactions in dispute may have engaged in conduct in the United States related to the specific transactions in question or otherwise may have relatively broad contact with the United States. In addition, American courts interpret jurisdiction very broadly when fraudulent communications are directed to persons in the United States. Thus, even a single communication, whether it be a telephone call or a telefax, which is part of a fraudulent scheme, may be sufficient to establish personal jurisdiction over a foreign defendant.² In addition, when defendants act in concert and conspire with one another, the acts of the defendants may be attributed to one another.³

B. SUBJECT MATTER JURISDICTION

In addition to having personal jurisdiction over the parties, a court must have *subject matter jurisdiction* over the claim. The United States has two court systems: “state” courts operated by the various states such as Pennsylvania and New York, and “federal” courts operated by the United States government. Generally, the state courts of the first instance (known as “trial courts”) have unlimited subject matter jurisdiction. In contrast, federal courts of the first instance (known as “district courts”) generally exercise jurisdiction in two circumstances: (1) when a federal statute provides for jurisdiction, and (2) when there is complete diversity between parties, i.e. when plaintiffs who are residents of one or more states sue defendants of states different than where the plaintiffs reside.

III. THE RACKETEER INFLUENCED CORRUPT ORGANIZATIONS ACT

The Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961 et seq, provides civil causes of action against persons who engage in a "pattern of racketeering" in certain circumstances. The most used provision of RICO, 18 U.S.C. §1962(c) provides that "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity."

RICO is a highly effective tool in fighting civil fraud and other illegal commercial conduct; it provides for the recovery of damages in the amount of three times the actual loss (treble damages) as well as costs and attorney fees. Further, under §1962(d) of RICO, any person, who conspires with another person who violates §1962(c), is jointly and severally liable for all harm caused. The specific elements of RICO are described below.

A. ENTERPRISE AND PERSON

A RICO "person" includes any individual or entity capable of holding legal or beneficial interest in property.⁴ An "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.⁵ This language is expansive; the word "includes" renders the statutory listing illustrative, not exhaustive and is to be liberally interpreted.⁶ Not only do all normal commercial organizations constitute "enterprises" under RICO but also enterprises which associate with one another, such as financial-industrial groups, or even individuals, such as organized crime organizations, fall within this definition as well.

B. "CONDUCT OR PARTICIPATE" AND "CONTINUITY"

Under RICO, a person must "conduct or participate" in an enterprise's activities in order to be held liable under §1962(c). The word "participate" makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase "directly or indirectly" makes clear that RICO liability is not limited to those with a formal position in the enterprise; however, some part in directing the enterprise's affairs is required.⁷ Nonetheless, a person who does not exercise any control, but conspires with a person who does, can be held liable under §1962(d), which makes it illegal to conspire with a person to violate RICO. In addition, it must be shown that that conduct is continuous, i.e. that it amounts to or pose a threat of continued criminal activity.

The concept of "continuity" can be described as "closed-ended" period of repeated conduct, or "open-ended," referring to past conduct which by its nature projects into the future with a threat of repetition.⁸ Although there is no hard rule for the length of time required to establish closed-ended continuity, 18 months normally suffices. "Open-ended" continuity is established if there is a threat of continued racketeering activity. This requirement is satisfied where the predicates acts are a regular way of conducting the defendant's business.⁹ "Open-ended" continuity is also found where criminal activity ceased upon discovery where there is evidence to infer that, without detection, defendants' alleged scheme might have continued indefinitely.¹⁰ A few months or days--even less--may be sufficient if the continuing threat is present.¹¹

C. PATTERN OF RACKETEERING ACTIVITY

Under RICO, the “pattern of racketeering” must consist of two or more related “predicate acts,” a term which is defined to include various types of illegal activity. “Predicate acts” most prevalent in the commercial context are described below.

1. Mail And Wire Fraud

Under RICO, it is a predicate act of racketeering to use the wires (or United States mail) as part of a “scheme or artifice to defraud.”¹² The application of this provision is enormously broad because almost all dollar denominated financial transactions are wired through banks in the United States. Thus, almost any wire of dollars connected to a fraudulent scheme would constitute wire fraud. In addition, the use of the American telephone system, or sending telefaxes to recipients in America, as a part of a fraudulent scheme would also violate this statute and constitute predicate acts of racketeering.

The term “scheme or artifice to defraud” is interpreted broadly.¹³ No misrepresentation of fact is required in order to establish a scheme to defraud. Rather, completely “innocent” mailings – ones that contain no false information – may supply the mailing element.¹⁴ The plaintiff need not rely on the wires in order to establish the fraud. Nor is it required that the use of the mails or wires be an essential element of the fraudulent scheme. Rather, so long as the mailings or wires are incident to an essential part of the scheme, the mailing or wire element is satisfied.¹⁵

2. Money Laundering

Under RICO, it is a predicate act of racketeering to engage in the laundering of monetary instruments, which is commonly known as money laundering. Specifically, the money laundering statute prohibits transactions with proceeds from some form of unlawful activity with the intent to promote the carrying on of “specified unlawful activity”; or knowing that the transaction is designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of “specified unlawful activity.”¹⁶ “Specified unlawful activity” includes wire fraud.¹⁷

The international money laundering provision of the statute prohibits the transfer of funds “from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States.”¹⁸ In a sub-section of the statute that specifically refers to “extraterritorial jurisdiction,” the statute applies if: (i) the conduct is by a US citizen; or (ii) by a non-US citizen but “the conduct occurs in part in the US;” and (iii) the value of the transactions exceeds \$10,000.¹⁹ Conduct “occurs in part” in the US if a defendant “acts electronically” in the US, even if a defendant is never physically present in the US.²⁰

3. Illegal Monetary Transactions With Property Derived From Illegal Activity

Under RICO, it is a predicate act of racketeering to engage in financial transactions with the intent of promoting “specified unlawful activity,” which includes transmitting monetary instruments or funds to or through the United States, or to conduct financial transactions with the proceeds of “specified” unlawful activity.²¹

4. Violation Of The Travel Act

Under RICO, it is a predicate act of racketeering to violate the Travel Act, 18 U.S.C. §1952, which prohibits “travel in interstate or foreign commerce or uses of the mail or any facility in interstate or foreign commerce, with intent to – (1) distribute the proceeds of any unlawful activity ... or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity.” “Unlawful activity” is

defined to include “illegal transactions in monetary instruments” which would include conducting financial transactions with the proceeds obtained through wire fraud. Thus, a person who travels to promote, manage, or otherwise facilitate such unlawful activity commits predicate acts of racketeering.

IV. ADVANTAGES OF LITIGATION IN THE UNITED STATES

Litigation in the United States offers substantial advantages including an impartial judiciary, the availability of broad discovery (both documents and depositions), and the absence of the risk of paying the defendants’ attorney fees in the event that the plaintiff does not prevail (i.e. the American rule compared to the English rule).²² Moreover, litigation in the United States can be combined with an aggressive supporting program in other Western jurisdictions, such as England, where pre-judgment arrest of assets in support of foreign litigation is often easier to obtain than in American courts.

V. CONCLUSION

Given the nature of litigation in Russian courts, commercial participants in Russia should give full consideration to remedies which exist for wrongful conduct in Western jurisdictions, particularly the United States. Fraudulent conduct involving wires within the United States or between the United States and foreign locations, including money laundering, may form the basis for an action under RICO, under which American courts have not hesitated in exercising extra-territorial jurisdiction. This is particularly true when there is a strong American nexus to the case, i.e. American interests were defrauded or substantial conduct causing the alleged harm occurred in the United States.

MARKS & SOKOLOV

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- ¹ *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 416 (1984)
- ² *Ashahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 114 (1987)
- ³ *Salinas v. U.S.*, 522 U.S. 52 (1997)
- ⁴ 18 U.S.C. § 1961(3)
- ⁵ 18 U.S.C. § 1961(4)
- ⁶ See, e.g., *United States v. Huber*, 603 F.2d 387 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980); See, e.g., *United States v. Masters*, 924 F.2d 1362 (7th Cir.), cert. denied, 508 U.S. 906 (1991)
- ⁷ *Reves v. Ernst & Young*, 507 U.S. 170, 122 L. Ed. 2d 525, 113 S. Ct. 1163 (1993)
- ⁸ *H.J. Inc. v. Northwestern Bell*, 492 U.S. 229 (1989)
- ⁹ *Tabas v. Tabas* 47 F.3d 1280 (3d Cir. 1995)
- ¹⁰ *Seneca Ins. Co. v. Commercial Transp. Inc.*, 906 F. Supp. 239, 244 (M.D. Pa. 1995)
- ¹¹ See, e.g., *United States v. Indelicato*, 865 F.2d 1370 (2d Cir.), cert. denied, 491 U.S. 907 (1989) (three simultaneous Mafia assassinations carry threat of continuity)
- ¹² 18 U.S.C. § 1343
- ¹³ *McNally v. United States*, 483 U.S. 350, 374 (1987)
- ¹⁴ *Schmuck v. United States*, 489 U.S. 705, 715 (1989).
- ¹⁵ *Tabas v. Tabas*, 47 F.3d 1280, 1295 n. 18 (3d Cir. 1995).
- ¹⁶ See 18 U.S.C. § 1956(a)(1)
- ¹⁷ 18 U.S.C. § 1957.
- ¹⁸ See 18 U.S.C. § 1956(a)(2); *United States v. Zvi*, 168 F.3d 49, 56 (2d Cir. 1999)
- ¹⁹ See 18 U.S.C. § 1956(f).
- ²⁰ See *United States v. Approximately \$25,829,268.80 in Funds*, 1999 WL 1080370, at *3; see also *United States v. Goodwin*, 141 F.3d 394, 400 (2d Cir. 1997 (only a de minimis effect on US Commerce necessary for money laundering prosecution).
- ²¹ 18 U.S.C. § 1956 (a).
- ²² Actually, RICO is rare for an American statute in that it provides for a prevailing claimant to recover attorney fees.