

# EUROPEAN BUSINESS LAW REVIEW



Wolters Kluwer  
Law & Business

## **Distribution**

In North, Central and South America,  
sold and distributed by Aspen Publishers Inc.  
7101 McKinney Circle  
Frederick MD 21704  
United States of America

In all other countries, sold and distributed by  
Turpin Distribution  
Stratton Business Park  
Pegasus Drive, Biggleswade  
Bedfordshire SG18 8TQ  
United Kingdom

## **Subscriptions**

European Business Law Review is published bi-monthly. Subscription prices for 2014 [Volume 25, Numbers 1 through 6] including postage and handling:  
Print subscription prices: EUR 933/USD 1244/GBP 686  
Online subscription prices: EUR 864/USD 1152/GBP 635

This journal is also available online at [www.kluwerlawonline.com](http://www.kluwerlawonline.com). Sample copies and other information are available at [www.kluwerlaw.com](http://www.kluwerlaw.com). For further information please contact our sales department at +31 172 641562 or at [sales@kluwerlaw.com](mailto:sales@kluwerlaw.com).

## **Advertisements**

For Marketing Opportunities please contact [marketing@kluwerlaw.com](mailto:marketing@kluwerlaw.com).

## **Information**

Contributions should be emailed to Iris Chiu, Executive Editor, at [EBLRditorial@gmail.com](mailto:EBLRditorial@gmail.com).

This journal may be cited as [2014] EBLR 481-604.

## **Book Reviews**

Book reviews may be sent to Iris Chiu, Executive Editor,  
European Business Law Review at [EBLRditorial@gmail.com](mailto:EBLRditorial@gmail.com).

## **Copyright**

© 2014 Kluwer Law International

**ISSN: 0959-6941**

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, mechanical, photocopying, recording or otherwise, without prior written permission of the publishers.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th floor, New York, NY 10011, United States of America. E-mail: [permissions@kluwerlaw.com](mailto:permissions@kluwerlaw.com).

**Visit our website at [www.kluwerlaw.com](http://www.kluwerlaw.com)**

*Editorial Board*

- Guido Alpa** *General Editor*, Professor, La Sapienza, Rome, President of the Italian Bar.  
**Mads Andenas** *General Editor*, Professor, University of Oslo, Director of the Centre of Corporate and Financial Law, Institute of Advanced Legal Studies, University of London.  
**Giuseppe Conte** Professor of Law, University of Florence.  
**Iris H-Y Chiu** Executive Editor, Reader in Law, University College London.  
**Francesco Capriglione** Professor, Luiss University, Rome.  
**Jan Dalhuisen** Professor, King's College, London, and University of Utrecht.  
**Duncan Fairgrieve** Sciences-Po, Paris and the British Institute of International and Comparative Law, London.  
**Laurence W Gormley** Barrister, Professor of European Law, University of Groningen.  
**Stefan Grundmann** Professor, Humboldt University, Berlin.  
**Vassilis Hatzopoulos** Assoc. Professor of Law, Democritus University of Thrace (Greece).  
**Peter-Christian Müller-Graf** Professor, University of Heidelberg.  
**Renato Nazzini** Reader, University of Southampton.  
**Barry A K Rider** Director of the Institute of Advanced Legal Studies and Professor of Law, University of London; Tutor and Fellow, Jesus College, Cambridge; Barrister, England and Wales.  
**Jukka Snell** Professor, School of Law, University of Swansea.  
**Jan Wouters** Professor, University of Leuven.

*Editorial Advisory Board*

- Sir Christopher Bellamy**, Slaughter and May, London.  
**Sir William Blair**, Royal Courts of Justice, London.  
**John Board**, Professor, University of Reading.  
**Stephan Breidenbach**, Professor, Europa University Viadrina of Frankfurt (Oder).  
**Sir Ross Cranston**, Royal Courts of Justice, London.  
**Paul L Davies**, Professor, University of Oxford.  
**Jacqueline Dutheil de la Rochère**, Professor, University of Paris II.  
**Carmen Estevan de Quesada**, Professor, Universidad de Valencia.  
**Walter Baron van Gerven**, Professor, Leuven and Maastricht.  
**Roger Goebel**, Professor, Fordham University School of Law.  
**Sir Roy Goode QC FBA**, Norton Rose Professor of Law, Oxford.  
**Christos Hadjiemanuil**, Reader, London School of Economics.  
**Gerard Hertig**, Professor, ETH Zürich.  
**Klaus J Hopt**, Professor, Director of the Max-Planck-Institut of Comparative and International Private Law, Hamburg.

*Book Review Editor:*

**Duncan Fairgrieve**,  
Sciences-Po, Paris, and  
the British Institute of  
International and  
Comparative Law,  
London.

*Executive Editor:*

**Dr Iris Chiu**,  
Reader in Law,  
University College  
London.

- Guy Horsmans**, Professor, University of Louvain la Neuve, Brussels.  
**Kåre Lilleholt**, Professor, University of Oslo.  
**John Lowry**, Professor of Law, University College London.  
**The Rt Hon Lord Mance**, Supreme Court of the United Kingdom.  
**Michel Menjucq**, Professor, University of Paris I.  
**Giuditta Cordero Moss**, University of Oslo.  
**Dr Lazaros Panourgias**, European Investment Bank, Luxembourg.  
**Sir Richard Plender**, Royal Courts of Justice, London.  
**Sir Bernard Rix**, Royal Courts of Justice, London.  
**Roberta Romano**, Professor of Law, Yale Law School.  
**Marco Roscini**, Reader, University of Westminster.  
**David Vaughan CBE QC** London.  
**Erik Werlauff**, Professor of Law, Aalborg Universitet

## **Interaction between Russia and England in Civil Procedure**

ROMAN KHODYKIN\*

### **Abstract**

In civil or commercial disputes, the need sometimes arises to obtain evidence, to serve proceedings or other judicial documents, or to enforce some other judicial act in the territory of a foreign country.

Not only does this article present an overview of the Russian court system and its advantages and disadvantages, it also describes in great detail the legal assistance between Russia and England and covers the service abroad of judicial and extrajudicial documents, the taking of evidence abroad as well as the enforcement of English judgments in Russia.

### **I General Overview of Russian Court System**

Current Russian law is the result of a long and complex process of development. Its earliest recorded sources date to the Tenth Century AD. Legal norms contained in these sources derived from local customs under the influence of Byzantine, Norman and western European legal systems.

The most significant landmark in the early development of Russian law was the comprehensive reform by King (Tsar) Alexander II (the Liberator) in the middle of the nineteenth century. This reform created great opportunities for economic prosperity and the free development for citizens. Judicial reform was an important element of the general transformation. During this period, the first civil procedure code in Russia was promulgated. Adopted in 1864, it was based on the principles of equality of the parties, their freedom to decide the fate of the suit, adversariality, independence of the courts and free assessment of evidence. It guaranteed the opportunity to resolve any civil matter in a judicial forum.

In 1917 the Socialist revolution happened. The first years after it were times of political instability, war and changes of regime. In 1922 the Union of Soviet Socialist Republics (the USSR) was formed, in which a special system of socialist law prevailed. A powerful party apparatus was created and endowed with legislative, judicial and administrative functions. State institutions often served only to legitimize party decision-making by adopting legislation or rendering judgments based on the decisions of communist party organs. Law was viewed as a way of realising the will of the ruling class of workers and its vanguard, the communist party. State prop-

---

\* Ph D in Law, partner at Berwin Leighton Paisner LLP; the views expressed in this article are those of the author alone.

erty dominated and encompassed practically all means of production and trade. The activities of state enterprises were governed by special economic laws, under which administrative methods of control prevailed.

During this period, individuals could only own things required for personal consumption. The 1964 Civil Code governed citizens' legal rights in relation to property. This Code denied private property rights and the right for people to run their own business, although a number of features of private law were preserved. Disputes arising in this area were resolved by the courts, whose activities were controlled by traditional principles of civil litigation to a significant extent.<sup>1</sup>

After the events of 1991, which resulted in the dissolution of the USSR, Russia became a completely different country. It gained a free market economy and a new legal structure for the Russian Federation ("RF"). The Constitution of the Russian Federation (hereinafter, the "Constitution"), which was adopted by a national referendum on 12 December 1993, established the new legal system.

However, the structure of the court system still bears some features of the Soviet era. For instance, during the Soviet time, Russia had two independent branches of judiciary – general jurisdiction courts and so called "state arbitrazh" courts. It is important to understand that the Russian term "arbitrazh" refers to the Russian state commercial courts and must be distinguished from the English term "arbitration", which refers to independent tribunals whose jurisdiction requires the consent of the parties.

Both systems existed almost independently. Each branch had its own highest judicial authority: the Supreme Court for the courts of general jurisdiction and the Supreme Arbitrazh Court for the arbitrazh courts. Judgments of one branch could not be appealed to the court of another branch. This is still the case today.<sup>2</sup>

There are three types of courts in the Russian state judicial system: (i) Constitutional courts; (ii) Courts of general jurisdiction; and (iii) Specialist commercial courts (arbitrazh courts).

*The Constitutional Court:* This court consists of nineteen judges appointed by the upper chamber of the Parliament upon the nomination of the President of the Russian Federation. Three-quarters of this number are sufficient for the performance of the court's business. A judge of the Constitutional Court of the RF must be a citizen of the RF, at least 40 years of age at the time of appointment, with a degree in law and not less than 15 years' experience in the legal industry. He or she must also possess an impeccable reputation and recognised high qualifications in the field of law.

---

<sup>1</sup> On the history of Russian civil procedure see: N Eliseev, J Dratler Jr, *Commercial Litigation in Russia* in The Hon. Sir Anthony Colman (ed), *Encyclopaedia of International Commercial Litigation* (London: Graham&Trotman, 2005), Volume 2.

<sup>2</sup> Since this article has been written, the Russian parliament adopted a new law pursuant to which the Supreme Arbitrazh Court will be liquidated and all arbitrazh (state commercial) courts in the country will be subordinated to the Supreme Court. The reforms are now pending and the changes will be implemented towards the end of 2014.

The Constitutional Court: (a) examines matters involving conformity with the Constitution of various normative acts and international agreements of the RF that have not yet entered into force; (b) resolves disputes among organs of state power over their respective competence; and (c) provides interpretations of the Constitution of the RF and conclusions as to the observance of the established procedure for impeachment of the President of the RF for treachery against the state or other heinous crimes.

It is important to note that the Constitutional Court decides questions of law exclusively. In its proceedings the Court refrains from investigating or establishing factual circumstances in all cases, which falls within the competence of other courts or organs. It does not review the legality or proper factual foundation of decisions of arbitrazh courts or courts of general jurisdiction.<sup>3</sup>

Under English law the judiciary cannot suspend or invalidate an act of Parliament. It is possible for the court to disapply an act where it is incompatible with EU law.<sup>4</sup> In a situation where an act contravenes the Human Rights Convention, the court can issue a declaration of incompatibility.<sup>5</sup>

In contrast to English law, under Russian law, a rule of law which is found by the Constitutional Court to be incompatible with the Constitution, is seized of legal force and cannot be applied by the court.<sup>6</sup> If the court applies the incompatible rule, the judgment must not be enforced and must be reversed and re-considered (legally, the judgment of the Constitutional Court is considered to be a “new circumstance” which entitles the parties to apply to have the judgment set aside). In other words, the courts immediately stop applying the relevant rule and the rule is not applied between the date of the judgment and the date the new law is passed.

*Arbitrazh Courts:* such courts are specialist courts. Procedure before arbitrazh courts is governed by the Arbitrazh Procedure Code. These courts handle what are known as “economic disputes” between entities or individual entrepreneurs (the concept is similar to sole traders in the UK) who have acquired the status of an individual entrepreneur in a manner established by law (typically by registration in a special registry). “Economic disputes” mean matters arising out of entrepreneurial activity, i.e. independent activity done at one’s own risk and directed at the systematic receipt of profit from the use of property, the sale of goods, the performance of work or the rendering of services.<sup>7</sup> In particular, arbitrazh courts handle disputes in relation to the amendment or rescission of commercial contracts, the non-performance of obligations or claims that obligations are not subject to performance, the payment of damages and the protection of business reputation (i.e. defamation and libel claims as long as the libel occurred in the course of a business). In addition, an economic dispute can arise

---

<sup>3</sup> Ruling of the Constitutional Court of RF of 3 March 2004.

<sup>4</sup> s 2(4) of the European Communities Act 1972.

<sup>5</sup> s 3 of the Human Rights Act 1998.

<sup>6</sup> Art. 79 of the Federal Law On the Constitutional Court of the Russian Federation.

<sup>7</sup> Art. 27(1),(2) of the Arbitrazh Procedure Code.

out of non-business activity, for example, out of a contract with a charitable corporation, government organization or local government.

Large commercial disputes are most likely to be brought in arbitrazh courts. Arbitrazh courts have a four-tier, hierarchical system, consisting of:

- (1) The Supreme Arbitrazh Court of Russia (a) is the first instance court for cases challenging the legislative acts of state bodies and officials of the highest level (for example, acts of the Russian President); (b) resolves commercial disputes between the Russian state and its constituent entities (that is, the republics, districts (*okrugs*), provinces (*oblasts*) and territories (*krais*); and (c) reviews the acts of lower courts through judicial supervision (final appeal instance).<sup>8</sup>
- (2) Federal district arbitrazh courts hear cassation appeals and are the first instance courts for claims seeking compensation for the violation of the right to a court hearing within a reasonable time.
- (3) Appellate arbitrazh courts, which hear appeals from the first instance courts only. There are 20 appellate courts in Russia in total.
- (4) Arbitrazh courts of the constituent entities of Russia (including the cities of Moscow and St Petersburg). These courts usually consider cases as first instance courts and pass judgment on the merits.

In 2011, a specialist branch of arbitrazh courts was created to consider intellectual property disputes. This branch of arbitrazh courts will have a two-tier system: first and cassation instances.

*Courts of General Jurisdiction:* Procedure before the courts of general jurisdiction is governed by the Civil Procedure Code. The system of courts of general jurisdiction consists of four tiers:

- (a) Magistrates (Justices of the peace);
- (b) district / city courts (*raionnye sudy*) (second tier federal courts which can hear more serious cases as a first instance court);
- (c) supreme courts of the republics, courts of the *krai* and *oblasti*, city courts, and courts of the autonomous regions and areas, namely, *oblasti* and *okrugi* (third tier); and
- (d) the Supreme Court of the RF (fourth tier).

Courts of general jurisdiction handle a number of different types of dispute. They usually have competence to resolve a dispute if at least one of the parties is a natural person not having the status of a business, or if a natural person who is a party has

---

<sup>8</sup> Since this article has been written, the Russian parliament adopted a new law pursuant to which the Supreme Arbitrazh Court will be liquidated and all arbitrazh (state commercial) courts in the country will be subordinated to the Supreme Court. The reforms are now pending and the changes will be implemented towards the end of 2014.

that status, but the matter in dispute did not arise in connection with the performance of business or other economic activity.

The existence of two judicial systems that are independent of one another with two independent higher judicial organs, but which are all occupied with examining private disputes, carries the risk that the legal norms, of which the Civil Code is the nucleus, will be applied or interpreted in contradictory ways. Joint sessions of the Plenum of the Supreme Court and the Supreme Arbitrazh Court ameliorate this risk in part.

Recently the President proposed to join Arbitrazh Courts and courts of general jurisdiction.

## II Main Advantages of Russian Court System

There are two main advantages of Russian courts in general and the arbitrazh courts in particular, namely, the speed and cost of litigation.

*Timing of Proceedings:* Speed is achieved in a number of ways. First, the Russian Procedure Code imposes a short and explicit deadline for the delivery of judgments on the merits. Russian procedure codes set forth deadlines for the consideration of a case. Article 152 of the Arbitrazh Procedure Code states that cases must generally be resolved on their merits within three months after the respective statement of claims are received by the court. This three-month term may be extended to six months by the President of the relevant court. To get an extension the judge must write an application explaining the grounds for extension (e.g. there is a large volume of documentary evidence or a substantial number of parties involved). The President will grant the extension if he/she finds the application to be merited.

Article 154 of the Civil Procedure Code imposes even stricter deadlines – the judgment must be delivered within two months of the date of filing the statement of claim. Some cases must be resolved even faster, e.g. illegal termination of employment disputes must be resolved within one month. There is no provision allowing the deadline to be extended.

The Arbitrazh Procedure Code also enables claimants to apply for the summary examination of a case provided that the claim is: (a) confirmed beyond reasonable doubt by the documents (for example, claims based on documents confirming that a debt is owed); (b) not contested by the defendant; and (c) for a relatively small amount of money (for example, less than RUB20,000 for claims against legal entities).<sup>9</sup>

The court informs the parties of the possibility of examining the case summarily and sets a 15-day period for the parties to object. If the defendant objects to the claim or if any party objects to the case being examined summarily, the case is considered in the usual way. Otherwise, the court resolves the case *ex parte* on the basis of written documents only. Cases examined summarily must be resolved within one month after the statement of claim is filed.

---

<sup>9</sup> £413,82 at the exchange rate as of 31 May 2013.

Disciplinary recourse against judges for non-compliance with the time limits is possible. Further, litigants can apply to the President of an arbitrazh court to speed up the process.<sup>10</sup>

Parties to a dispute can also apply to the court to seek compensation for the violation of the right to a court hearing within a reasonable time. However, by far the most severe consequence of delay is that statistics in relation to the time taken to hear a case are recorded on the personal file of each judge. The more often cases have been decided beyond the time limit provided by the Procedure Code, the more likely the judge's office will be terminated. That is why all judges do their best to deliver a judgment within the specified time period. In 2011, *91.6 per cent* of cases were resolved in the arbitrazh courts of first instance within the correct time limit.<sup>11</sup>

However, in complex cases, the proceedings may take much longer, lasting months or even years.

The second pillar giving rise to the speed of the process is the relative simplicity of the proceedings and number of pleadings. Proceedings are started by a claimant filing a statement of claim with the competent arbitrazh court. The statement of claim must be detailed, accompanied by documents supporting the claim and a confirmation that the statement of claim and the attached documents have been sent to the defendant and to the other parties to the proceedings. The court must decide within five working days of registering the statement of claim whether to accept the statement of claim and schedule a preliminary court hearing. Strictly speaking, the code envisages only one exchange of pleadings, although in practice there is no real limit on the number of pleadings and in some cases the parties exchange dozens of replies and rejoinders.

*Litigation Costs:* The general principle in Russia is that costs should follow the event (in other words, the successful party is entitled to its costs).<sup>12</sup> It is also common practice for Russian courts to recover only those legal costs actually paid by the party to counsel. To that end, the party seeking to recover costs should submit to the tribunal, *inter alia*, payment orders or SWIFTs confirming payment for the legal services.

In the Russian Federation, success fees are not enforceable by the courts and are essentially regarded as a bet.<sup>13</sup> Under Russian law, it is not possible for a party to compel another party to perform his or her obligation under the bet. In other words, if the client pays a success fee voluntarily, the lawyer is entitled to it, however, if the client refuses to pay the success fee, the lawyer cannot compel payment through the court.

The Supreme Arbitrazh Court's position is that the success fee, if it is paid by the client, can be recoverable from the losing party.<sup>14</sup>

---

<sup>10</sup> Art. 6.1 (6) of the Arbitrazh Procedure Code.

<sup>11</sup> Judicial statistics of the Supreme Arbitrazh Court, available in Russian language on the Supreme Arbitrazh Court's website: [www.arbitr.ru](http://www.arbitr.ru).

<sup>12</sup> Art. 110 (1) of the Arbitrazh Procedure Code; Art. 98 (1) of the Civil Procedure Code.

<sup>13</sup> Decree of the Constitutional Court of the Russian Federation No. 1-P dated 23 January 2007.

<sup>14</sup> Paragraph 6 of the Review of Court Practice on the Issue of Splitting Between the Parties Legal Fees of Attorneys and Other Representatives (Informational letter of the Presidium of the RF Supreme Arbitrazh Court No. 121 of 5 December 2007).

Recoverable costs include, *inter alia*, the *reasonable* legal costs and expenses of the successful party.

In practice, Russian judges tend to reduce the amount of costs awarded to a level they deem reasonable. Up until recently, on a cost application for £200,000 in fees, the judge could grant £400–500 on the premise that it was what the judge considered to be reasonable. The logic behind this court practice was to protect the inexperienced Russian business community from professional litigants.

Therefore, there was no real downside to going to court. If the claim was awarded it was a good outcome; if the claim was lost, there was nothing really to lose. That is why a lot of businesses used the courts in a vexatious way.

Recently, the Supreme Arbitrazh Court changed its position. The main message is that “*It must be expensive to lose a case in an arbitrazh court.*”<sup>15</sup> The arbitrazh courts started recovering full rates in some cases,<sup>16</sup> although general jurisdiction courts still try to protect individuals.

### III Main Disadvantages

We have just seen how speed and costs are the main advantages of the Russian court system. However, there is a flip side to the coin. What proves to be an advantage could also be a disadvantage of sorts. The speed and cost of the proceedings have a number of disadvantages, as will now be suggested.

Given that a businessman could resolve his dispute with a counter-party quickly and with no financial detriment (as only a small proportion of legal costs is recoverable), a huge number of Russian businesses prefer litigation to mediation, arbitration and other forms of alternative dispute resolution. All their disputes find their way to court. Also, because legal costs do not serve as a constraining factor given that it is very difficult to recover them, some canny parties bring a lot of meritless claims with the purpose of either obtaining injunctive relief or increasing pressure on the adverse party. *Res judicata* and *lis alibi pendens* rules are very narrowly defined and a party could file multiple claims by just amending the grounds of the claim or the relief sought. In England this kind of behaviour could be prevented by the operation of the *Henderson v. Henderson* rule,<sup>17</sup> but in Russia there is no equivalent rule. As a result, the Russian courts are snowed under with work.

The average judge in the Moscow City Arbitrazh Court hears approximately 50–90 cases a month. With that average, it is virtually impossible for a judge to consider each and every case properly, especially bearing in mind the consequences for non-

---

<sup>15</sup> “*Third parties are allowed to recover legal costs*” in: <http://pravo.ru/review/view/73378/> (visited on 31 May 2013).

<sup>16</sup> See, e.g.: the Decree of the Moscow Federal District Court in case No. A40–35715/2010 where the claimant was awarded 32.5 million Roubles (£672,460 at the exchange rate for 31 May 2013).

<sup>17</sup> 3 Hare 100.

compliance with the time limits.<sup>18</sup> In a nutshell, it is a debate of speed versus quality of justice. Russia is better in terms of speed, but this is at the expense of the quality of justice. However, in some cases the speed is less important than the administration of justice and it appears that the right balance is still to be found in Russia.

There is still room for development as to whom Russia recruits on the bench. Many lower ranking judges are appointed without much experience or success in private practice. However, this is not applicable universally. There are plenty of very experienced and sophisticated judges in the highest courts. In fact the majority of well-educated and experienced lawyers who are recruited as judges sit in the Federal district arbitrazh courts, Supreme Courts or the Constitutional courts.

With all that in mind, it is clear why Russian courts are not very suitable for large and complex commercial cases. Although it is time consuming and costly, business people are eager to use arbitration or litigation in England, France or Sweden.

#### IV New Initiatives

Arguably, the most surprising initiative was voiced by the President of the Supreme Arbitrazh Court Mr Justice Ivanov at the legal forum in May 2012. Mr Ivanov wanted to amend Russian legislation so that the Russian courts would have the power to set aside foreign court judgments and international arbitration awards that “*prejudice the interests of Russian parties*”. He also wanted to bar judges, arbitrators, lawyers and parties to the proceedings from entering Russia and seize and confiscate any Russian assets belonging to them.<sup>19</sup> Mr Ivanov complained of “a union” between arbitral tribunals and state courts in a number of jurisdictions that made it “*virtually impossible to cancel an arbitral award in state courts of such countries*”, and said that Russian legislation did not provide “*measures to fight against such issues*.”<sup>20</sup>

This initiative caused concern. In particular, Timur Aitkulov warned that:

*“Anton Ivanov’s initiative would allow the same Russian courts that are often criticised for lack of integrity to effectively nullify in Russia the outcome of foreign proceedings, which is potentially very bad news for many investors ... Also, it is unclear how his suggestions are compatible with international treaties to which Russia is a party, such as the 1958 New York Convention.”*<sup>21</sup>

Another Russian practitioner, Andrey Goltsblat cautioned:

*“It is confusing what is meant by these proposals – how can you legally implement them? Russia doesn’t want to cause problems at the moment, as there are*

<sup>18</sup> See: section II *supra*.

<sup>19</sup> See: A Ross, *Russian Proposals Cause Alarm* Global Arbitration Review (21 May 2012).

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

*a number of high-profile court cases going on in other jurisdictions. We need to improve the Russian legal system before we can fully attract parties to arbitrate here.”<sup>22</sup>*

It is clear that the Russian courts would like to gain more powers and extend their jurisdiction extraterritorially. Although it is in line with the Russian courts’ somewhat anti-arbitration attitude, Mr Ivanov’s proposal does not sit comfortably with Russian attempts to promote Moscow as a place of arbitration.<sup>23</sup> Mr Ivanov’s initiative is fuelled by the fear that investment arbitrations will come knocking on Russian doors, although there seems to be a lack of understanding that it would not resolve Russia’s problems in this respect.

Further to the above initiative, bill No. 243734–6 was entered into Parliament to implement this initiative. The good news is that the new bill did not include arbitration, probably because any such initiative would contradict international treaties to which Russia is a party, e.g. the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The bill proposes that the losing party will be able to recover the amount in Russia at the expense of the state whose court delivered a judgment against a Russian party and/or enforced the award against it, where the party did not submit to the jurisdiction of that foreign court.

It is hoped that common sense will prevail in Parliament and the bill will never become the law. What is clear is that the Russian judiciary is annoyed with the English courts for accepting cases between Russian parties.

Apart from that initiative, it must be noted that over the past few years both procedure codes have been changed quite substantially.

For courts of general jurisdiction, a new appeal instance was introduced.<sup>24</sup> In a couple of cases it was found that the supervision procedure at the RF Supreme Court could not be considered as a proper appeal procedure.<sup>25</sup> It was decided to mirror the three-step appeal procedure employed by the arbitrazh courts to address this concern.

Also, because of the very existence of two branches of judiciary, there happens to be an overlap in their jurisdiction. In particular, there have been cases where both the arbitrazh courts and the courts of general jurisdiction found jurisdiction to hear the same case. It is not a problem *per se* unless mala fide parties use this. By way of an example, in some cases the parties have found an artificial connecting factor to file a claim with a court from another region of Russia and have obtained injunctions from

---

<sup>22</sup> “Russia’s Proposed Court Laws ‘Almost Stalinist’”, *The Global Legal Post* (18 June 2012).

<sup>23</sup> Final Report of ADR Work-Stream, *UK-Russia Liaison Group on Moscow as an International Financial Centre*, *TheCityUK*. The report is available at: <http://www.thecityuk.com/uk-financial-services-overseas/international-financial-centres-initiative/moscow-international-financial-centre/moscow-international-financial-centre-alternative-dispute-resolution-work-stream/>.

<sup>24</sup> Federal Law of 9 December 2010 No. 353-FZ on Introducing Amendments to the Civil Procedure Code.

<sup>25</sup> *Ryabykh v. Russia* (no. 52854/99, ECHR 2003-IX); *Denisov v. Russia*, (dec.), no. 33408/03; *Martynets v. Russia* (dec.), no. 29612/09, 5 November 2009.

that court. These injunctions were then used to squeeze out certain shareholders from the company or change the management of the company. By the time the injunctions were reversed by a higher court, the company's assets had already been squandered by the director who, on top of that, had disappeared. For that reason one of the developments was to clarify the jurisdictional boundaries between the two branches of the judiciary. In particular, arbitrazh courts now also hear corporate disputes irrespective of whether the particular shareholder is an individual or a legal entity.<sup>26</sup>

Also, the concept of class action was introduced some time ago into the Arbitrazh Procedure Code to deal with mass harms. But the desire of Russian legislators to create their own group litigation procedure has resulted in a unique hybrid set of rules with both "opt-in" and "opt-out" elements and, as a result, the group litigation provisions are mere 'paper' rules that are not used.<sup>27</sup> However, the courts are keen on developing class action in Russia, in particular, a new chapter on class action is being introduced into the Civil Procedure Code for use by individuals.

Another interesting development was the introduction of the principle of consecutive appeals in 2010. Before that amendment was made, the parties were allowed to make leapfrog appeals. In England the appellant has to obtain leave to appeal in order to make a leapfrog appeal. In Russia it was possible to do that by simply purposefully missing the time for filing the appeal with the 2nd instance court (1 month) and filing the cassation appeal with the 3rd (cassation) instance court (within the next 2 months), or even with the Supreme Arbitrazh Court. One of the reasons a litigant might have wanted to leapfrog was that the 3rd instance court was tasked with checking the correct application of the law, rather than re-assessing the evidence. In other words, if your appeal was concerned with the law rather than facts, you may have thought that there was no point in wasting time appealing to the court of appeal. The problem was that the higher courts often faced multiple appeals filed with different courts, for instance, if two parties appealed the judgment approximately one and a half months after it was issued. This may arise where one party files an appeal with the cassation (3rd instance) court and it is accepted for consideration because it was filed within a 3 month period, whereas the second party seeks an extension to file its appeal with the appeal court because the 1 month time limit has been missed. If the extension is granted, there will be two appeals pending in parallel. To avoid this situation, amendments were made to the Arbitrazh Procedure Code in 2010, which bar the parties from appealing the judgment to a higher court unless the litigant has exhausted all possibilities to appeal to a lower court.

Important developments were also made in the field of the Internet and other high-tech developments in civil procedure.

---

<sup>26</sup> Art. 33 (2) of the Arbitrazh Procedure Code.

<sup>27</sup> See, for more details: Ходыкин Р.М. К вопросу о групповом производстве // Судебная реформа и проблемы развития гражданского и арбитражного процессуального законодательства. Материалы международной научно-практической конференции, Москва, 2012. С. 381–390 [Roman Khodykin, *On the Issue of Class Litigation*, in *Judicial Reform and Contemporary Problems of Civil and Arbitrazh Procedures Development: Materials of International Conference*, 381–390 (Moscow, 2012).

According to the recent amendments to the Arbitrazh Procedure Code, statements of claim (as well as other procedural documents) can be filed through the website of the Supreme Arbitrazh Court.<sup>28</sup> In Russia, everybody is able to register on the Supreme Arbitrazh Court's website and make an online filing. No additional fee is payable for using the e-filing facility. Arguably, this creates room for some kind of bad faith behaviour and we will see where this takes the practice in the future. Another difficulty to deal with is the size of the country. Notwithstanding the collapse of the USSR and concomitant loss of territory, Russia is still the largest country in the world. The general rule of jurisdiction is that the action is brought at the location of the defendant. In other words, if your defendant is located in the far east of Russia, be prepared to spend 10 hours on a flight. There may also be a 7-hour time-difference from Moscow. One of the amendments was to introduce participation in the proceedings by way of video-conference. It does not mean, however, that the party or witness can dial-in from his office or home. The court arranges the video-conference at the location of the party / witness and the court hearing the case. In other words, the party and witness must go to their local court so that the court can verify their identities before they go online.

Finally, the Russian courts are striving to make the proceedings more transparent. For instance, all hearings before the Presidium of the Supreme Arbitrazh Court are now available online. Also, certain important hearings can be broadcast on the Internet at the request of one of the parties.

## V Legal Assistance between Russia and England

In civil or commercial disputes, the need sometimes arises to obtain evidence, to serve proceedings or other judicial documents, or to enforce some other judicial act in the territory of a foreign country.

Appropriate proceedings are regulated mainly by international treaties and partly by national law. Russia is a party to the following treaties: (a) The Hague Convention on Civil Procedure of 1954 (to which the USSR acceded in 1967, and which the Russian Federation continues to honour); (b) The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 1965 (to which the RF acceded in 2001); (c) The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 1970 (to which the RF acceded in 2001); and (d) bilateral agreements on mutual legal assistance with various countries. As an example, there is a treaty in place between the United States of America and Russia, concluded by the exchange of notes in 1935.

International treaties provide the means for receiving legal assistance from foreign "organs of justice". The absence of an agreement concerning legal assistance with a state does not mean that the execution of requests of courts in that state is impossible within the RF, as requests may be executed in the RF independent of the presence of

---

<sup>28</sup> Art. 125 (1) of the Arbitrazh Procedure Code.

special international agreements and even independent of the reciprocity of relations with the corresponding state.<sup>29</sup>

A refusal to enforce a foreign request is appropriate only in cases where execution would contravene the security of the RF (for example, a request for the interrogation of a witness concerning questions that fall within the category of state or military secrets) or would interfere with the jurisdiction of the Russian court.<sup>30</sup> The Arbitrazh Procedure Code provides an additional basis for refusal, namely, the court may ignore a letter of request if its genuineness is not certified.<sup>31</sup>

#### *Service Abroad of Judicial and Extrajudicial Documents*

Russia is a party to the Hague Convention on Civil Procedure 1954, the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 (1965 Convention) and a number of bilateral international agreements.

The 1954 Civil Procedure Convention requires all documents to be sent through diplomatic channels whilst the 1965 Convention envisages a simplified procedure by which the request for service of the proceedings by an English court shall be sent directly to what is named a “Central Authority”, i.e. the state organ which is tasked with executing requests under the 1965 Convention. In Russia, the Central Authority for the purposes of the 1965 Convention is the Ministry of Justice.<sup>32</sup> It is important to make a few observations here. Under Article 12 of the 1965 Convention,

*“The service of judicial documents coming from a Contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed.”*

In the US, a third party provider was designated to deal with all service matters and the provider charges about \$99 for each application. On that basis, there have been instances where Russia refused to apply the 1965 Convention vis-à-vis the USA.

Also, Article 10 of the 1965 Convention states that,

*“[T]he present Convention shall not interfere with (a) the freedom to send judicial documents, by postal channels, directly to persons abroad, b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination, c) the freedom of any*

<sup>29</sup> Decree of the Plenum of the Supreme Arbitrazh Court of the RF of 10 June 1999, para. 8.

<sup>30</sup> Art. 407.2 of the Civil Procedure Code.

<sup>31</sup> Art. 256.2(3) of the Arbitrazh Procedure Code.

<sup>32</sup> Edict of the President of the Russian Federation No. 1101 dated 24 August 2004 “On the Central Authority in the Russian Federation for the Purposes of the Hague Convention on of Judicial and Extrajudicial Documents in Civil or Commercial Matters”.

*person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.”*

While ratifying the 1965 Convention, the Russian Federation entered a couple of reservations, namely: (i) pursuant to the third paragraph of Article 5 of the 1965 Convention documents to be served within the territory of the Russian Federation shall only be accepted if they have been written in, or translated into, the Russian language. And (ii): Service of documents by methods listed in Article 10 of the Convention is not permitted in the Russian Federation.

In England CPR rule 6.40(3) authorises a party to English proceedings to serve the proceedings out of the UK by any method permitted by the Civil Procedure Convention or Treaty or by any other method permitted by the law of the country in which it is to be served. However, r. 6.40(4) makes it clear that

*“Nothing in paragraph (3) or in any court order authorises or requires any person to do anything which is contrary to the law of the country where the claim form or other document is to be served”.*

In respect of CPR 6.40(3) the case you should look at is the very recent decision of the Supreme Court in *Abela v. Baadarani*.<sup>33</sup> The Supreme Court has overturned a Court of Appeal decision which said, amongst other things, that 6.40(3) does extend as far as to exclude a type of service which is simply invalid (as opposed to illegal) in the country in which documents are purportedly served. The particular point about 6.40(3) is dealt with at paragraph 46:

*“My third reason for disagreeing with the Court of Appeal concerns para. 23 of Longmore LJ’s judgment, where he says that a claimant who wishes the court retrospectively to validate alternative service abroad must “(save perhaps where there are adequate safeguards which were not present in this case)” show that the method used was good service under the local law. As noted above, that would render rule 6.15(1) and (2) otiose ...”*

There is also a High Court decision of 2011 which concerns the same point. You may in particular be interested in it given that it deals with service out of the jurisdiction into Russia and whether personal service or service by post, as opposed to service through Hague Convention official channels, is illegal or just impermissible.<sup>34</sup>

It is common ground among Russian scholars that service of the proceedings by a party would not have legal effect under Russian law (in other words, the party will be deemed not to have been properly notified about the proceedings). However, there

---

<sup>33</sup> [2013] UKSC 44 (26 June).

<sup>34</sup> See *BNP Paribas SA v. Open Joint Stock Company Russian Machines and another* [2011] EWHC 308, in particular paras 123–135.

is an argument about whether it could amount to illegality. Here we have a whole spectrum of opinion.

The following arguments for illegality can be marshalled: (1) Civil Procedure belongs to the Public Law family. In the public law sphere the main principle is that everything is forbidden unless directly authorised by the law. Given that direct service is not provided for, it must be deemed prohibited. (2) Service of proceedings under Russian law is deemed to be a judicial function which cannot be delegated to the parties (a comparison is often made that to allow parties to perform judicial functions is akin to allowing them to make judgments for the judge). (3) The reservation made by Russia in respect to the 1970 Service convention forms part of the Russian domestic law in accordance with Article 15(3) of the Constitution, therefore, it could be argued that there is a direct prohibition of the alternative methods of service.

Conversely, these arguments can be made to suggest that these matters would not involve illegality: (a) The purposive interpretation of the Civil Procedure suggests that the main goal of the service rules is to give a party proper notice of the pending proceedings. This aim is achieved by direct service. (b) There is nothing in the law expressly prohibiting it. Although it may be ineffective, it is not necessarily illegal as a matter of Russian law.

Meanwhile, in *BNP Paribas v. Russian Machines and Ingosstrakh-Investments* Blair J held that “*Alternative service in Russia in person or by post is not permitted but neither is it illegal*”. At the moment, a case is pending before the Supreme Arbitrazh Court as to whether service must comply with the formal requirements 1965 Convention.<sup>35</sup> In that case, the English High Court allowed alternative service and English proceedings were served on a Russian party by DHL courier service. However, the notification did not comply with the formal requirements set out in the 1965 Convention. The presidium of the Supreme Arbitrazh Court is tasked with deciding whether the service must be either (a) effective, i.e. it should achieve a goal of putting a party on notice of pending proceedings or (b) it should be formal, i.e. strictly in compliance with formal requirements. As of now the decision is yet to be taken by the Supreme Arbitrazh Court.

#### *Taking of Evidence Abroad*

The procedure for transmitting letters rogatory is one of the major objects of regulation under international agreements. For example, the 1970 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the “1970 Convention”) contemplated a simplified procedure, under which the letter is transmitted through a central authority. Under other agreements, for example, the Hague Convention of 1954 in connection with the Note of the Ministry of Foreign Affairs of the USSR, there is a more complex diplomatic process for transmitting letters of request through the RF Ministry of International Affairs.

---

<sup>35</sup> See: Ruling of the Russian Federation Supreme Arbitrazh Court of 23 April 2013 No. VAS-3366/2013.

Russia has yet to appoint its Central Authority under the 1970 Convention. This means that English courts cannot use the 1970 Convention as it simply does not have the designated Central Authority to which to send requests, while Russian courts can by all means send the request to the English Central Authority.

As a rule, a request of a foreign court for the performance of a procedural act is executed on the basis of Russian law. Foreign procedural rules are applicable if an international treaty so provides.<sup>36</sup> For example, in accordance with Article 9 of the 1970 Convention, the judicial authority that executes a letter of request will comply with a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the state of execution, is impossible to perform by reason of its internal practice and procedure or by reason of practical difficulties.

On receipt of a request to take evidence from a witness, a Russian court will summon the witness, question him and return the statement produced from the questioning through the appropriate channels.

## VI Enforcement of English Judgments in Russia

Enforcement of foreign judgments is possible through both the arbitrazh courts and the courts of general jurisdiction.

An application for enforcement must be filed with the arbitrazh court at the place where the debtor or its property is located.

Both Russian procedure codes provide that decisions of foreign courts may be recognised or enforced if so provided by international treaties to which the Russian Federation is a party.<sup>37</sup> The possibility of recognizing and enforcing foreign judicial decisions in Russian territory arises on the basis of international agreements, for example, the 1969 Convention on Civil Responsibility for Damage from Oil Pollution, or the 1952 Rome Convention on Recovery for Harm Caused by Foreign Air Vessels to Third Parties on the Surface.

Although general jurisdiction courts often refuse to recognise and enforce foreign judgments in the absence of relevant treaty between the countries and this practice was found to be compliant with the Constitution by the RF Constitutional court<sup>38</sup>, there have been instances where foreign judgments were recognised and enforced without an applicable treaty or convention on the grounds of reciprocity. Russian law indirectly permits this and there have been several instances in which a party successfully claiming for recognition and enforcement of foreign (for example, English and Dutch) court judgments cited reciprocity as one of its principal arguments. Reciprocity must be established on a case-by-case basis, and due to minimal case law on the

---

<sup>36</sup> Art. 407(3) Civil Procedure Code; Art. 256(3) Arbitrazh Procedure Code.

<sup>37</sup> Art. 409(1) of the Civil Procedure Code; Art. 241(1) of the Arbitrazh Procedure Code.

<sup>38</sup> See: Ruling of the Russian Federation Constitutional Court No. 890-O of 17 June 2013.

matter, it is difficult to predict with certainty whether a particular foreign judgment would be enforced in Russia on the grounds of reciprocity.

In particular, there is no treaty on recognition and enforcement of judgments between Russia and the UK. Yet, the first foreign judgment, which was enforced in Russia on the basis of reciprocity, was a judgment of the English High Court.

This is a notorious case because the judgment was made and then enforced against Yukos, the oil company whose former owner is now serving a term in prison. The facts of the case were quite straightforward. A consortium of Western banks had lent money to Yukos. After Yukos's failure to repay the loan, the banks started High court proceedings in England and ultimately recovered about half a billion dollars. The judgment was then recognised and enforced in Russia. As a next step, the banks filed for the bankruptcy of Yukos and assigned the claims to the Russian oil giant Rosneft.

As mentioned above, Art. 241 of the Arbitrazh Procedure Code explicitly states that foreign judgments can be enforced if it is provided for by an international treaty with the relevant state or by the federal law. The only Russian law which provides for recognition and enforcement of foreign judgments is the Federal Law on Insolvency (Bankruptcy). At the time, Yukos was not bankrupt and this provision could not be invoked. Granting enforcement of the judgment the court held:

Firstly, there is a treaty on friendship, partnership and cooperation between the European countries (incl. the UK) and Russia which provides, among other things, that foreign citizens and companies will not be discriminated against in Russia and that they will have recourse to Russian courts. Therefore, it would amount to discrimination if a foreign judgment was not enforced in the same way as Russian judgments are enforced in Russia. In other words, the court found that there was a treaty in place although the treaty in question did not provide for recognition and enforcement of foreign judgments.

Secondly, the court found that enforcement of judgments forms part of the right to judicial remedy under Art. 6 of the Human Rights Convention. In that respect, the court made reference to the ECHR judgment in the case *Hornsby v. Greece* (1997).<sup>39</sup> Under Article 15 of the RF Constitution, international norms and international customs are part of the Russian legal system and gain immediate application. To that end, apart from pleading reciprocal treatment, the claimants were under an obligation to prove it. The banks submitted that as Russian judgments are enforceable in England, the High Court judgment must be enforced on the basis of reciprocity.

Another example of enforcement of an English court order is the case *Boegli-Gravures S.A. v. Darsail ASP & Mr Pyzhkov*.<sup>40</sup> In this case the court was asked to enforce a cost order made by the Chancery Division. In brief, the English court issued a declaration that the Respondents were in breach of a European patent. The declaration had no bearing on Russia and therefore, there was no need to enforce it there. However, all of the Respondents' assets were in Russia and it was logical to seek to enforce the cost order there.

---

<sup>39</sup> [1997] ECHR 15; [1998] ELR 365; (1997) 24 EHRR 250.

<sup>40</sup> Case No. A40-130760/11-141-1135.

The main difference from the *Yukos* case was that the court in the latter case had to consider whether the cost order was a “final judgment on the merits,” as interim and partial judgments and awards are not usually enforceable in Russia. Also, the defendant took issue with the court order to provide security for costs as a pre-condition for appealing the judgment. While the courts did not experience any difficulty in understanding that costs orders could be considered “a final judgment on the merits”, the Supreme Arbitrazh Court spent a lot of time discussing security for costs. Russian scholars believe that, given that the right to appeal an illegal judgment forms part of the right to legal remedy, making an appeal conditional upon security for costs is a violation of the right to a fair trial. However, in this particular case, the panel of the Supreme Arbitrazh Courts decided that, by submitting to the jurisdiction of English court, the Respondents also submitted to English civil procedure rules in respect of security for costs. The Supreme Arbitrazh Court relied on the judgment of the ECHR in the case *Tolstoy Miloslavsky v. United Kingdom*<sup>41</sup> in which the court found that a security for costs order does not violate the right to a fair trial under Article 6 of the Human Rights Convention.

In both the *Yukos* case and *Boegli-Gravures S.A. v. Darsail ASP & Mr Pyzhkov* the claimants submitted a legal opinion by Adrian Briggs (Oxford) to prove reciprocity. Briggs relied on two cases to prove that Russian judgments are enforceable in England: *Golubovich v. Golubovich*<sup>42</sup> where the decree of a divorce issued by a Russian court was recognised; and *Commercial Innovation Bank Alfa Bank v. Kozeny* (Bahamas).<sup>43</sup> In both his Opinions, Professor Briggs contended that he had researched case law dating back as long as 100 years ago and that he was unable to find any cases where enforcement of a Russian judgment was refused.

However, the situation has changed since then. In the recent case *Aeroflot v. Berезovsky and Glushkov*,<sup>44</sup> Floyd J, sitting as a judge in the Chancery Division, refused to enforce the judgment of a Moscow general jurisdiction court, stating that: “*Enforcement of the judgments would breach the finality principle. I will grant summary judgment dismissing the action accordingly.*”

Although it could now be used as an argument against enforcement of English judgments in Russia, there appears to have been grounds to refuse enforcement in this particular case. The following considerations should be taken into account.

The Russian courts issued two decisions in favour of Aeroflot in its action against Mr Berezovsky, Mr Glushkov and others in relation to various allegations of fraud.

The first decision was issued by the Savelovsky Court on 3 July 2006, according to which Mr Glushkov was liable together with others to Aeroflot for the sum of 214,988,879.70 roubles. A year later the same Court issued another judgment against Mr Berezovsky, stating that he was jointly liable with Mr Glushkov and the others for the same sum. With the assistance of the Federal Examining Magistrate in Laus-

---

<sup>41</sup> Application No. 18139/91.

<sup>42</sup> [2010] EWCA Civ 810.

<sup>43</sup> [2002] UKPC 66 (11 December 2002).

<sup>44</sup> [2012] EWHC 3017 (Ch).

anne, Switzerland, the Public Prosecutor of the Russian Federation recovered 52 million Francs and 700 thousand US dollars pursuant to the Savelovsky Court's judgment, which in fact was 8 times more than the sum ordered by the Russian Court.

The second decision delivered on the same matter concerned an indexation or uplift of the damages originally awarded to Aeroflot. The decision was delivered by the Golovinsky Court and was again in favour of Aeroflot. Pursuant to this decision, the original sum awarded by the Savelovsky Court had to be increased to 2,117,875,744 roubles to take the inflation into account. The second decision was issued on 31 May 2011. Following the decision of the Golovinsky Court, Aeroflot applied to the English High Court for enforcement of this decision.

The English Court refused to enforce the Golovinsky Court's decision on the premise that "*the decision to re-open the judgment as to the amount of damages payable was a plain breach of the finality principle.*" First of all, there was no question of any new facts coming to light; in fact, the indexation was up to the date of the decision of the Savelovsky Court. Secondly, the Savelovsky Court had already "*assessed the amount of damages due for the cause of action. There is no suggestion that the indexation claim is a separate cause of action.*" Thirdly, the Court also rejected Aeroflot's argument that the Golovinsky Court's decision was not a new judgment but merely a variation of the amount of damages. Finally, the Court rejected an argument that the defendants should be deemed to have anticipated an indexation claim. Accordingly, the High Court refused to enforce the decision of the Golovinsky Court.