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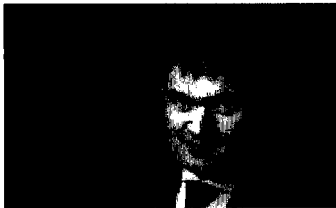
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Guest post: merger of Russia's high courts, made in heaven?

Oct 16, 2013 11:56am by guest writer



By Roman Khodykin of Berwin Leighton Paisner

Last week, following the announcement of president Vladimir Putin's decision to liquidate the Supreme Arbitration Court and subordinate all commercial courts to another branch of the judiciary, about one in eight Supreme Arbitration Court judges and a number from other commercial courts immediately tendered their resignations in protest. Are they right to be so concerned about the impact of the reforms?

Since the Soviet era Russia has had two independent branches of the judiciary – general jurisdiction courts and so-called “arbitration” (or commercial) courts. Each branch has its own highest authority: the Supreme Court and the Supreme Arbitration Court.

The existence of two independent systems has resulted in competition between them. Often, litigants have paid the price of the courts playing off against each other. On a number of occasions the European Court of Human Rights found Russia to be in breach of the human rights convention for kicking a case about between the two branches. In some cases, the branches actually ruled differently when the facts were the same, creating uncertainty and confusion.

The dual courts system was clearly far from ideal and had to be eliminated one way or another. What is not clear is whether the implementation of the reforms will help create a more efficient system or is instead a threat to the courts' independence.

In a merger of two courts, it is of paramount importance to keep the best judges from each system. The merger bill suggests that justices of the Supreme Court will retain their positions without further ado while their counterparts from the commercial courts will face an exam before a Special Commission comprising Supreme Court judges, academics, representatives of the Presidential administration and the Association of Russian Lawyers.

This raises two issues immediately. First, should a potential judge be subject to examination by state officials? Second, the Supreme Arbitration Court has historically attracted the most talented and experienced judges in the country. Those who resigned made it clear that they did not want to be tested by people less qualified than themselves.

When the decision to merge the two courts was first announced, it was unclear which would take preference. In essence, both branches deal with private matters but the Supreme Court's jurisdiction is broader and includes criminal cases.

Approaches in the two branches were somewhat different. Anton Ivanov, president of the Supreme Arbitration Court, was an avid innovator. He formally introduced a doctrine of precedent into Russian law, made a number of steps towards transparency and introduced e-filing and video-conferencing. Vyacheslav Lebedev, head of the Supreme Court, has preferred a more cautious approach and was more likely to follow the statute than to create judge-made law. Will the innovations of the Supreme Arbitration Court improving speed and transparency of dispute resolution be lost when control moves to the more conservative Supreme Court?

It goes without saying that development of the law should be encouraged and it is vital that the judiciary has the power to administer justice and protect people. However, in some cases, Ivanov's initiatives arguably went too far.

In particular, he was unhappy with the English courts for accepting cases between Russian parties and wanted to amend domestic legislation so that the Russian courts would have the power to set aside foreign judgements and international arbitration awards that "prejudice the interests of Russian parties". Ivanov also wanted to bar judges, arbitrators, lawyers and parties to such proceedings from entering Russia to seize and confiscate any Russian assets. A bill was introduced into parliament to implement this.

Clearly, there are numerous arguments for and against a merger of the highest judicial instances in a country where they have co-existed for decades. The process needs to be fully thought through, balanced and timely. However, the reform bill introduced into parliament provides for only six months to sort everything out, effectively leaving Russia in a state of turmoil.

For businesses, it is better to deal with the devil you know. Unpredictability for the near future could be a setback for Russia, especially given its stated goal of making Moscow a global business capital. Undeniably, there are issues between the two court branches which must be addressed. However, unless the changes are implemented with due care to preserve the best of the two systems, this may well be the worst court reform of the past 100 years.

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