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Introduction

In this Introduction I summarise and comment on the contributions to Number XIV of the Review, and supply some additional references and material. In particular, I highlight the hard-hitting Report produced in October 2009 by President Medvedev's Institute for Contemporary Development. And I end with some depressing developments in the Constitutional Court of the Russian Federation, hitherto the leader in the struggle to implement the rule of law in Russia.

This is a varied collection. **Christos Giakoumopoulos**, Director of the Directorate of Monitoring of the Council of Europe (CoE) and **Torbjørn Frøysnes**, Ambassador and SRSO of the Secretary General of the CoE, ask the million dollar question. What indeed can the EU and Council of Europe do to help Russia to strengthen the rule of law? Their response is, as would be expected, a comprehensive and highly technical overview of the wide variety of institutional mechanisms by means of which Russia engages with the Council of Europe, of which it has been a member since 1996.

Svendson and **Bunik** give an overview of the Russian legal system, oriented to the interests of foreign investors. Their analysis does not shy away from highlighting the problems of corruption and political interference faced by the system.

Paul Kalinichenko's article notes the surprisingly large number of "Russian" cases now being heard at the EU's European Court of Justice. This is a development with a fairly long history. Most of these cases have been brought by enterprises challenging the anti-dumping sanctions imposed by the EU Commission and Council on Russian products. As he points out, there is a growing tendency for Russian firms to appeal to the ECJ for the protection of their interests where issues of competition, environmental policy and intellectual property are concerned. The Russian firm won in *Alrosa v. Commission*¹, which came before the Court of First Instance (CFI) in 2007. The case concerned the EU's policies regarding competition. The CFI concluded that in regulating the competitive environment in the market for rough diamonds, the Commission had violated the principles of proportionality, as well the terms of Article 41 (2) of the EU Charter on Fundamental Rights that guarantees the right to be heard.

Marina Vasilieva notes in general terms some of the wider issues confronting EU companies wishing to invest in the Russian Federation.

Dr Anton Burkov presents some of the findings of his PhD research on the impact of the ECHR on Russian courts, carried out while at Cambridge University in England. The full results have very

¹ Case T-170/06 *Alrosa v. Commission* [2007] ECR II-02601.



recently been published in Russian by Wolters-Kluwer², and its central propositions will shortly appear in English³.

Burkov is quite right that the main responsibility for seeing to it that Russian judges at all levels take proper account of the ECHR and its jurisprudence, which are after all part of the domestic legal system of the Russian Federation since 1998, rests on the advocate who appear and argue before the courts. The more they raise Convention issues, the more the judges will respond. There is one significant problem which Burkov does not address. That is the lack of authoritative translations of much of the Strasbourg case-law into Russian. Judges rightly feel uncomfortable ruling on Strasbourg jurisprudence without reliable translations. This is a huge and very expensive task, but absolutely necessary.

Kristoffer Svendsen contributes a well-referenced survey of EU-Russia legal co-operation. He points out that the main body responsible for co-operation between Europe and Russia on legal matters remains the Council of Europe (explored elsewhere in the Review). He notes the critical remarks of the 2005 evaluation report of the Council of Europe, written by a number of persons with huge experience of work in and with Russia, and presents the various institutional mechanisms.

On this issue, a critical review was given at the highest level in Russia when the need for judicial reform was confirmed again recently, in October 2009, with the publication of another report ordered by the Institute of Contemporary Development (ICD) and prepared by the Centre for Political Technology. This report is entitled "The Judicial System of Russia. The Fundamentals of the Problem."⁴

The Report was based on qualitative sociological research carried out in 2009, by means of expert interviews in several regions of Russia with judges and retired judges, advocates, academic lawyers, business people and NGOs.

The report concluded that the main problem of the Russian judiciary is not corruption, which does not exceed the level of corruption in Russia as a whole, but the high level of dependence of judges on government officials. The research showed that the large number of cases which do not concern the interests of government bodies are decided objectively. But in the most significant cases judges protect the interests of the officials and not those who are actually in the right. A case decided in accordance with the law, but not in the interests of officials, will be overturned on appeal and returned for further consideration. And the more frequently judgments are overturned, the more grounds there will be for dismissing a judge who has simply decided according to law. Judges bear these unwritten rules in mind, and make their own conclusions as to which cases to decide according to law and which not.

² See <http://www.wolters-kluwer.ru/catalogue/34373.html> (accessed on 23 May 2010)

³ Burkov A., "The European Convention for Human Rights and Fundamental Freedoms in the Russian Legal System" in *The European Convention for Human Rights and Fundamental Freedoms in Central and Eastern Europe*. (Utrecht: Eleven International Publishing.)

⁴ http://www.politcom.ru/tables/otchet_sud.doc (accessed on 23 May 2010)



The research revealed all the levers by means of which the dependence of judges is maintained within the system itself. The most important factor in the work of judges, the report says, is fear and dependence on the chairman of the court. The chairman of every court has powerful levers for putting pressure on judges. The chairman decides on the distribution of cases to particular judges, awards bonuses, and resolves the judges' housing problems. The promotion of a judge is decided by the chairman, and the chairman may take disciplinary proceedings against a judge right through to the judge's dismissal. At the same time, the chairman of any court in Russia is appointed and re-appointed by the President of the Russian Federation, which ensures the chairman's dependence on the authorities. Thus, a rank and file judge, when taking a decision, must keep an eye on the court chairman, and the chairman in turn must correctly interpret signals from the Kremlin, the local administration, influential government officials, politicians and businessmen.

Thanks to the actions of these levers, government officials have at their disposal a directed court, which can be used in part as a disciplinary mechanism (the experts came to the conclusion that the court is a repressive organ) and as an instrument for advancing the interests of particular economic groups. The level of pressure on the court depends on its level, and the higher the court the less is the pressure, the report says. The Constitutional Court is the most independent, and the lower the court the greater the number of sources of pressure.

Unfortunately, one of the key recommendations of the Report was that the power of the court chairmen be reduced by allowing them to be elected by their fellow judges as with the Constitutional Court. Sadly – and this is indicative of present problems in the Russian legal system – that right for the Constitutional Court had already, in May 2009, been taken away by a law proposed and then signed into force by President Medvedev. Henceforth, the Constitutional Court's Chairman and Vice-Chairman will be nominated by the President and approved by the Federation Council, as with all other court chairmen⁵. The change has been strongly criticised by the former (elected) Vice Chairman of the Court, Tamara Morshchakova⁶. And, sadly, analysis of the timid judgments of the Constitutional Court since its forced move to St Petersburg in 2008 has led to a situation in which judges are now said, in an authoritative article by Dmitry Kamyshev and Anna Pushkarskaya in the weekly *Vlast* on 26 April 2010, to be deciding according to the "principle of self-preservation"⁷.

This must be very bad news for the rule of law in Russia.

*Professor Bill Bowring, Birkbeck College, University of London;
Member of the EU-Russia Centre Advisory Board*

⁵ <http://www.newsru.com/russia/21may2009/chteniaks.html> (accessed on 23 May 2010)

⁶ <http://www.lenta.ru/conf/morschakova/> (accessed on 23 May 2010)

⁷ <http://www.kommersant.ru/doc.aspx?DocID=1357606>



What More Could the EU/Council of Europe Do to Support the Rule of Law in Russia?

by

Christos Giakoumopoulos and Torbjørn Frøysnes*

INTRODUCTION

Supporting the rule of law has been a key task for the co-operation in the Council of Europe ever since the organisation was established in 1949. There are now 47 members in the Council of Europe, including all the 27 EU member countries and Russia. This means that the Council of Europe is a well-placed forum for co-operation to support the rule of law in Russia and other new democracies, some of which have also joined the European Union.

The new democracies that applied for membership in the Council of Europe after the fall of the Berlin Wall in 1989 took on a number of rule of law commitments imbedded in the membership. At the same time they were given a great number of possibilities to strengthen rule of law through co-operation in the many committees and structures established for these purposes in the Council of Europe.

In the introductory meeting with newly elected Secretary General Thorbjørn Jagland of the Council of Europe 23 December 2009, President Medvedev of the Russian Federation strongly emphasised his commitment to promote the rule of law in his country, and to abide by the commitments and the co-operation in the Council of Europe for this purpose.

The Council of Europe offers a comprehensive work place for European experts at the highest level to develop legally binding norms. The development of rule of law in all its aspects requires a long-term and continuous effort, where all member countries can learn from one another.

INTERGOVERNMENTAL CO-OPERATION

The intergovernmental co-operation in the Council of Europe to promote the rule of law is guided and supported by annual **Conferences of Ministers of Justice**, where Justice Ministers sometimes are also joined by Ministers of Interior when the agenda calls for it, e.g. in Moscow, 2006, on international co-operation in criminal matters. These conferences are normally very well attended at Ministerial level. At their 2009 Conference in Tromsø (Norway), Ministers of Justice called for a review of the rule of law situation in member countries for the purposes of targeting better co-

* The title of this article was suggested by the EU-Russia Centre Review. Mr. Giakoumopoulos is the Director of the Directorate of Monitoring in the Secretariat of the Council of Europe in Strasbourg. Mr. Frøysnes is the Ambassador and SRSG of the Secretary General of the Council of Europe to the EU in Brussels. Dep. Dir. de Biolley and Trainee Irina Bykova of the Brussels Office of the Council of Europe also assisted in compiling the material for this article.



operation activities and the development of standards. The Secretary General will submit concrete proposals for such a review this year.

As a member State, the Russian Federation is invited to participate in all CoE intergovernmental co-operation activities. In the field of rule of law, Russia, like all member states, is represented in the meetings of the **intergovernmental Steering Committees** and their subordinate Committees (expert or specialist groups). These Steering Committees are dealing with issues like criminal policies (CDPC); legal co-operation in civil and family law as well as data protection (CDCJ), terrorism (CODEXTER) and Human Rights (CDDH), to mention some of the most important.

In these committees experts from the competent national authorities, like the Ministry of Justice and the Ministry of Interior are meeting regularly to address improvements of important aspects of the rule of law.

- **The European Committee on Crime Problems (CDPC)**, set up in 1958, was entrusted with the responsibility for overseeing and coordinating the Council of Europe's activities in the field of crime prevention and crime control and prison reform. The CDPC identifies priorities for intergovernmental legal co-operation, makes proposals to the Committee of Ministers on activities in the fields of criminal law and procedure, criminology and prison reform, and implements these activities. Most recently, the CDPC prepared Council of Europe Probation Rules, a Third Protocol to the European Extradition Convention and the Medicrime Convention ("..."). Russia has taken a leading role in the modernisation and strengthening of criminal law conventions, which are vital for judicial co-operation all over Europe. It also participated actively in a new project to develop effective tools, including a database, for mutual legal assistance in criminal matters. Russia is very active in elaborating common strategies and policies with regard to criminal matters within the CDPC, since Russia is constantly represented in the Bureau of CDPC since 2005.
- **The European Committee on legal co-operation (CDCJ)** has been responsible for many areas of the legal activities of the Council of Europe since 1963. The Committee defines the policy of legal intergovernmental co-operation and fixes priorities in the fields of public and private law and promotes law reform and co-operation in the following fields: administrative law, civil law, data protection, family law, children's rights, information technology and law, justice and the rule of law. The CDCJ currently prepares legal instruments on child-friendly justice, parental responsibilities and status of children as well as profiling techniques on the Internet
- **Committee of Experts on Terrorism (CODEXTER)** is an inter-governmental committee of experts. In 2003 it replaced the Multidisciplinary Group on International Action against terrorism (GMT) to coordinate the implementation of the Council of Europe's action against terrorism. The CODEXTER is currently focusing on exchanges of information and best practice on compensation and insurance schemes for the victims of terrorism, identifying gaps in international law and action against terrorism with a view to proposing ways and means to fill them and monitoring the signatures and ratifications and promoting the effective



implementation of the Council of Europe conventions applicable to the fight against terrorism, in particular the Council of Europe Convention on the Prevention of Terrorism.

- **The Steering Committee for Human Rights (CDDH)** defines policy and co-operation with regard to human rights and fundamental freedoms. It sets the priorities as concerns the implementation of the activities of its committees of experts and groups of specialists. In particular, the CDDH assumes tasks which aim to develop and promote human rights, as well as to improve procedures for their protection, constantly bearing in mind the evolution of the case-law of the European Court of Human Rights.

CO-OPERATION COMMITTEES

Special committees of experts have been established in the Council of Europe to address co-operation activities related to the efficiency of justice (CEPEJ), securing the independence of judges (CCJE) and supporting functioning public prosecution services (CCPE). These committees represent important support functions for the highest officials in all member countries.

The European Commission for the Efficiency of Justice (CEPEJ) was established in 2002. It is aimed at the improvement of the efficiency and functioning of justice in the member States, and the development of the implementation of the instruments adopted by the Council of Europe to this end. The CEPEJ carries out the following tasks: analysis of the results of the judicial systems and difficulties they meet, ways to improve functioning of these systems, assistance to member States, at their request and proposals to the competent instances of the Council of Europe in the fields where it would be desirable to elaborate a new legal instrument.

The Consultative Council of European Judges (CCJE), set up in 2000, is a consultative body concerning independence, impartiality and competence of judges. The CCJE is the first body within an international organisation composed **exclusively of judges** and therefore constitutes a unique body at the European level.

The Consultative Council of European Prosecutors (CCPE), a consultative body to the Committee of Ministers of the Council of Europe, was created by decision of the Ministers' Deputies on 13 July 2005, with the intention of institutionalising the yearly Conference of Prosecutors General of Europe (CPGE). By institutionalising this forum, the Committee of Ministers as well as its European Committee on Crime Problems (CDPC), recognises the importance of closely involving Public Prosecution services of its member States in its work aimed at developing common policies and legal instruments related to their functioning and professional activities.

MONITORING MECHANISMS

The Russian Federation is party to 56 Treaties of the Council of Europe, and participates in the monitoring and follow-up activities of these instruments. The ratification of others is currently underway, including the Council of Europe's data protection convention 108.



The Russian Federation ratified the **European Convention on Human Rights** on 30 March 1998 and the European Court issued its first judgment against Russia on 7 May 2002. Since then, the European Court has delivered some 800 judgments finding violations of the ECHR. About 40 per cent of these judgments concern the problem of non-enforcement or lengthy enforcement of domestic judicial decisions related to pensions, child-care subsidies, various compensation schemes to benefit Chernobyl workers and military personnel. Another 30 per cent concern poor conditions of pre-trial detention and excessively lengthy detentions on remand. About 15 per cent of the Court's judgments relate to use of the supervisory-review procedure which allows the reversal of a final domestic judicial decision. An important number of judgments concern the actions of the Russian security forces in the Chechen Republic. Lastly, an increasing number of judgments relate to ill-treatment in police custody and lack of an effective investigation in this respect.

It is interesting to note that the European Court of Human Rights was able, from the very first cases it dealt with, to single out some of the most significant shortcomings of the judicial system of the Russian Federation: Thus, in its **first judgment** of 7 May 2002, (*Burdov v. Russia*) the Court found violation of the ECHR because of the non-enforcement of domestic judicial decisions delivered in favour of the applicant who took part in rescue operations after the Chernobyl plant explosion. The **second judgment** issued shortly after (*Kalashnikov v. Russia*) concerned the excessive length of the applicant's pre-trial detention and the poor conditions of his pre-trial detention. In a **subsequent judgment** (*Ryabykh v. Russia*) the Court found that the use of the so-called supervisory review procedure to quash final decisions of domestic courts violates the principle of legal security and, consequently, the right to a fair trial. Several judgments of the European Court of Human Rights find violations of ECHR in the framework of action of security forces in the Chechen Republic.

Under Article 46 of the Convention, all these judgments are transmitted to the **Committee of Ministers, consisting of all member countries of the Council of Europe**, who supervise their execution by the Russian authorities. Such an execution requires, beyond the payment of any just satisfaction that may have been awarded by the Court to the victims of the violations, the adoption of other individual measures to redress the violations caused to the victims but also general measures preventing new similar violations.

Since the first judgments of the European Court, the Russian authorities have engaged in **comprehensive reforms** aimed at resolving problems underlying the repetitive violations of the Convention. The problems revealed by the European Court go to the very roots of the Russian legal order; they often affect a large number of people and immediately generate a huge amount of applications. Their resolution requires an integrated approach involving all actors and decision-makers at different levels and a comprehensive strategy of reforms. Russian authorities have participated with large delegations in high level round-tables and seminars organised by the Council of Europe to address these issues.

Despite the increasing number of applications to Strasbourg, the impact of judgments of the European Court of Human Rights on the Russian legal system should not be underestimated.



The Russian authorities show both a legislative activity related to and increased budgetary appropriation for the prison system and the judiciary in response to the European Court's judgments. Russian judges increasingly draw on the decisions of the Strasbourg court, thus giving direct effect to the Convention and to the European Court's case-law in their daily practice. New structures have been set up within different organs in order to improve the communication with the Government Agent's office. The implementation of important reforms is underway and these will contribute to further mainstreaming the Convention requirements and the European Court's case-law into the Russian legal order and to enhancing the protection of the Russian citizens' rights by Russian courts.

The Committee of Ministers (CM) is assessing all of these measures and recognising the efforts made by the Russian authorities. The CM has always stressed that their effectiveness will very much depend on the concrete and visible results achieved in practice. Whereas the political will to continue the reforms in these areas can easily be documented, there are still delays in adoption of decisive general measures. The solution to these problems in Russia is contingent on enhanced co-operation between all actors of the State. Experience shows that internal high-level task forces or coordination boards, benefiting from a high level support (for example, by being placed under the President's auspices) may rapidly achieve coordination and concrete results.

The Russian Federation also participates actively in a number of **specialised Monitoring bodies** of the Council of Europe, like **GRECO** (corruption), **MONEYVAL** (money laundering and terrorism financing) **CPT** (prevention of torture), **ECRI** (racism and intolerance) as well as in the monitoring of the **Framework Convention for the Protection of National Minorities**.

In **GRECO**, **Minister of Justice Konovalov** has led the Russian delegation himself, and attended several GRECO Plenary meetings. GRECOs report on Russia has been made public with the agreement of the Russian authorities.

Russia chairs **MONEYVAL** since the end of 2009. Russia is very active and very much involved in Anti-Money Laundering and Counter Financing of Terrorism. Although not yet party to the new Council of Europe Convention on Confiscation of Proceeds of Crime and combating financing of Terrorism, Russia is nevertheless always present and very active.

CPT has carried out numerous visits to the Russian Federation, and on three occasions concerning the Chechen Republic made public statements in view of failure to improve the situation in the light of the Committee's recommendations.

Russia is actively participating in the **Venice Commission** and makes use of its advice, and is cooperating substantially with the **Council of Europe Commissioner for Human Rights**.

TARGETED CO-OPERATION PROGRAMMES

Co-operation with specialised Ministers in the field of Justice and the Interior are pursued through different targeted co-operation programmes. In the Russian Federation, the Council of Europe currently has the following programmes of assistance:



- enhancing the capacity of legal professionals and law enforcement officials to apply the ECHR in domestic legal proceedings and practice
- setting up an active network of independent non-judicial national Human Rights structures
- global project on cybercrime
- money-laundering and terrorism financing.

Most of the activities carried out within these programmes benefit from a sizable **financial contribution** from the EU and are being implemented as Council of Europe/European Union Joint Programmes with Russia.

STRONGER EU INVOLVEMENT

The Memorandum of Understanding entered into by the EU and the Council of Europe in 2007 foresees enhanced co-operation and political dialogue. This is followed up actively, as documented in the latest Report to the Foreign Minister's meeting of the Council of Europe 11 May 2010 in Strasbourg. Following the entry into force of the Lisbon Treaty, greater involvement by the EU, with more resources, in relevant Council of Europe-monitoring mechanisms as well as accession to relevant Council of Europe's legal instruments could represent valuable contributions to strengthening rule of law in Russia and in Europe.

The EU-Russia summit in Rostov-on-Don from 31 May to 1 June 2010, and its follow-up, focusing on priorities of the Partnership for Modernisation, could represent good opportunities to strengthen the co-operation between EU, Russia and the Council of Europe in support of the rule of law.



An Overview of EU-Russia Legal Co-operation

by

Kristoffer Svendsen*

INTRODUCTION

EU-Russia relations are based on the Partnership and Co-operation Agreement (PCA)⁸, which was complemented by the Four Common Spaces⁹ and the Road Map for the Common Economic Space¹⁰ in 2005. However, the main body responsible for co-operation between Europe and Russia on legal matters remains the Council of Europe. This is one reason why the European Commission does not try to promote specific programmes on the rule of law, in order not to undermine, or risk undermining, the work of the Council of Europe. The Council of Europe has access to an impressive knowledge base and its work and achievements over the years have proved that co-operation on legal issues and technical legal matters are often more fruitful than political co-operation.

The phrase 'legal co-operation' is not defined in any official document between the EU and Russia, allowing some flexibility on the issues that can be discussed under this heading. The European Commission attaches great importance to the modernisation partnership agenda and has placed the rule of law at the top of its priorities for the modernisation of Russia. As far as legal co-operation is concerned, this could translate in an even wider interpretation of its meaning in order to avoid entering into endless negotiations over another "road map" on the matter with Russia.

CO-OPERATION IN THE SECOND COMMON SPACE – JUSTICE, FREEDOM AND SECURITY

EU-Russia co-operation in the common space on justice, freedom, and security has become a key component in the relationship between EU and Russia¹¹. The co-operation is based on the Road

* LL.B. (Bond), LL.M. (Bond), LL.M. (MGIMO-University of MFA) is a Research assistant at the EU-Russia Centre.

⁸ Agreement on partnership and co-operation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, Official Journal L 327 , 28/11/1997 P. 0003 – 0069, retrieved 21 April 2010, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21997A1128%2801%29:EN:NOT>.

⁹ European Commission External Relations, (2009) 'EU-Russia Common Spaces', retrieved at 21 April 2010 http://ec.europa.eu/external_relations/russia/common_spaces/index_en.htm.

¹⁰ Council of the European Union, (2005) Road Map for the Common Economic Space Building Blocks for Sustained Economic Growth, 15th EU-Russia Summit, Moscow, 10 May 2005, published 11 May 2005, 8799/05 ADD 1 (Presse 110) Brussels.

¹¹ European Commission External Relations, (2009), 'Freedom, security and justice' retrieved 21 April 2010 http://ec.europa.eu/external_relations/russia/common_spaces/fsj_en.htm.



Map on the Common Space of Freedom, Security and Justice of 2005¹². This focuses on the following:

- equality between partners and mutual respect of interests
- adherence to common values, notably to democracy and the rule of law as well as to their transparent, and effective application by independent judicial systems
- respect of human rights, including the rights of persons belonging to minorities, adherence to and effective implementation, in particular of United Nations (UN) and Council of Europe Conventions as well as related protocols and OSCE (Organization for Security and Co-operation in Europe) commitments in this field
- respect for and implementation of generally recognised principles and norms of international law, including humanitarian provisions
- respect for fundamental freedoms, including free and independent media¹³.

The Permanent Partnership Council (PPC), responsible for freedom, security and justice is in charge of monitoring co-operation of this aspect of the road map. The EU-Russia PPC on freedom, security and justice met in Stockholm 2 December 2009 and reviewed the road map. On this occasion, the PPC agreed to continue close co-operation to implement all of its provisions. The participants decided to:

- continue to work on the EC-Russia visa facilitation and readmission agreements,
- discuss possible amendments to the EC-Russia visa facilitation agreement with a focus on Kaliningrad and local border traffic agreements,
- lend their support for swift negotiation, look forward to the Senior Officials' report on the EU-Russia Visa Dialogue,
- enhance EU-Russia dialogue on all migration issues,
- examine border co-operation,
- negotiate an operational agreement between Europol and Russia on personal data protection,
- intensify anti-drug co-operation,
- strengthen EU-Russia Co-operation in the fight against corruption and trafficking,

¹² Road Map on the Common Space of Freedom, Security and Justice, approved on 10 May 2005, retrieved 21 April 2010, <http://eng.kremlin.ru/text/docs/88030.shtml>.

¹³ Ibid, Preamble



- solve the current problems on judicial co-operation,
- strengthen judicial co-operation in civil and commercial matters¹⁴.

CO-OPERATION THROUGH EUROPOL AND EUROJUST

Europol is the European Union Law Enforcement Agency, which handles criminal intelligence. Europol aims to improve the effectiveness and co-operation of competent authorities in the Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of organised crime¹⁵. Eurojust is a judicial co-operation body created to help provide safety within an area of Freedom, Security and Justice and to improve the fight against serious crime by facilitating the optimal co-ordination of action for investigations and prosecutions¹⁶.

Europol and the Russian Federation signed a co-operation agreement in 2003¹⁷ on combating serious forms of transnational criminal activities, such as offences against the life and health of individuals, terrorism and its finance, trafficking, money laundering, and illegal immigration¹⁸. However, the scope of this co-operation is limited by article 2 of the agreement, which expressly excludes the exchange of personal data as a part of the agreement.

Eurojust and the Russian Prosecutor's Office have been engaged in talks on a co-operation agreement since 2009, but, despite the conclusion of two rounds of negotiations, no agreement has yet been signed. The European Commission mentioned in its report that the implementation of a national data protection legislation in accordance with the standards of the Council of Europe's 1981 Convention is a pre-requisite for entering into an agreement¹⁹.

Eurojust held a seminar on 'The Judicial Co-operation in Criminal Matters between the European Union and the Russian Federation' in Hague in 2009²⁰. The seminar focused on extradition and mutual legal assistance and raised issues regarding the transferral of personal data. Justice co-operation between EU and Russia is complicated by real differences and the seminar allowed the identification of problem areas and underlined the need to move forward on issues such as extradition. The result of discussions on these issues could lead to a treaty such as extradition. The general perception is that these seminars contribute positively to the EU-Russia dialogue on justice

¹⁴ Joint Statement, EU-Russia Permanent Partnership Council (Freedom, Security and Justice), 2 December 2009, Stockholm.

¹⁵ Europol, 'EUROPOL, the European Police Office' <http://www.europol.europa.eu/>

¹⁶ Eurojust, 'the European Union's Judicial Co-operation Unit' <http://www.eurojust.europa.eu/>

¹⁷ Agreement on Co-operation between the European Police Office and the Russian Federation dated 6 November 2003 and signed by Igor Ivanov and Jürgen Storbeck.

¹⁸ Ibid art. 4.

¹⁹ European Commission, (2010) 'EU-Russia Common Spaces Progress Report 2009' dated March 2010, p. 43.

²⁰ Eurojust press release, 'Eurojust seminar of judicial co-operation between the European Union and the Russian Federation' the Hague, 9 October 2009, retrieved 23 April 2010, http://www.eurojust.europa.eu/press_releases/2009/09-10-2009.htm



and home affairs as both Russia and EU send very good experts to participate and the parties are encouraged to intensify the relationship. Justice Minister Mr Kononov said:

“The Russian Federation is eager to intensify co-operation with EU partners. To this aim, this seminar is a very important stepping-stone. We are going to do our best to harmonise our national legislation with EU rules and sign the co-operation agreement with Eurojust as soon as possible”²¹

Furthermore, co-operation exists among liaising officers in Moscow, including law enforcement officials meeting for informal discussions. The European Commission stated in its report that the next Liaison Officer meeting will occur in Moscow this spring²². Liaison Officer meetings took place twice in 2009.

The EU and Russia also co-operate on civil law. Article 2.7 of the Road Map states an obligation to fight corruption and sign, ratify, and implement UN and CoE conventions on corruption. The EU wants Russia to commit to additional conventions on corruption to the Criminal Law Convention on Corruption. Russia has not yet signed the Civil Law Convention on Corruption, nor the Additional Protocol to the Criminal Law Convention on Corruption²³. As a part of EU-Russia civil law co-operation, the EU has also encouraged Russia to accede to the many CoE conventions which it has not yet signed in the area of mutual assistance in criminal matters. Furthermore, in accordance with article 3.3 of the Road Map the EU wants Russia to accede to the Hague Conventions regarding legal assistance in civil matters and implement the Hague Convention on Service of Documents. The EU would also like Russia to be a part of the Hague Conventions that protect the rights of children and counters child abduction. Some feel that Russia is concerned that the convention was drafted when Russia was weak and that it would like to re-open negotiations. However, the EU is unwilling to do so. As a result, Russia would rather negotiate bilateral agreements while EU Member States want to see Russia accede to the Hague Conventions on civil legal matters²⁴.

THE IMPORTANCE OF LEGAL CO-OPERATION PROGRAMMES ON EU-RUSSIA RELATIONS

Both the EU and Russia benefit from engaging in co-operation programmes. As in any other area of conflict, close ties help in negotiating a peaceful result. As the EU is a large block, small and large disputes between the EU and Russia will always exist. Good legal co-operation on a variety of issues

²¹ Ibid.

²² European Commission, (2010) ‘EU-Russia Common Spaces Progress Report 2009’ dated March 2010, p. 44.

²³ Council of Europe, ‘Conventions’ <http://conventions.coe.int/>.

²⁴ The Hague Conventions are really results of the Hague Conference on Private International Law, a melting pot of different legal traditions, which respond to global needs in: the international protection of children, family and property relations; international legal co-operation and litigation; international commercial and finance law. Conventions on civil legal matters may be found on www.hcch.net/, or as an example: http://www.hcch.net/index_en.php?act=search.result.



is therefore a good investment towards moving closer to a stable investment and trade relationship with a main trade partner. Even though the road maps are criticised for being vague and do not contain deadlines or plans for specific projects, the road maps are used by the EU to put in place a sensible framework for the EU's future interaction with Russia. Likewise, the road maps are useful for Russia, as it broadly needs modernisation and reform of the steps outlined in the road maps.

CONCLUSION

This article has described the main current programmes that exist between Russia and the EU in the area of legal co-operation. The EU and Russia are engaged in programmes such as co-operation in the area of justice, security, and freedom; combating criminal activity through Europol; and judicial co-operation in criminal matters through Eurojust. Co-operation between Russia and the EU is important even though it might appear inefficient. Notwithstanding, legal co-operation benefits the parties and should be strengthened.



The Case Law of the Court of Justice of the European Union for Russian Legal Entities and Individuals

by

Dr Paul Kalinichenko*

The Court of Justice of the European Union is a non-political institution of the EU. Its function is to ensure that the rights of all citizens and non-citizens are protected and respected during the interpretation and application of the EU Treaties. In accordance with the Lisbon Treaty (Article 19) the Court of Justice of the European Union is made up of the European Court of Justice (ECJ); the General Court or Court of First Instance (CFI); and specialised courts.

The Court of Justice of the European Union examines

- Cases brought by Member States, EU Institutions, private individuals and legal entities (direct jurisdiction);
- Pre-judicial orders, at the request of the national courts of Member States concerning the interpretation of EU law and the validity of EU laws (indirect jurisdiction);
- Other instances, envisaged by the Treaties.

Paragraph 4, article 263 of the Treaty on the Functioning of the European Union (TFEU) endows any individual or legal entity with the right to appeal against the actions and rulings of EU Institutions to the Court of Justice of the European Union. This enables not only private individuals in the Member States to gain its protection, but also citizens of third countries, including Russia. Here we consider the experience of such appeals and complaints to the Court of Justice by Russian individuals and legal entities and the practice of the Court of Justice in examining, in pre-judicial order, applications made by the national courts of Member States.

SOVIET HISTORY

The first attempted recourse by Russian applicants to the judicial procedures of the European Community was made many years ago. In 1983 the Court of Justice of the European Communities (as it was then entitled) in Luxembourg agreed to examine the action brought by Raznoimport, a Soviet foreign trade organisation, against the European Commission²⁵. Raznoimport disputed the temporary anti-dumping duties that the Commission had imposed on imports of nickel from the USSR. The action was accepted for consideration but not examined: the parties managed to reach a compromise agreement out of court.

* Associate Professor at the EU law faculty, Moscow State Law O.E. Koutafin-Academy

²⁵ Case 120/83R V/O Raznoimport v. Commission [1983] ECR 02573.



The first full lawsuit to come before the ECJ was the *Technointorg* case²⁶, examined in 1988. Technointorg brought two actions, one against the Commission in 1986, another against the Council in 1987, disputing the introduction, of temporary and final anti-dumping duties on freezers manufactured in the Soviet Union. After seeking and obtaining the opinion of its Advocate General Sir Gordon Slynn, the ECJ ruled that the plaintiff's demand for the abolition of anti-dumping sanctions should not be upheld²⁷. Fundamental differences in the operation of market and State-run economies influenced the examination of this application. Soviet trade organisations lacked experience in fighting cases before the ECJ, and this also worked against the plaintiff. Finally, the closed nature of the Soviet economy made it impossible to submit all of the information required by European institutions – the freezers were being produced in the same factories as weapons for the defence industry.

It may seem appropriately symbolic that this was the case that the ECJ chose to examine during the “Cold War”. There is also a certain paradox in the situation. The Soviet Union did not officially recognise the European Community until June 1988, yet five years earlier Soviet trade organisations had already begun applying to the Court of Justice to defend their rights. At the end of the 1980s Soviet organisations wanting to challenge the EC's anti-dumping sanctions on imports from the USSR tried another tactic; they submitted actions through the joint ventures that were popular at the time. All of the cases were accepted for consideration but not one led to a positive outcome²⁸.

After the USSR ceased to exist and the Soviet system collapsed, little changed for Russian companies working in the Community's domestic market with regard to anti-dumping procedures. In 1992, the new Russian government began market reforms. Yet the EC continued to classify the country as having a managed, State-run economy until mid-1998.

THE EU-RUSSIA PARTNERSHIP AND CO-OPERATION AGREEMENT

After the terms of the EU-Russia Partnership and Co-operation Agreement came into force in December 1997 (it had been signed three years earlier, in 1994) Russia gained the status of a country with a transitional economy. This did not preclude a harsher policy towards Russian exports on anti-dumping rules than those enforced against countries with a market economy.

²⁶ Joined cases 284/86 and 77/87 *Technointorg v. Commission and Council* [1988] ECR 06077.

²⁷ For more detail, see Edwin Vermulst, “Commercial Defence Actions and Other International Trade Developments in the European Communities: 1 July 1988-30 June 1989”, *European Journal of International Law*, 1990 (Vol.1), No. 1, p. 350; P. Eeckhout, “The *Technointorg* Judgment of the European Court of Justice and the Issue of Non-Market Economy Dumping”, *World Competition*, 1989 (Vol. 13), Issue 4, pp. 39-54.

²⁸ Joined cases C-304/86 and C-185/87 *Enital SpA v. Commission and Council* [1990] ECR I-02939; Joined cases 305/86 and 160/87 *Neotype Techmaslexport GmbH v. Commission and Council* [1990] ECR I-02945; Joined cases C-320/86 and C-188/87 *Stanko France v. Commission and Council* [1990] ECR I-03013.



During the 1990s there were several unsuccessful attempts by Russian companies to appeal to the Community's judicial institutions against such anti-dumping duties. In the case of the *International Potash Company v. Council of the European Union*, the plaintiff, a Russian company, applied directly to the Court of First Instance²⁹. In the *Perestroika Potash Import* case, on the other hand, the action was submitted in the name of an EC-registered subsidiary of the Russian parent company³⁰. And it was at this time that Euromin, as a European company with subsidiaries in Russia, made an interesting application to the CFI against Council³¹.

Changes began in mid-2002 when Russia was given the status of a country with a market economy. This was reflected in the terms of the EU's Basic Anti-Dumping Regulations. The change in status, and the development of the Russian economy as a whole, led to the growth in the number of attempts by Russian companies to defend their rights at the level of the European Union. At the beginning of the 21st century the appeals remained unsuccessful. In 2007, the Swiss subsidiary of the Russian company SUAL brought the first ever successful appeal against EU anti-dumping sanctions in the *Aluminium Silicon* case³². The true breakthrough, however, only came a year later. On 10 September 2008, the CFI issued a ruling in the *Kombinat* case, recognising the fairness of the objections raised by the Kirovo-Chepetsky Chemical Kombinat (Kirovo-Chepetsk, Kirov Region) regarding EU anti-dumping measures being applied to its ammonium nitrate output . This was an unprecedented decision³³.

For the first time, a Russian company had been able to use the judicial system of the European Union to win the Court's approval in its own right, not through an EU-based subsidiary³⁴. A Russian legal entity had won a case against the main legislative body of the European Union. This was yet further confirmation of a shift in the attitudes of the EU's judicial system towards Russian companies. Today there is greater confidence and trust in these companies. The Courts act as if they are dealing with equal and full participants in the EU domestic market, whose status is determined by their attachment to a State that is not a member of the Union, and with the right to be defended under EU legislation. The *Kombinat* case reflected positive trends in the evolution of trading and economic ties between Russia and the European Union. Today this has reached the stage of mutual penetration of markets and the creation of systems of guarantees for those who are active there. This is no longer an issue that is confined to Russia's foreign trade and economic organisations in their dealings with the EU: it is a problem that must be resolved by the constituent bodies of the Union itself.

²⁹ Case T-87/98 *International Potash Company v. Council* [2000] ECR II-03179.

³⁰ Case T-164/94 *Ferchimex SA v. Council* [1995] ECR II-02681.

³¹ Case T-597/97 *Euromin SA v. Council* [2000] ECR II-02419.

³² Case T-107/04 *Aluminium Silicon Mill Products GmbH v. Council* [2007] ECR II-00669.

³³ Case T-348/05 *JSC Kirovo-Chepetsky khimicheskij kombinat v. Council* [2008] ECR II-00159.

³⁴ See P.A. Kalinichenko, "The Kirovo-Chepetsky chemical combine v. the EU Council, and the defence of Russian business interests against EU anti-dumping policies", *Zakon*, 2009, No 4, pp. 194-202.



The *Kombinat* case was only one in a series of analogous actions brought before the CFI by Russian commodity producers (exporters). By early 2010, the CFI had officially accepted the following cases for examination: T-80/07 *EuroChem v. Council*; T-190/08 *CHEMK/KF v. Council*; T-234/08 *EuroChem v. Council*; and T-235/08 *Acron/Dorogobuzh v. Council*. The *Kombinat* case also served to stimulate objections to anti-dumping duties from other former Soviet republics in the Commonwealth of Independent States: for example, the Nikopolsky pipe plant and the Nizhnedneprovsky Tube Rolling Plant from the Ukraine (case T-249/06), and the Kazakhstan Transnational Company Kazchrome based in Aktyubinsk (case T-192/08). There is a marked contemporary trend towards defending the lawful interests of producers from the former Soviet Union from the anti-dumping policies of the EU, and such measures are increasingly being disputed through the judicial institutions of the European Union.

Among the series of lawsuits by Russian legal entities already examined by the CFI, the *Alrosa v. Commission* case³⁵, which came before the CFI in 2007, stands out from the rest. This did not concern anti-dumping regulations but the policies of the EU regarding competition. The CFI concluded that in regulating the competitive environment in the market for rough diamonds, the Commission had violated the principles of proportionality, and the terms of Article 41 (2) of the EU Charter on fundamental rights that guarantee right to be heard. The Commission thereby infringed the interests of the Alrosa company, registered in the town of Mirny in Russia's north-eastern Sakha (Yakut) republic. The CFI accordingly upheld the claims of the Russian diamond mining company.

The case represented a completely new category in the experience of Russian business, and was evidence that Russia has established itself on the EU's domestic market. Further confirmation is provided by the action against the Commission brought to the Court of Justice by Norilsk Nickel Harjavalta Oy, a Finnish subsidiary of Russia's Norilsk Nickel company³⁶. The action demanded the abolition of the Commission's directive 2008/58/EU (21 August 2008) /5/ which, taking into account technical progress, updated the Council's directive on dangerous materials³⁷. The interests of Russian business on the EU domestic market today, therefore, are not limited to merely exports.

CASES BROUGHT BY INDIVIDUALS

During this period of development in relations between Russia and the EU, the Court of Justice of the Union has also examined several cases concerning the rights and interests of Russian citizens. Three of these, at least, deserve attention.

Two of the cases were examined within the framework of pre-judicial requests from national courts of the Member States. In the case of *Vera Jacquet* (1997), the ECJ did not recognise the grounds for applying an equal treatment of free movement and social benefits of the Union to this Russian

³⁵ Case T-170/06 *Alrosa v. Commission* [2007] ECR II-02601.

³⁶ Case T-170/06 *Alrosa v. Commission* [2007] ECR II-02601.

³⁷ OJ L 246, 15 September 2008, pp. 1-191.



citizen³⁸. In the *Simutenkov* case (2005) important conclusions were drawn in favour of the provision of such opportunities on the basis of the Partnership and Co-operation Agreement between Russia and the EU³⁹. Eight years separated the two cases. That of *Jacquet* was heard before the PCA came into force. If examined today, the subsequent development of EU legislation of guarantees for employees from third countries in the 21st century might have permitted the ECJ to reach a different decision.

The *Simutenkov* case proved of the greatest importance in elaborating the legal expression of the treaty obligations in EU-Russia relations. It not only asserted an equal treatment for the labour rights of Russian citizens on EU territory, but also offered the possibility of the direct application of those and other articles of the PCA to the territory of the Member States. The *Simutenkov* case marked yet another contribution by the ECJ to the development of the principle of the direct action of EU provisions, which had taken shape in its case law in the 1960s and 1970s. It is, in all probability, the most widely known “Russian” case that the ECJ has examined⁴⁰.

The latest case to concern the interests of a Russian citizen is that of *Goncharov v. OHIM* (2010). It was examined by the General Court in January this year⁴¹. Goncharov, an inhabitant of Moscow, disputed the refusal of the Office for Harmonisation in the Internal Market (OHIM) to register a trade mark in the EU. The General Court, however, considered that OHIM’s decision was lawful and declined the plaintiff’s lawsuit.

CONCLUSION

Over the last 27 years, the judicial institutions of the European Union have examined almost a quarter of the hundreds of cases brought by Russian legal entities and individuals. The number of cases, moreover, is constantly rising. Over the last ten years, the EU’s judicial bodies have examined one and a half times more “Russian” cases than all of the 20th century complaints and appeals by Soviet and Russian applicants.

The great majority of such cases have been brought by legal entities disputing the anti-dumping sanctions imposed by the Commission and the Council on Russian products. At the same time, there is a growing tendency for Russian individuals to appeal to the Court of Justice of the Union for

³⁸ Joined cases C-64/96 and C-65/96, *Land Nordrhein-Westfalen v. Kari Uecker and Vera Jacquet v. Land Nordrhein-Westfalen* [1997], ECR I-03171.

³⁹ Case C-265/03 *Igor Simutenkov v. Ministerio de Educación y Cultura, Real Federación Española de Fútbol* [2005] ECR I-5961.

⁴⁰ For more on the *Simutenkov* case see: Case note by C. Hillion, “Case C-265/03 *Simutenkov v. Ministerio de Educación y Cultura, Real Federación Española de Fútbol* [2005] ECR I-2579”, 45 *Common Market Law Review*, 2008 (Vol. 45), pp. 815-833; P.A. Kalinichenko, “Defending the rights of private individuals from Russia in the European Union in the light of the decision taken in the *Simutenkov* case by the Court of the European Union”, *Zakon*, 2008, No 1, pp. 211-220; M.L. Entin, *In search of partnership relations: Russia and the EU, 2004-2005* (in Russian), St Petersburg, 2006, pp. 375-381.

⁴¹ Case T-34/07 *Goncharov v. OHIM* [2010] ECR 00000 (OJ C 63, 13 March 2010, p. 46-46).



the protection of their interests where issues of competition, environmental policy and intellectual property are concerned. As a rule, these cases are examined by the Court of First Instance (the General Court), a special sub-division of the Court of Justice, since for the most part these are instances of direct jurisdiction. There have been two cases, however, that were examined by the ECJ, where national courts in Germany and the Netherlands formally applied for a ruling on the application of EU law to actions brought by Russian citizens.

The developing experience of the Court of Justice of the European Union in dealing with cases brought by Russian companies and citizens has confirmed the real possibility of defending one's rights and lawful interests through EU legislation and opens up new horizons for both individuals and companies who are active within the European Union.



Investing in Russia by EU Companies: Some Legal Considerations

by

Marina Vasilieva*

The European Union is Russia's main commercial and economic partner. The strategic partnership between the two takes place within the framework of political dialogue and interaction in various fields of activity, including the key issues of bilateral economic co-operation. One of the crucial areas in EU-Russia co-operation is that of investment. Taken as a whole, the EU member-states are the largest foreign investor in Russia.

The activities of foreign investors in Russia are regulated by a variety of legal acts: international treaties; national laws and domestic regulations; laws and domestic regulations specially drawn up to regulate investment activities; and, in addition to all these, the legislation of the many constituent subjects of the Russian Federation.

Russia is a signatory to several multilateral international treaties. Among them may be noted: the Multilateral Investment Guarantee Agency or MIGA (Seoul 1985, in force since 1988); the Partnership and Co-operation Agreement (Corfu, 24 June 1994), establishing a partnership between Russia, on the one hand, and the European Communities and their member-states, on the other; and the Energy Charter Treaty (1994). In addition, Russia has concluded about sixty bilateral agreements with other countries concerning the encouragement and mutual protection of investments.

Two federal laws form the basis for the legal regulation of foreign investments in the Russian Federation: the law "On Foreign Investments in the Russian Federation", (160 FZ, 9 July 1999); and the law "On Investment Activities in the Russian Federation in the Form of Capital Investments", (39 FZ, 25 February 1999). Investment of foreign capital in banks and other credit organisations, including insurance firms, are covered by RF legislation concerning banks, banking activities and insurance.

It is a priority for the Russian Federation to create a favourable investment climate in Russia, and to establish a system that effectively defends the rights of investors. European companies show a great interest in the investment opportunities in Russia. However, the lack of predictable and stable conditions for the effective investment of capital stirs serious apprehension among would-be outside investors. These concerns relate, first and foremost, to Russia's harsh tax policy, its high level of inflation, imperfect current laws about foreign investments, and further problems posed by corruption and poor standards of corporate management. The examples of the Yukos affair or Sakhalin-2 are evidence, Western investors believe that the risks of investing in Russia are high. The legal uncertainty about investor rights and their lack of protection by law are, therefore, one of the major issues affecting economic relations between Russia and the European Union.

* Adviser to the State Civil Service of the Russian Federation



To create a favourable investment climate for foreign investors it is essential, first and foremost, to raise the level of legal protection, under Russian law, for outside investment. Legislation in Russia has established a series of guarantees to the foreign investor. Among these guarantees are those covering: legal defence for the activities of outside investors in the Russian Federation; the right of foreign investors to make investments in a variety of ways; compensation if the property of a foreign investor or of a commercial organisation with foreign investors is nationalised or sequestrated; the proper resolution of disputes arising from the process of investment or of business activities within the Russian Federation; the right of the foreign investor to acquire bonds, allowances; rights provided to foreign investors by the constituent areas (regions & republics) of the Russian Federation and by local government bodies, and so on.

One of the most significant norms embodied in the 1999 law “On Foreign Investments”, ensuring stability for investors is the “grandfather” or stability clause (*clausula rebus sic stantibus*). This guarantees that unfavourable changes in legislation will not be extended to the investor over a definite period of time. The rules in existence when the investment was first made continue to apply. At the same time, a number of exceptions restrict the operation of this clause. Specifically, it does not apply to legal amendments aimed at defending the foundations of the constitutional system and of morality, and the health, rights and lawful interests of other people; nor does it extend to any amendments made to assure the country’s defence and security.

The clause is applicable, to those foreign investors and commercial organisations with foreign investment that are carrying out priority investment projects, but only extends to the commodities they import for their implementation. Priority projects refer to those involving particularly large sums, or those in which the share of the investor in the statutory capital is particularly small – the projects must be in a list confirmed by the government. Finally, the clause is applicable to other organisations with foreign investment where the foreign share exceeds 25%. The duration of the clause is usually guaranteed to the foreign investor for the payback period of the project, but not for any length of time in excess of seven years.

The most promising area in which the State’s ability to attract foreign investment might be improved is the creation of dependable legal guarantees and mechanisms for resolving disputes, giving the investor confidence in the reliable protection of his activities within the territory of the Russian Federation.

The law on foreign investments does offer a guarantee to the foreign investor that disputes arising from their investment and business activities in Russia will be appropriately resolved. Such disputes are dealt with in accordance with the international treaties signed by Russia and federal laws before a court or arbitration tribunal (national judicial system) or through international arbitrage (arbitration tribunal).

INTERNATIONAL ARBITRAGE

With the agreement of the parties, the following may be submitted for international arbitrage: disputes concerning contracts and other civil law relations arising in the pursuit of foreign trade and



other forms of international economic activity. It is a condition, however, that the commercial enterprise of at least one of the parties is located abroad; that the disputes are between enterprises created with the participation of foreign capital; or that the disputes are between international organisations, between their participants, and likewise their disputes with other legal entities.

At a national level the disputes are examined in accordance with the procedural law of that state and, as a rule, where the respondent or his property is located. There are a number of advantages for the foreign investor in having disputes examined by commercial arbitration compared to the national arbitration court.

Firstly, the speed, cost and simplicity of the procedures. The extensive opportunities for the parties in a dispute to have a say in the composition of the arbitration board resolving their disagreement is also an advantage. The parties may elect to put forward a single arbiter. Or they can each select an arbiter who will then, working with them, reach agreement on who will chair the discussion. Such a mechanism ensures impartiality and makes it possible to bring together the most competent specialists in the area of dispute.

Secondly, disputes are settled in camera. While hearings in national courts are, as a rule open to all and their decisions may be published in full, when a case comes before commercial arbitration the hearings are held in camera and if the decisions are published, they do not name the contesting parties or other information that would permit those parties to be identified.

Thirdly, a fundamental principle of commercial arbitration is that any decision so reached is final and binding. It cannot be appealed or altered and may be forcibly enforced quickly.

The greatest number of cases are heard and resolved at the International Commercial Arbitration Court (ICAC) of the RF Chamber of Commerce and Industry.

INTERNATIONAL COMMERCIAL ARBITRATION COURT OF THE CHAMBER OF COMMERCE AND INDUSTRY OF THE RUSSIAN FEDERATION

The activities of the Court were laid down in the federal law “On International Commercial Arbitration” (7 July 1993). A variety of problems may be brought before Court. Frequently, it deals with disputes concerning the validity of transactions, the scope of the arbitration clause, matters of jurisdiction, the operations of branch enterprises and offices representing foreign legal entities and, finally, cases linked to legal aspects of tax and excise.

A party may only appeal to the ICAC if an arbitral agreement has been existed. An agreement about arbitration may be included as a clause within a contract or be concluded subsequently as a separate agreement (arbitration contract) established in order to resolve an already existing dispute (arbitral record). The autonomy and judicial independence of the arbitration agreement means that if the contract proves invalid this does not render that agreement invalid, no matter what the form in which it was concluded. Analysis of arbitration rulings in cases linked to the scope of the arbitration clause shows that it is extremely important that the range of individuals to which the



agreement is applicable should be precisely defined. These individuals should also have given their agreement for disputes to be handled by commercial arbitration.

In practice model agreements, recommended by the established arbitration institutions, are frequently used. ICAC recommends that an arbitration clause with the following wording be included in contracts:

“All disputes, disagreements or claims arising from, or linked to, the present contract (agreement), including matters concerning its execution, violation, termination or invalidity, must be resolved before the ICAC at the RF Chamber of Commerce and Industry in accordance with the Court’s rules and procedures”

DUAL TAXATION

Disputes concerning the avoidance of dual taxation also come before arbitration courts and are of topical relevance to European companies in Russia. In reaching their decisions Russia’s arbitration courts rely on the treaties the country has made with other states covering the avoidance of dual taxation.

One such case arose when a Finnish construction company acted as a sub-contractor in Russia without setting up a local office. Seeking to avoid dual taxation, the company referred to the 6 October 1987 agreement between the Soviet and Finnish governments about the avoidance of dual taxation in respect of income tax. This stated that the resident and permanent company office should pay all taxes in the country determined by the agreement (e.g. where the legal entity was registered). In this particular case if the foreign company had been working in another state without establishing a permanent office there, taxes were to be paid where the income was received. The one condition was that the duration of the work should exceed a certain length of time.

In the 1987 treaty on dual taxation this period was set at 36 months. The Finnish construction company was therefore liable to pay taxes according to Russian legislation if it had a permanent office or was working at a building site or on a project in Russia for more than 36 months. It would only be permitted to avoid taxes in Russia if the relevant body in the Russian Federation issued an official permit allowing the building site not to be regarded as a permanent office. International agreements do not specify which body is entitled to take such a decision; that has been left to the contracting parties under national legislation⁴².

The issue of dual taxation is one of the most urgent in the field of investment relations. The majority of authors who have examined and analysed world practice on this issue conclude that there are two principal ways of resolving the question. One, by improving national legislation and, the other by concluding of bilateral agreements covering the avoidance of dual taxation. There are other quite interesting proposals outlining different approaches to the subject. The English

⁴² Circular Letter No. 10 of the Presidium of the Supreme Commercial Court of the Russian Federation of December 25, 1996.



specialist T.F. Sutherland suggested that a universal Ministry of Finance be established with national functions and that a unified international tax be created on the income from transnational activities⁴³.

In Russia the terms of agreements about the avoidance of dual taxation are applied in two ways. Firstly, the prior release from taxation of the passive incomes from Russian sources of foreign legal entities. Secondly, the repayment of tax levied on the incomes received by foreign legal entities from sources within Russia. Common reasons for refusing to release a company from payment of taxes are: the lack of a certified copy of the agreement between the foreign legal entity and its Russian partner, outlining the payment of income; a change of identity between the named partner in applications submitted initially and subsequently. Sometimes refusal is based on the lack of a signature by an official from the tax body of the foreign government; or completion of the form in English prompts refusal; other reasons include the lack of a power of attorney entitling that tax agent to submit applications, and so on⁴⁴.

In discussing reform of the Russian tax system many authors and practitioners in the field have repeatedly suggested that in its partnership with European countries, the Russian Federation should not only consider the most successful experience of others in reforming national tax systems; it should also examine the modernisation of the secondary legislation of the European Union and, in particular, that concerning the avoidance of dual taxation.

APPLICATION OF RUSSIAN LAW IN CIVIL CASES

Russian legislation states that foreign people and entities should follow the civil-legal procedures laid down by national practice unless international treaties state otherwise. Confiscation of limited assets from foreign investors can only be justified by Russia's federal laws to the extent that it is necessary for the defence of the constitutional order; the defence of the morality, health and lawful interests of other people; and in pursuit of the country's defence and security. The application of clauses concerning the use of the national regime, however, has not always been uniform.

One interesting case was examined and described in an official letter of 18 January 2001 (No. 58), "A survey of decisions taken by arbitration courts in disputes concerning the defence of foreign investors", circulated by the Presidium of the RF Supreme Commercial Court. The highest instance of the Arbitration Court system in Russia examined a lawsuit brought by a foreign firm against a Regional land committee. This concerned the validity of part of the lease of a plot of land that set payment at a higher level than that levied on Russian businessmen. The Presidium concluded that the national regime was not in operation in this Region but a regime of most favoured commercial

⁴³ I.Z. Farkhutdinov. *Mezhdunarodnoye investitsionnoye pravo i protsess* (International Investment Law and Procedure). Moscow, 2010, pp. 306-308.

⁴⁴ A.A. Petryshkin. *Primeneniye soglasheniy ob izbezhanii dvoynogo nalogooblozhenia* (Application of Agreements on Avoidance of Double Taxation. 1999, pp. 42-45.



partner⁴⁵. This is an unexpected decision. The federal law “On Foreign Investments”, to which the plaintiff was appealing in justification of his demands, states unambiguously, in the clauses concerning the principles establishing the legal status of the investor, that the national regime is in force for foreign investors in this Region. The law “On Foreign Investments” envisaged no restriction on the rights of foreign investors in leasehold payments. It thereby did not lay down grounds for changing the interpretation of the concept, i.e. the reclassifying of the national regime into one of most favoured partner status⁴⁶.

BANS ON FOREIGN INVESTMENT IN SELECTED INDUSTRIES

Currently a draft law has been prepared providing “a list of the industries, types of production, varieties of activity and areas of the country where activities by foreign investors are forbidden or restricted”. This divides into two lists. The first list includes everything connected with nuclear weapons, uranium production, armaments and military equipment, means of coded messaging, genetic engineering, the pathogens of infectious diseases, narcotics and psychotropic substances, and the territory of all military installations. The second list includes all the restrictions on foreign investors in particular industries and types of activity. At present this list contains more than forty such items. These restrictions are imposed either through an RF Government decree setting (as a percentage) the maximum permissible share for a foreign investor in the statutory capital of an organisation, or the maximum allowable amount (by value) of foreign investment in the said project, or in the issue by the RF government of a licence or special permission.

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At present the Russian Federation is working to create a favourable investment climate, by providing the stable political and macro-economic conditions which can underpin the legal foundations for the activities of foreign investors. The overall aim is to make Russia more attractive to such outside investment.

Since the early 1990s various organisations have been set up to facilitate the attraction of foreign investment to Russia. Among them the Russian Centre for Support of Foreign Investment at the RF Ministry for the Economy; the National Association of Investment and Development Agencies; the Russian Agency for International Co-operation and Development; the North-Western Agency for Development and Investment. A government decree of 18 September 2004 established a Consultative Council for Foreign Investment in Russia. Within the Council operate working groups that cover the improvement of the investment climate and prepare proposals to be submitted to the RF government on improving conditions for the economic activities of foreigners in Russia.

⁴⁵ Circular Letter No. 58 of the Presidium of the Supreme Commercial Court of the Russian Federation of January 18, 2001: “Review of Commercial Court Practices of Resolving Disputes Relating to Protection of Foreign Investors.”

⁴⁶ I.Z. Farkhutdinov. *Mezhdunarodnoye investitsionnoye pravo i protsess* (International Investment Law and Procedure). Moscow, 2010, p. 219.



The most urgent problems arising out of the business partnership between the Russian Federation and EU countries are discussed as part of the Round Table of Russian and EU Business People, a forum for those who head companies in Russia and Europe. The main tasks of the Round Table are to draw up joint recommendations for improving conditions of trade and investment, and the development of business partnerships in order to create a shared economic space between Russia and the EU; participation in public discussions on strategic issues in Russian-European relations, based on the joint recommendations of the Round Table; support for an uninterrupted and ongoing dialogue between the business communities in Russia and the EU, on the one hand, with the political leadership, on the other, concerning the most topical issues in economic relations between Russia and the European Union.

The priority in improving the investment climate in Russia should be the amendment and additions to existing laws. Discrepancies between federal laws and those of the subjects of the Russian Federation should be eliminated. Making laws explicit, rather than referring to other legislative acts; the creation of additional State guarantees; simplification of the tax system; the adoption of international standards of accounting; simplification of excise legislation; the removal of unjustified administrative barriers; the defence of property rights; and the fight against red tape and arbitrary treatment. These measures will be implemented, in addition to the drafting of federal laws to amend the relevant laws, by administrative reform and the further anti-corruption policy of the State.

Furthermore, there are prospects for developing mutually-beneficial mechanisms for attracting foreign investment in particular sectors of the economy such as, for example, agriculture which is in acute need of capital. To activate this process it makes sense to offer certain benefits and guarantees for investors.

Only action on the part of the Russian government in ensuring favourable conditions for attracting foreign capital and the reform of legislation concerning foreign investment will secure the long-term practical co-operation with the European Union and European companies.



Impact of the Convention for the Protection of Human Rights and Fundamental Freedoms on the Russian Legal System

by

Dr. Anton Burkov*

RUSSIA'S ACCESSION TO THE COUNCIL OF EUROPE

On 6 May 1992 the Government of the Russian Federation expressed in its letter to the Secretary General of the Council of Europe the wish to be invited to join the Council of Europe, and declared itself willing to respect the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms (Article 3 of the Statute of the Council of Europe). However, on 28 February 1996, the Russian Federation acceded to the Statute of the Council of Europe without meeting all of the human rights requirements for member States.

The accession occurred despite an unfavourable *ad hoc* Report by the Eminent Lawyers Group⁴⁷, which concluded that:

“The legal order of the Russian Federation does not, at the present moment, meet the Council of Europe standards as enshrined in the Statute of the Council and developed by the organs of the European Convention on Human Rights⁴⁸.” The same evaluation of the Russian legal system was given by the Director of the Legal Department of the Russian Ministry for Foreign Affairs, A. Khodakov, in the Explanatory Note on the Issue of Signing the European Convention for the Protection of Human Rights and Fundamental Freedoms by the Russian Federation, dated 30 January 1996.

* Dr. Anton Burkov, PhD (Cantab), LL.M (Essex), kandidat uridicheskikh nauk (Tumen State University), a law degree (Urals State Law Academy). This article is based on research conducted for PhD thesis at the University of Cambridge. For more detail on the research results in English please refer to Burkov A., “The European Convention for Human Rights and Fundamental Freedoms in the Russian Legal System” in *The European Convention for Human Rights and Fundamental Freedoms in Central and Eastern Europe*. (Utrecht: Eleven International Publishing). Forthcoming in 2010; in Russian – Burkov A. L. *Konventsia o Zashchite Prav Cheloveka v Sudakh Rossii* (The Convention for the Protection of Human Rights in Russian Courts). Moscow: Wolters Kluwer, 2010.

⁴⁷ The Eminent Lawyers Group is a group of legal experts on human rights set up by the Council of Europe in order to establish whether the Russian Federation legal order was in line with the Council of Europe’s human rights standards for the purpose of Russia’s accession to the Council of Europe.

⁴⁸ Rudolf Bernhardt et al., “Report on the Conformity of the Legal Order of the Russian Federation with Council of Europe Standards,” *Human Rights Law Journal* 15, no. 7 (1994). P. 287.



On 5 May 1998 the Convention entered into force with regard to the Russian Federation. From then on, those under the jurisdiction of the Russian Federation were allowed to bring violations of the Convention before the European Court of Human Rights (the ECHR), and, more importantly, to seek legal protection within the national legal system by invoking the Convention's guarantees before national courts.

The main aim of international human rights law is “to bring human rights home.”

As far as the Convention is concerned, the core of this aim is outlined in its Article 1. Under Article 1, the Russian Federation has undertaken an obligation “to secure to everyone within [its] jurisdiction the rights and freedoms defined in Section I of [the] Convention.” Article 1 does not merely oblige High Contracting Parties to respect human rights and fundamental freedoms, but also requires them to protect and to remedy any breach at subordinate levels⁴⁹.

THE CONSTITUTION OF THE RUSSIAN FEDERATION ON THE IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Under Article 15(4) of the Constitution, the international treaty of the Russian Federation becomes part of the Russian legal system. Unlike the USSR or RSFSR Constitutions, Article 15(4) of the Russian Constitution clearly affirms the domestic status of international law in the Russian Federation, stating that:

“The commonly recognised principles and norms of international law and the international treaties of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation establishes other rules than those envisaged by a statute, the rules of the international agreement shall be applied.”

Article 15(4) of the 1993 Constitution should be read (and interpreted) in conjunction with other constitutional norms and particularly with Article 46(3):

“Everyone shall have the right to appeal, according to international treaties of the Russian Federation, to international bodies for the protection of human rights and freedoms, if all existing internal state means of legal protection have been exhausted.”

Article 46(3) of the 1993 Constitution of the Russian Federation provides that, when international guarantees are not complied with by Russian authorities within the Russian legal system, victims have the right to bring the violation to the attention of an international tribunal. Therefore, Article 46(3) indirectly requires that international human rights principles be respected at the national level in the first instance.

⁴⁹ *Ireland v. UK. Judgment of 18 January 1978* 2 E.H.R.R. no. 25. Para 239.



Top of the hierarchy of national legislative acts in the Russian Federation is the Constitution, followed by the federal constitutional statutes and then the regular federal statutes. The second sentence of Article 15(4) places norms of international law at the same level as national legislative acts, with priority given to international treaties in cases of conflicts of norms between the two⁵⁰.

What the Constitution omitted was the status of the practices of treaty bodies such as the ECHR. The review of the development of legislation and subordinate law fills this gap.

RUSSIAN LEGISLATION ON THE DOMESTIC STATUS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN COURT OF HUMAN RIGHTS CASE-LAW

The 1995 Law “On International Treaties” (the 1995 Law) reiterates constitutional provisions regarding the domestic status of international treaties.

Under Article 3 of the Federal Constitutional Law No. 1-FKZ of 31 December 1996 “On the Judicial System of the Russian Federation” (the 1996 Law) all Russian courts must apply “generally recognised principles and norms of international law and international treaties of the Russian Federation.” Once again the Russian Federation emphasised the domestic status of international treaties to which Russia is a party. The main feature of this Law is that, for the first time in Russian legislation, judges had direct jurisdiction over the application of the norms of international law.

In 2001 and 2002 respectively, provisions similar to the provision contained in the second sentence of Article 15(4) of the Constitution were incorporated into new Criminal and Civil procedure codes: Part 2 of Article 1 of the Civil Procedure Code of the Russian Federation and Part 3 of Article 1 of the Criminal Procedure Code of the Russian Federation.

A great step forward in developing the mechanism for the domestic applicability of international law was made by the Law No. 54-FZ of 30 March 1998 “On the Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms” (the 1998 Law). According to the last paragraph of Article 1 of the 1998 Law, the Russian Federation recognises compulsory jurisdiction of the Court regarding the interpretation and application of the Convention. The 1998 Law was the first legislative act that recognised the decision of an international tribunal as a binding authority in interpreting provisions of international treaties.

The question remains whether the Russian Federation accepts legal principles developed by the ECHR against other member-states as legally binding for the Russian authorities. The Constitutional Court has given Article 15(4) a wider interpretation so that the entire ECHR case-law was admitted as a source of Russian law.

⁵⁰ Provisions similar to the second sentence are incorporated in Part 2 of Article 1 of the Civil Procedure Code and Part 3 of Article 1 of the Criminal Procedure Code, and many other laws.



IMPLEMENTATION OF STRASBOURG COURT DECISIONS IN DOMESTIC COURTS

The Constitutional Court

There have been many judgements by the Constitutional Court on the issue of the implementation of Strasbourg decisions domestically. Two recent examples include:

- a) In its judgment of 5 February 2007 No. 2-P the Constitutional Court recognised the possibility that individuals under Russian jurisdiction might be able to argue cases based on the ECHR case-law before national courts. The Constitutional Court did not limit the binding force of ECHR case-law to just those judgments rendered against Russia.

The Constitutional Court arrived at the conclusion that, in addition to the text of the Convention, judgments of the ECHR formed a part of the Russian legal system. In other words, judgments of the ECHR were recognised as sources of Russian law and law enforcement practice, thus, they must be taken into account when cases are considered by national courts.

- b) On 26 February 2010, the Constitutional Court of the Russian Federation delivered its judgement N 4-P, which stated that the parliament has the obligation to introduce “a mechanism of execution of final judgements of the European Court of Human Rights which would allow adequate redress for violations of rights determined by the European Court of Human Rights”

In theory, the Constitution of the Russian Federation places the priority of norms of international law over national law. Nevertheless, until today, the opportunity to institute the reconsideration of a national case due to a judgement of the ECHR has only existed with regard to criminal and commercial cases. The Civil Procedure Code omitted this issue. According to the judgement of the Constitutional Court of the Russian Federation however, the legislator now has the obligation to amend the Civil Procedure Code so that it includes a mechanism for reconsideration of those cases, giving priority to judgements by the European Court of Human Rights against Russia.

The Constitutional Court of the Russian Federation differs from other courts in its regular practice of implementation of the Convention in its judgements.

During the period following the accession of the Russian Federation to the Council of Europe on 28 February 1996 and before the ratification of the Convention on 5 May 1998, the Constitutional Court of the Russian Federation was the first to implement the norms of the Convention (when the Convention was not yet in force for Russia). Over this period, there were three Constitutional Court judgements containing references to the Convention.

By August 2004, there had been 54 judgements quoting the Convention of a total of 166 since Russia's accession to the Council of Europe and 116 since the Convention came into force in the Russian Federation on 5 May 1998. During the same period, only 12 out of the 54 judgements of the Constitutional Court of the Russian Federation contained references to the case-law of the ECHR. The other 42 judgements only referred to the norms of the Convention, which can hardly be



called “implementation” of the Convention given that: “States give effect to the Convention in their legal order, in the light of the case-law of the European Court of Human Rights” (Recommendation of the Committee of Ministers of the Council of Europe Rec(2004-5).

Since 2004, there have been some changes in the practice of implementation of the Convention by the Constitutional Court of the Russian Federation. For example, from August 2004 to January 2008, the Constitutional Court referred to the Convention more often than before 2004. At the same time the quality of implementation of the Convention improved.

We must not forget that Russia is not Moscow and the Constitutional Court of the Russian Federation does not represent the entire Russian Judicial System. Therefore, the question is whether courts of general jurisdiction headed by the Supreme Court will follow the positive practice of the Constitutional Court of the Russian Federation.

The Supreme Court

The Supreme Court does not apply the Convention with any degree of regularity or competence. This, in spite of the fact that the Supreme Court provided lower courts with a special Regulation on 10 October 2003 on the application of international law⁵¹. Likewise, the Supreme Court’s jurisprudence did not change significantly after the adoption of the 2003 Regulation. Though the Supreme Court started to invoke the ECHR’s case-law after 2003, it does so very rarely, with many faults and selectivity. Often the Supreme Court ignores Convention issues raised by applicants or gives no substantial grounds for rejecting applicants’ references to the Convention. We have witnessed a situation where a national supreme court, having issued a special regulation that orders all lower courts to apply the Convention by taking into account ECHR’s case-law, does not follow the provisions of its own document in its own jurisprudence. So there is little evidence of preventive application of norms of the Convention.

Nevertheless, there are recent examples of implementation by the Supreme Court of the Convention after the violation of the Convention was found by the ECHR. Therefore, the violation was allowed by national courts and determined by the ECHR. In the first issue of its official Bulletin for 2010, the Supreme Court of the Russian Federation published a judgement of the Presidium of the Supreme Court of the Russian Federation which demonstrates the application, by the Russian Supreme Court, of the Convention. This specific judgement at the highest level of the Russian Federation stipulates that a violation of the Convention is an admissible ground for reopening a criminal case. And this case is not the only example of reopening cases after a violation of the Convention was found by the ECHR.

⁵¹ Regulations by the Plenum of the Supreme Court are general statements of good judicial practice with no relation to the facts of particular cases based on review and analysis of the lower courts’ and the Supreme Court’s jurisprudence. They take the form of abstract norms that are authoritative on all lower courts, summarising the judicial practice of courts and explaining how particular provisions of statutes should be applied. They allow other courts to apply provisions of legislation consistently. Regulations have their legal basis in Articles 126 of the Constitution.



District Courts' Jurisprudence

The jurisprudence of the district courts seems to indicate a better understanding of the Convention. There is evidence that the rare occasions of the Convention's implementation by the district courts were prompted by applicants' arguments based on ECHR case-law, rather than on the courts' own initiative. The quality of the Convention's implementation directly depends on the arguments made by the parties and even on the training and books offered to judges by the applicants and by NGOs. However, the Supreme Court, by introducing the 2003 Regulation, has contributed to the level of awareness among district court judges in relation to the need to implement the Convention. This means that the Supreme Court's Regulations could be effective instruments, and therefore should be employed in order to improve the impact of the Convention.

For instance, in most defamation cases, and civil cases concerning a failure to investigate alleged killings, torture and disappearances, the Convention may afford strong support for the claimant.

Judges do not necessarily lack the knowledge of, and experience in the application of, the Convention but the motivation to implement the Convention. Judges of courts of general jurisdiction do not take the initiative to invoke the Convention guarantees. It is up to the party to plead the Convention's provisions to a judge. The more the judges face arguments based on ECHR case-law, the more likely they are to implement it.

Often the judges ignore ECHR case-law on purpose or simply state that the Convention is not applicable without giving legal ground for such a conclusion. Sometimes, in order to avoid application of the Convention, judges incorrectly apply the phenomenon of precedent or change the subject of the law suit.

Judges often refuse to apply ECHR case-law decided before 5 May 1998, stating that Russia ratified the Convention on 5 May 1998, and so Russia is bound only by cases delivered after 5 May 1998.

CONCLUSION

We should hope that ratification by the Russian Federation of Protocol 14 in February 2010 begins not only the long awaited reform of the ECHR, but also a campaign that aims to improve the work of Russian courts and therefore provide fewer reasons for applications by individuals to the ECHR. Political will (the ratification of Protocol 14) for improvement has been demonstrated. There are recent examples that highest courts follow this political will or, in other words, follow the provision of Article 15(4) of the Russian Constitution. It is very important to remember that we can lower a significant number of applications before the ECHR by accurately using the principles of the Convention in the light of the case-law of the ECHR before national courts. This means that consideration of the merits of every case pending before a court of first instance can be undertaken under the auspices of the Convention. Therefore, it is crucial that the highest courts demonstrate a good example in the conduct of such practice. The other components of the Russian judicial system will then follow that positive example.



A Brief Overview of the Russian Legal System

by

Kristoffer Svendsen*

Ivan Bunik*

INTRODUCTION

The general system of jurisprudence in Russia is part of the European continental system of “civil law”. The current legal system is the result of drastic historical changes, retaining traces of the Tsarist Russian legal system and the Soviet system of law. It is close to that of Germany, though Netherlands experts have helped in drafting the new Civil Code.

Russia’s current Constitution of 12 December 1993⁵² adopted the principle of the separation of power between the executive, legislative, and judicial branches. Russian courts are split into three separate court systems: the Constitutional Court of the Russian Federation, Courts of General Jurisdiction, and the Arbitrazh (Commercial) Courts⁵³. Furthermore, the Office of the Procurator General (prosecutor) is the body in charge of state prosecution in courts⁵⁴.

The Ministry of Justice⁵⁵ (MinJust) is a federal executive body. According to changes introduced by the Decree of the President of the Russian Federation No. 1313 of October 13, 2004⁵⁶, the MinJust prepares and executes state policy and regulations regarding the fulfilment of criminal sentencing, and registers non-profit organisations and offices of international organisations, public organisations, political parties, and religious organisations. The MinJust also prepares and executes state policy and regulations regarding registration of organisations engaged in the practice of law,

* LL.B. (Bond), LL.M. (Bond), LL.M. (MGIMO-University of MFA) is a Research assistant at the EU-Russia Centre.

* J.D. (MGU), Ph.D. (MGIMO-University of MFA), is a partner at Timofeev, Vahrenwald & Partners LLP.

⁵² The Constitution of the Russian Federation was adopted by national voting on 12 December 1993. In English at <http://www.constitution.garant.ru/DOC_11113000.htm#sub_para_N_1111> retrieved at 11 March 2010.

⁵³ Ibid Art 125-127. See also the Federal Constitutional Law ‘on the Judicial System of the Russian Federation’ of 31 December 1996 № 1-FKZ Russian Federation.

⁵⁴ The Federal Law on Prosecution Services of the Russian Federation of 17 January 1992 N 2202-1. English extract at <http://eng.genproc.gov.ru/legal_basis_of_the_activities/> retrieved at 11 March 2010.

⁵⁵ Ministry of Justice of the Russian Federation, <<http://www.minjust.ru/ru/>> retrieved at 12 March 2010.

⁵⁶ Decree of the President of the Russian Federation No. 1313 of October 13, 2004 "Issues of the Ministry of Justice of the Russian Federation" retrieved 30 April 2010, <http://www.minjust.ru/ru/about/regulations/>



notarial services, and civil registration; and regarding the maintenance of established court procedure and the execution of judgements⁵⁷. It is apparent from these amendments that the Ministry of Justice, as an executive body, has no power to appoint judges. All judges in Russia are appointed by the President, except for the judges of the Supreme Court, the Supreme Arbitrazh (commercial) Court and the Constitutional Court, which are appointed by the Council of the Federation upon the recommendation of the President⁵⁸.

The Constitutional Court of Russia, with the constitutional and charter courts of its republics and other subjects, is a court of constitutional review. They review cases questioning the compliance of Federal law, normative acts of the President, the Council of the Federation, the State Duma, the Government, Republics' constitutions, and other normative acts of Subjects with the Russian Constitution, or the Constitutions or Charters of the republics and other regions⁵⁹. The Constitutional Court of the Russian Federation is largely modelled on the Federal Constitutional Court of Germany.

The Courts of General Jurisdiction are a four-tier system with the Supreme Court of the Russian Federation at the top. The three-tier military court system is an integrated part of this branch of courts. The Courts of General Jurisdiction deal with civil, criminal, and administrative cases. In addition to supervising the military court system, the Supreme Court also supervises subordinate courts in the system of courts of general jurisdiction and specialised courts. The Supreme Court may give clarifications on issues of judicial practice and has the right of legislative initiative⁶⁰. The Courts of General Jurisdiction are similar to other courts of general jurisdictions, in such countries as Austria, Germany, etc. However, these courts do not have legislative initiative, but they do have jurisdiction over commercial disputes where individuals are concerned.

The Courts of General Jurisdiction have exclusive jurisdiction over many legal areas. The civil courts of general jurisdiction deal primarily with relations between individuals in the areas of contract, tort, property and family law. Disputes involving individuals are resolved in the courts of general jurisdiction, while economic disputes between legal entities are resolved in the Arbitrazh (commercial) courts. In addition, parties may, by an agreement, provide for the arbitration of disputes in Russia or abroad. Russian law allows parties contractually to choose the application of foreign law, with some restrictions. However, if the parties agree to have a dispute resolved in a foreign jurisdiction by arbitration, a Russian court will not hear the dispute.

⁵⁷ Ibid.

⁵⁸ The Constitution of the Russian Federation was adopted by national voting on 12 December 1993, art. 83 f) and 102 g). In English at http://www.constitution.garant.ru/DOC_11113000.htm#sub_para_N_1111 retrieved at 11 March 2010.

⁵⁹ Constitution, above 1, Art 125. For more information, see Federal Constitutional Law No. 1-FKZ of 21 July 1994 'On the Constitutional Court of the Russian Federation'.

⁶⁰ Federal Constitutional Law 'on the Judicial System of the Russian Federation' of 31 December 1996 № 1-FKZ Russian Federation, art 19.



It is worth noting that, although the USSR (and Russia as a successor of the USSR) acceded to the UN Convention on the Recognition and Enforcement of Foreign Arbitration Awards⁶¹ there is no legislation requiring the enforcement of foreign court judgments, except in cases where a separate treaty provides for reciprocal enforcement⁶². Russia has not ratified all of the Hague Conventions.

Commercial disputes in Russia are heard by the Arbitrazh (Commercial) Courts. The Arbitrazh Courts consist of a three-tier system with the Supreme Arbitrazh Court of the Russian Federation as its supreme judicial body. The Arbitrazh Courts should not be confused with international or internal arbitration institutions; their structure was inherited from Soviet law. During the Soviet Union, the State Arbitrazh settled disputes between state enterprises⁶³.

The first levels of these courts are located in each of the 83 subjects of the Russian Federation. The Arbitrazh Courts are specialised in commercial cases and extend their jurisdiction to any case concerning commercial disputes and to cases concerning other commercial activities where both parties are business entities, or individuals engaged in commercial activities without a legal entity and with the status of an individual entrepreneur. In this case, it does not matter what kind of legal relations serve as the basis for the arisen dispute: civil, administrative or other relations⁶⁴. However, the Arbitrazh Courts do not handle disputes related to criminal activities, even though they might include economic or business activities.

The Arbitrazh Courts do not deal with disputes where parties are individuals and not registered as sole proprietors, if they are not otherwise provided for in the Arbitrazh Procedural Code⁶⁵.

⁶¹ The USSR acceded to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards, dated 10 June 1958, on 22 November 1960

⁶² Russia has entered into treaties on the reciprocal enforcement of foreign court judgments with only a few countries (mostly Eastern Europe).

⁶³ Legal Communication 'Arbitrazhnyi (commercial) courts', at Russian Law Online <<http://www.russianlawonline.com/content/russia-court-system-arbitrazhny-commercial-court>>

⁶⁴ The Code of Arbitrazh (Commercial) Procedure of the Russian Federation of 24 June 2002 N 95-FZ Art. 1-3. The jurisdiction of the Arbitration court of the subject of the Russian Federation covers economic disputes, arising from administrative and other public legal relations, and other cases, concerning the exercise by legal entities and individual entrepreneurs of business and other commercial activities, such as disputes: (1) about disputing normative legal acts concerning rights and legitimate interests of an applicant in the area of business and other commercial activities; (2) about disputing non-normative legal acts of the state bodies of the Russian Federation; (3) about administrative offences where federal laws refer their consideration to the jurisdiction of Arbitration courts; (4) about the recovery from legal entities and individual entrepreneurs, engaged in business and other economic activities, compulsory payments and sanctions, unless federal laws provide for another procedure for the recovery thereof.

⁶⁵ The general rule is that foreign persons have the same procedural rights as Russian citizens. Chapter 43 of the Civil Procedural Code and Chapter 32 of the Arbitrazh Procedural Code give a description of rights and obligations of foreign persons concerning the court and the Arbitration procedures.



The Supreme Arbitrazh Court exercises judicial supervision and acts as a court of first instance in certain cases⁶⁶. The Arbitrazh Courts are, in some respects, similar to the Commercial Courts in England and Wales, which are a sub-division of Queen’s Bench Division of the High Court of Justice. The Commercial Courts of England and Wales have jurisdiction over “any claim arising out of the transaction of trade and commerce”⁶⁷.

JUDGES

In Russia, judges are obliged by law to be independent. The law on the status of judges⁶⁸ states that they should only submit to the Russian Constitution. Further, the law states that “judicial power is autonomous and acts independently from legislative and executive powers”⁶⁹.

Furthermore, a judge of a court of the Russian Federation must perform his or her duties and conduct his or her private affairs in such a way that his or her objectivity, justice and impartiality as a judge are not compromised. A judge cannot be a deputy, obtain political relations, and mix private business with the office of a judge. However, a retired judge has the right to work in the area of jurisprudence⁷⁰.

Russian citizens may apply become judges of Russian courts an accordance with the requirements laid down in article 4 of the law. A Russian citizen not less than 25 years old, with higher legal education, with no less than five years of experience in the legal profession, and with no defaming acts the can become a judge. The applicant has to pass a qualifying examination and receive a recommendation of the Qualifying Collegium of Judges before the applicant may become a judge⁷¹. The above-mentioned age requirements are raised for judges of higher courts⁷².

Each applicant fulfilling the requirements has the right to sit the qualifying examination, which is conducted by an examinational body of MinJust with the personal staff of the Qualifying Collegium of Judges. Every applicant meeting the requirements has also the right to apply to the qualifying collegium of judges for the recommendation. The Qualifying collegium of judges considers the applicant and his or her results giving the chairman of the appropriate court its conclusion about

⁶⁶ Federal Constitutional Law ‘on the Judicial System of the Russian Federation’ of 31 December 1996 № 1-FKZ Russian Federation, art. 23.

⁶⁷ Civil Procedure Rules of England and Wales, amendment 51st, Rules 58.1. For a more detailed article on the Russian court structure, see EU-Russia Centre, The Judicial System of the Russian Federation located at: <http://www.eu-russiacentre.org/russia/judicial-system>

⁶⁸ Judges’ status law of the Russian Federation of 26 June 1992 N 3132-1, <http://www.supcourt.ru/EN/jstatus.htm> retrieved 23 March 2010.

⁶⁹ Ibid art. 1.2.

⁷⁰ Ibid art. 3.

⁷¹ Ibid art. 4.

⁷² A citizen of the Russian Federation not less than 30 years old can become a judge of the higher court, and a citizen of the Russian Federation not less than 35 years old with the experience in the legal profession not less than ten years can become a Justice of the Supreme Court of the Russian Federation or of the Highest Court of Arbitration of the Russian Federation.



every applicant recommended. The applicants are elected to the office of a judge on a competitive basis⁷³.

The Russian Federation is a relatively new country in the process of transformation from its Soviet past. Many of the current judges were educated during the Soviet Union, under a very different legal system. This is more common in the Courts of General Jurisdiction and among the lower levels of the courts more generally. Furthermore, most of the judges on the bench are former prosecutors and tend to favour the view of the prosecution. In some cases, it may appear that a case is being tried against two prosecutors. The prosecution often finds itself instructing judges on how to decide in many cases, such as that of former Moscow City Court Judge Kudeshkina⁷⁴. Further, the HSBC/Hermitage and three whales (tri kita) cases are good examples of how entangled the web of corruption can become involving law enforcement, high ranking government officials, tax officials, and various courts⁷⁵.

Unfortunately it is not uncommon in European countries to find close ties between judges, prosecution, or government. The curious case of Italian Supreme Court of Cassation judge, Corrado Carnevale testifies to the possible close ties between the Italian mafia and the courts⁷⁶. Similarly, Italian Prime Minister Berlusconi has been involved in a string of court cases in which the investigators alleged 'money-laundering, association with the Mafia, tax evasion, complicity in murder and bribery of politicians, judges and the finance ministry's police'⁷⁷. Doubt has also been cast on the independence of the French judicial system after the public prosecutor appealed against an acquittal in the criminal "Clearstream" smear-campaign trial against former Prime Minister Mr. de Villepin, in which Mr Sarkozy was one of the civil plaintiffs⁷⁸.

⁷³ Judges' status law of the Russian Federation of 26 June 1992 N 3132-1, <http://www.supcourt.ru/EN/jstatus.htm> retrieved 23 March 2010, art. 5.

⁷⁴ Olga Kudeshkina, (2010) 'Tackling Russia's legal nihilism' OpenDemocracy.net retrieved 30 April 2010, <http://www.opendemocracy.net/od-russia/olga-kudeshkina/tackling-russia%E2%80%99s-legal-nihilism>.

⁷⁵ Investigations, (2008) 'Investigation of the Tri Kita Case' published 2 April 2008 Novaya Gazeta, retrieved 30 April 2010, <http://en.novayagazeta.ru/data/2008/21/03.htm>.l and Clifford J. Levy, (2008) 'Kremlin Rules, An Investment Gets Trapped in Kremlin's Vise' New York Times published 24 July 2008, retrieved 30 April 2010, <http://www.nytimes.com/2008/07/24/world/europe/24kremlin.html?pagewanted=all>.

⁷⁶ Rory Carroll, 2001, 'Pizza, pasta, bribery and corruption' Guardian, published 11 July 2001. <http://www.guardian.co.uk/world/2001/jul/11/worlddispatch.rorycarroll> retrieved at 25 March 2010.

⁷⁷ The Economist, 2001, 'An Italian story' the Economist print edition 26 April 2001, http://www.economist.com/world/displaystory.cfm?story_id=587107

⁷⁸ Economist, 2010, 'France's judicial system, clear as mud' the Economist print edition 4 February 2010. http://www.economist.com/world/europe/displaystory.cfm?story_id=15464925&fsrc=rss retrieved at 25 March 2010.



THE PROSECUTION SERVICE

Peter the Great laid the foundations of the Prosecution Service of Russia. The powers of the prosecutors were drastically reduced in the legal and judicial reforms of Aleksandr II in 1864, but the Bolsheviks restored many previous powers. Today, the Prokuratura (Office of the Prosecutor General) is a part of the federal government, with its own status under the Constitution, independent of the judicial system. It is the supervising agency of observance and compliance of the law in Russia. The Prokuratura is at the head of the prosecution services including the Chief Military Prosecutor. The Prokuratura also includes the Research Advisory Council, which is an advisory body offering scientific and methodical assistance. Additional bodies are: the Research Institute of the Problems of Strengthening of Law and Order, the Institute of Professional Development of Executive Staff, and institutes for retraining prosecution officers and investigative authorities⁷⁹.

An interesting aspect of the Russian legal system is the prosecution's ability to appeal⁸⁰.

“Article 36 provides for a right to file an appeal in cassation, to appeal, or to appeal in exercise of supervisory power against an unlawful or unfounded court decision. Prosecutors may demand the record of any case or category of case where the decision has entered into legal force.”⁸¹

The Prokuratura can appeal against court decisions. This role of the prosecution may be seen from two different perspectives; a prosecutorial appeal on the same basis of appeals lodged by individual citizens. The other perspective may be understood as the systematic supervision of the courts, “a general task to supervise and control the functions of the courts.”⁸²

However, the subject of the prosecution's power to appeal has been raised many times in the European Court of Human Rights, for example in the cases of *Ryabykh v. Russia* (52854/99, Judgment of 24 July 2003), which followed the decision in *Brumarescu v Romania* (28342/95, Judgment of 28 October 1999) and *Nikitin v Russia* (50178/99, Judgment of 20 July 2004). This led to a limitation of the prosecution's power to appeal. The prosecutor may no longer seek to reverse an acquittal or increase a sentence in criminal cases and supervisory review must be sought within 12 months in all cases.

⁷⁹ The Prosecutor General's Office of the Russian Federation, 'History of Prosecution Service of Russian Federation' <http://eng.genproc.gov.ru/history/> retrieved at 26 March 2010.

⁸⁰ The Federal Law on Prosecution Services of the Russian Federation of 17 January 1992 N 2202-1, art. 36.

⁸¹ J. Hamilton and H. Suchocka, (2005) 'Opinion on the Federal Law on the Prokuratura (Prosecution's Office) of the Russian Federation Venice Commission adopted by the Commission at its 63rd plenary session (Venice, 10-11 June 2005), opinion No. 340/2005, p. 11.

⁸² Hartmuth Horstkotte, (1998) 'The relationship between the Prokuratura/Public Prosecution Offices and the judicial system (appeals by the prokuratura/Public Prosecution Offices against court decisions) p. 64 of 'the Prokuratura in a state governed by the rule of law' Council of Europe.



Article 22 defines the specific instruments of prosecutorial supervision and grants the prosecutor power to access all documents and materials of entities and can demand clarification of all matters relating to the violation of the law. Further, the article states that "officials of the bodies referred to in Article 21, item 1[...] shall be bound to comply immediately with any requests by the prosecutor or his deputy to carry out checks and inspection."⁸³ Article 6 of the law presents the principle that all requests by the prosecution are binding. This principle raises concern over whether such powers do violate the system of the separation of powers, eliminate the division of authority and grant the prosecution the rank of an authority above all other bodies.

QUALITY OF LEGAL COUNSEL

The legal profession has become one of the most prestigious and best-paid professions in Russia. The competition to enter law universities is high and law students study between five and six years in a university⁸⁴. Many practising lawyers and legal professionals also have a doctorate in law. Knowledge of the law is at high level within the profession as a result of long legal education and challenging oral exams, leading to graduates learning law by rote.

Russian legal practitioners are split into lawyers and advocates, a common separation in civil law. Lawyers are law university graduates and advocates are law university graduates with experience and who have passed bar examinations. Therefore, all law graduates in Russia are lawyers, but not every lawyer may become an advocate. Today, any individual with higher legal education has a right to offer paid-for legal services. However, there are special requirements for those who become advocates⁸⁵. This allows easy access to lawyers, but it is preferable to appoint lawyers from the major law universities with foreign language skills and law firms with foreign qualified specialists.

The Federal law "On Advocates' activities and the Bar (Advokatura)"⁸⁶ contains the same principles as contained in most European legislation, such as the duty to deny a client's requests if these are known to be of an illegal character, represent conflict of interest, client-attorney privilege, and following the client's instructions. The duties of an advocate likewise are reflective of certain ethical principles stated in the *Code of Professional Ethics of Advocates*⁸⁷. An advocate must honourably,

⁸³ The Federal Law on Prosecution Services of the Russian Federation of 17 January 1992 N 2202-1, art. 22.4.

⁸⁴ Five years – specialist in law (heritage of the Soviet/Russian educational system) and six years – bachelor and a master in laws (according to the Bologna process).

⁸⁵ The Federal Law on advocacy of the Russian Federation of 31 May 2002 №69-FZ, art.9-13 – requirements to become a lawyer: higher legal education (received in educational institution of higher vocational education which has state accreditation) or an academic degree on a legal speciality; at least two years' work experience in legal specialisation or training in an advocacy company not less than one year; and passing a special qualification examination and taking an oath of a lawyer.

⁸⁶ The Federal law of 31 May 2002 "On Advocates' activities and the Bar (Advokatura)" N 63-FZ.

⁸⁷ Code of Professional Ethics of Attorneys, Adopted by the first all-Russia Congress of attorneys 1 January 2003 (changed and amended by the second all-Russia Congress of attorneys 08.04.2005), retrieved 27 April 2010, <http://www.soeka.ru/eng/co-operation-eng.html>.



reasonably, and in good faith insist upon the rights and legal interests of his client, using all means not prohibited by Russian legislation. However, it is worth noting that jurists are not under these obligations.

